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September 6, 2012

VIA ELECTRONIC MAIL

D.C. Board of Zoning Adjustment
441 4th Street NW, Suite 210S
Washington, DC 20001

Re: BZA Appeal No. 18460 ("Appeal") – Motion to Intervene; Support for Motion to Expedite the Public Hearing

Dear Members of the Board:

On behalf of Wal-Mart Stores, Inc. ("Walmart"), we hereby move the Board of Zoning Adjustment ("BZA" or "Board") to allow Walmart to intervene in the above-referenced appeal concerning the issuance of Building Permit No. B1202925 (the "Permit") for construction of a new retail building at 5929 Georgia Avenue, NW (the "Property") for the purpose of operating a new Walmart store (the "Project"). In addition, Walmart supports an expedited public hearing on the Appeal inasmuch as the Appeal does not present a zoning issue for which the Board has subject matter jurisdiction.

I. MOTION TO INTERVENE

Section 3112.15 of the Zoning Regulations (11 DCMR § 3112.15) provides that the Board may permit intervenor status to parties who have a specific interest that will be affected by the Board's action on an appeal. Walmart possesses existing tenancy rights in the property owned by Missouri Avenue Development Partners, LLC ("Missouri"), the fee simple owner of the Property and developer of the Project. As such, Walmart has made substantial investments in the Project constituting a specific interest that will be affected by the outcome of the Appeal. As noted above, the Permit was issued for the purpose of constructing a new Walmart store on the property as well, which represents a further substantial interest in the Property. As a result, Walmart is requesting the right to intervene in this matter along with Missouri.

Board of Zoning Adjustment
District of Columbia
CASE NO.18460
EXHIBIT NO.17

II. SUPPORT FOR MOTION TO EXPEDITE THE PUBLIC HEARING

Walmart supports the Motion to Expedite the Public Hearing on the Appeal that Missouri filed on August 14, 2012. In addition to the reasons proffered by Missouri, Walmart asserts that the Appeal does not present a zoning issue for which the Board has subject matter jurisdiction as required by Section 3100.2 of the Zoning Regulations. The Appeal fails to allege any error in the administration or enforcement of the Zoning Regulations with respect to the issuance of the Permit. The Board has been very clear that Section 3100.2 of the Zoning Regulations authorizes the Board, pursuant to the Zoning Act, to hear appeals regarding building permits only in cases where the alleged error with respect to the permit deals with a provision of the Zoning Regulations or the Zoning Map. See Appeal No. 18154 of Capitol Hill Restoration Society (January 4, 2011); Appeal No. 17746 of Reed Cooke Neighborhood Association (June 10, 2008); and Appeal No. 17329 of Georgetown Residential Alliance (July 12, 2005), collectively attached.

The instant Appeal concerns no alleged error with respect to a provision of the Zoning Regulations or Map. Rather, it takes issue with the application of the Large Tract Review process, and asserts that the Project is inconsistent with the Comprehensive Plan. The BZA does not have subject matter jurisdiction with respect to the Large Tract Review process, which is an advisory planning process that does not entail the administration or enforcement of the Zoning Regulations or Map. The Court of Appeals has confirmed that the BZA does not possess subject matter jurisdiction with respect to the Comprehensive Plan on several occasions. (See French v. District of Columbia Board of Zoning Adjustment, 658 A.2d 1023 (D.C. 1995) and Tenley and Cleveland Park Emergency Committee v. District of Columbia Board of Zoning Adjustment, 550 A.2d 331 (D.C. App. 1998).

For these reasons, which Walmart will brief in detail prior to the hearing should its Motion to Intervene be granted, an expedited hearing is both reasonable and prudent. The Appeal is misguided and procedurally deficient. Therefore, Walmart's and Missouri's substantial investments in the Project, and Walmart property rights by tenancy, should not unduly be held hostage to an appeal which may readily be disposed of for lack of jurisdiction.

III. CONCLUSION

Walmart has substantial rights and interest in connection with the Permit, and it will be directly affected by the outcome of the Appeal. Therefore, the instant request meets the requirements of Section 3112.15 for intervenor status and good cause exists to permit Walmart to intervene in the Appeal. Furthermore, Walmart respectfully requests that the Board grant Missouri's Motion to Expedite the Public Hearing on the Appeal inasmuch as the BZA does not possess subject matter jurisdiction over an appeal arising out of the administration of the Large Tract Review process and the application of the Comprehensive Plan to a specific project.

Sincerely,

Donald A. Rea

Cynthia A. Giordano

cc: Matthew Burgess, Esq.
John Okwubanego, Esq.
Phil T. Feola, Esq.
Alan Bergstein, Esq.

Certificate of Service

I hereby certify that the foregoing Motion was sent by first class, postage prepaid, to the following:

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BZA Appeal No. 18460 – Motion of Walmart Stores, Inc. – Attachment to Walmart's Motion to Intervene

BZA Appeal No. 18154 of Capitol Hill Restoration Society

BZA Appeal No. 17746 of Reed Cooke Neighborhood Association

BZA Appeal No. 17329 of Georgetown Residential Alliance

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 18154 of Capitol Hill Restoration Society, pursuant to 11 DCMR §§ 3100 and 3101, from an October 13, 2010 decision of the Department of Consumer and Regulatory Affairs to grant Building Permit No. B1008586 allowing an addition to a one-family row dwelling in the R-4 District at premises 1363 Massachusetts Avenue, S.E. (Square 1037, Lot 73).

HEARING DATE: January 4, 2011
DECISION DATE: January 4, 2011

DISMISSAL ORDER

PRELIMINARY MATTERS

On October 25, 2010, the Capitol Hill Restoration Society ("CHRS" or "Appellant") timely filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board"). CHRS appealed the granting of Building Permit No. B1008586 by the D.C. Department of Consumer and Regulatory Affairs ("DCRA"). That building permit authorized the construction of an addition to a rear porch at premises 1363 Massachusetts Avenue, S.E. ("subject property"). The subject property is improved with a row dwelling with an existing rear porch. The porch extension permitted by the building permit occupies the entire rear yard of the dwelling, resulting in a lot occupancy of 100% on the subject property in violation of 11 DCMR § 403.2. The permit was issued without the owner of the subject property first obtaining a variance from § 403.2 pursuant to § 8 of the District's Zoning Act, D.C. Official Code § 6-641.07. DCRA concluded that a variance was unnecessary because it had already granted a reasonable accommodation from § 403.2 pursuant to the federal Fair Housing Act. 42 U.S.C. § 3604(f)(3)(b). The Appellant claims this conclusion was erroneous.

The Board scheduled a hearing on the appeal for January 4, 2011.

Appellee DCRA and the property owner to whom Building Permit No. B1008586 was issued were automatically parties to this appeal pursuant to 11 DCMR § 3199. Both filed motions to dismiss the appeal. (Exhibits 22 and 25, respectively.) The motions argued that the Board does not have jurisdiction to hear this appeal because it is based solely on DCRA's interpretation and implementation of the federal Fair Housing Act, and not on the Zoning Regulations. Both motions also argued that this appeal is inappropriate because the applicable DCRA regulation

makes the decision of the Director of DCRA ("Director") regarding a reasonable accommodation a final decision of the District government, not subject to further administrative remedies, such as this appeal. (14 DCMR § 111.13.) The Appellant filed a one-paragraph response to the two motions to dismiss that addressed the second argument concerning the finality of the Director's decision, but did not address the question of the Board's jurisdiction. (Exhibit 26.)

On January 4, 2011, the Board after deliberating upon the merits of the motions to dismiss, and the opposition thereto filed by the Appellant, dismissed the appeal for lack of jurisdiction by a vote of 4-0-1.

Notice of Appeal and Notice of Hearing. By memoranda dated November 1, 2010, the Office of Zoning ("OZ") provided notice of the appeal to DCRA, and specifically to the Zoning Administrator at DCRA, the D.C. Office of Planning, Advisory Neighborhood Commission ("ANC") 6B, the ANC within which the subject property is located, Single Member District 6B08, the Councilmember for Ward 6, and the owner of the subject property. Pursuant to 11 DCMR § 3112.14, OZ published notice of the hearing in the *D.C. Register*, and, on November 1, 2010, mailed such notice to the Appellant, the Zoning Administrator, ANC 6B, and the owner of the subject property.

Party Status. Consistent with 11 DCMR § 3199.1, the parties in this proceeding were the Appellant, DCRA, ANC 6B, and the owner of the subject property. There were no requests for party status.

ANC Report. ANC 6B filed a letter with the Board dated November 10, 2010 indicating that, at a regularly scheduled, properly noticed meeting, with a quorum present, the ANC voted to support the instant appeal. (Exhibit 21.) The ANC's letter opines that the Zoning Administrator exceeded his authority in granting Building Permit No. B1008586 and also requests that a Stop-Work Order be issued to stop construction at the subject property.

FINDINGS OF FACT

1. The subject property is located in an R-4 Zone District, where a lot occupancy of 60% is permitted as of right. (11 DCMR § 403.2.)

2. The subject property is improved with a row dwelling which has an existing rear porch.

3. Between the existing rear porch and the rear lot line of the subject property is a rear yard.

4. On or about July, 2010, the owner of the subject property filed an application for a building permit to extend the rear porch so as to cover the entire rear yard, resulting in 100% lot occupancy of the subject property, which would be in violation of § 403.2. (Exhibit 7.)

5. The property owner also filed a request for a "reasonable accommodation" from compliance with § 403.2 pursuant to 14 DCMR § 111, the relevant provisions of which are as follows:

> 111.1 This section implements the policy of the District of Columbia on requests for reasonable accommodation in its rules, policies, and procedures for handicapped individuals as required by the Fair Housing Act, as amended, 42 U.S.C. § 3604(f)(3)(B). The policy of the District of Columbia is to facilitate housing for the handicapped and to comply fully with the spirit and the letter of the Fair Housing Act.
>
> 111.2 Any person eligible under the Fair Housing Act may request a reasonable accommodation as provided by the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B), pursuant to the procedures set out in this section in lieu of the procedures that would otherwise apply to such requests . . . .
>
> . . .
>
> 111.16 While a request for reasonable accommodation is pending, all laws and regulations otherwise applicable to the dwelling that is the subject of the request shall remain in full force and effect.

6. DCRA granted the reasonable accommodation request in early October, 2010.

7. Thereafter, on October 13, 2010, DCRA issued Building Permit No. B1008568 believing that its grant of the reasonable accommodation from § 403.2 obviated the need for the owner to obtain a variance from that same provision. (Exhibit 5.)

8. DCRA's conclusion was based entirely upon its interpretation of the Fair Housing Act and not on the Zoning Regulations.

9. On October 25, 2010, the Appellant appealed the issuance of the building permit, claiming that DCRA's interpretation of the Fair Housing Act as preempting the Zoning Act was erroneous.

CONCLUSIONS OF LAW

Section 8 of the Zoning Act of 1938 authorizes the Board to hear appeals of any decision of any administrative officer or body "in the carrying out or enforcement" of any Zoning Regulation. D.C. Official Code § 6-641.07(g)(1) (2008 Supp.). Such appeals may be taken "by any person aggrieved . . . by any decision of the [Department of Consumer and Regulatory Affairs] granting . . . a building permit . . . *based in whole or in part upon any zoning regulation.*" D.C Official Code § 6-641.07(f) (emphasis added). Therefore, the Board has no authority to hear an appeal that is not based to some degree upon an interpretation of a zoning regulation. *See Appeal No. 17444 of Kuri Brothers, Inc.*, 55 DCR 4442 (2008) ("The Board has no jurisdiction to hear allegations of error concerning the DCRA Director's interpretation of a provision not contained

in the Zoning Regulations.").

Here, the Appellant claims error in DCRA's issuance of Building Permit No. B1008586 because the agency decided that its grant of the property owner's request for reasonable accommodation from 11 DCMR § 403.2 pursuant to the federal Fair Housing Act obviated the need for the owner to obtain a variance from the same provision from this Board under the District's Zoning Act. This conclusion was based solely upon its interpretation of the Fair Housing Act and not on any Zoning Regulations. Because its decision was not based in whole or part on any zoning regulation, the Board lacks the subject matter jurisdiction to hear and decide this appeal, and must dismiss it.

ANC 6B, to whose issues and concerns the Board must give great weight, pursuant to D.C. Official Code § 1-309.10(d) (2001), voted to support CHRS's appeal and also requested that "an immediate Stop-Work Order be issued" to stop the construction authorized by Building Permit No. B1008586. (Exhibit 21.) Because the Board did not reach the merits of the appeal, the ANC's issues and concerns are not legally relevant. *See, Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C. 1993) (ANC's views as to whether variance should be granted became irrelevant once the BZA concluded that the use was permitted as a matter of right.).

It is hereby **ORDERED** that this appeal be **DISMISSED.**

VOTE: **4-0-1** (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle, and Anthony J. Hood to Dismiss; No other Board member (vacant) participating)

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT
A majority of Board members has authorized the issuance of this order.

ATTESTED BY: _____
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: APR 14 2011

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 18154

As Director of the Office of Zoning, I hereby certify and attest that on APR 14 2011, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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ATTESTED BY: Jamison L. Weinbaum
JAMISON L. WEINBAUM
Director, Office of Zoning

BZA Appeal No. 17746 of Reed Cooke Neighborhood Association

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17746 of Reed Cooke Neighborhood Association, pursuant to 11 DCMR §§ 3100 and 3101, from a February 22, 2007 decision of the Department of Transportation, Office of Public Works, to grant a curb cut serving accessory parking for an apartment building in the R-5-B District at premises 2351 Champlain Street, N.W. (Square 2563, Lot 109).

HEARING DATES: May 6, 2008 and June 10, 2008
DECISION DATE: June 10, 2008

DISMISSAL ORDER

PRELIMINARY MATTERS

On October 19, 2007, The Reed Cooke Neighborhood Association ("RCNA" or "Appellant") filed this appeal with the Board of Zoning Adjustment ("Board" or "BZA"). RCNA appealed the decision of the Office of Public Works, Public Space Committee, of the D.C. Department of Transportation ("PSC"), to allow a curb cut at 2351 Champlain Street, N.W., within the Reed Cooke Overlay District ("Overlay"). RCNA contended that the curb cut violated the provisions of the Overlay.

The Board heard the appeal on June 10, 2008 and determined that that it had no jurisdiction over the decision appealed. Therefore, after the hearing, the Board voted 3-0-2 to dismiss the appeal.

FINDINGS OF FACT

1. On February 22, 2007, the PSC held a public hearing on the request of Erie Associates, intervenor herein, to permit the expansion of an already-existing curb cut at 2351 Champlain Street, N.W.

2. The curb cut expansion request was addressed to the PSC because the curb cut is located within the area along Champlain Street, N.W. designated as "public space."

3. At the end of the hearing on February 22, 2007, the PSC granted the curb cut request, allowing the expansion of the already-existing curb cut at address 2351 Champlain Street,

N.W. to facilitate access to parking accessory to a residential building being constructed by the intervenor.

4. The PSC's action did not permit the creation of off-street parking spaces.

5. The PSC does not make determinations concerning parking on private property; its jurisdiction with regard to parking is limited to ensuring that no off-street parking requirements will be fulfilled by using the public space, unless permitted.

6. The appellate jurisdiction of the BZA is limited to appeals of decisions that arise out of the administration or enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1) (2001); 11 DCMR § 3100.2.

7. The subject property, 2351 Champlain Street, N.W., is in an R-5-B zone district and within the Reed-Cooke Overlay District ("Overlay").

8. There is no provision in the Zoning Regulations, including in the Reed-Cooke Overlay provisions, which prohibits curb cuts within the Overlay.

9. There is no provision in the Zoning Regulations, including in the Reed-Cooke Overlay provisions, which prohibits a use from providing more off-street parking spaces then required by the regulations. *See,* 11 DCMR § 2101.2.

10. The purposes of the Overlay set forth in 11 DCMR § 1400 do not include any standards that must be met and are not self-effectuating.

11. There was no request for zoning relief involved in the application before the PSC.

12. The decision of the PSC to permit the curb cut was not based on any Zoning Regulation or any violation thereof.

CONCLUSIONS OF LAW

The Board is authorized to hear appeals of any decision of any administrative officer or body "in the carrying out or enforcement" of any Zoning Regulation. D.C. Official Code § 6-641.07(g)(1) (2001). *See,* 11 DCMR § 3100.2. (The Board may hear appeals of decisions made "in the administration or enforcement of the Zoning Regulations.") Therefore, if an appeal is brought before the Board which does not arise from the carrying out/administration or enforcement of the Zoning Regulations, it is not within the Board's jurisdiction, and the Board is without authority to hear it.

The Appellant and ANC 1C both opposed the curb cut and asserted that the PSC's decision to permit it violated several Zoning Regulations, specifically §§ 1400.2(c) and 1403.1(b), both

provisions of the Overlay, and § 2101.1, concerning required parking.[1] The Board, however, disagrees and fails to find any real nexus between the cited Zoning Regulations and the PSC's decision. Section 1400.2(c) sets forth one of the purposes of the Overlay, *to wit*: "[p]rotect adjacent and nearby residences from damaging traffic, parking, environmental, social, and aesthetic impacts." The purpose set forth in § 1400.2(c) is merely precatory. It is not self-effectuating and does not contain standards by which the curb cut application could have been judged, therefore, it does not create the nexus between the Zoning Regulations and the PSC decision necessary to bring that decision within the jurisdiction of this Board. *See, Georgetown Residents Alliance v. D.C. Bd. of Zoning Adjustment,* 802 A.2d 359, 365 (D.C. 2002). Section 1403.1(b) is inapplicable here because it is one of several subparagraphs which must be met if one is applying for a special exception from the requirements of the Overlay. There is no request for a special exception here.

The Appellant also cites § 2101.1 of the Zoning Regulations, which sets forth the parking requirement for the intervenor's building, as an ostensible basis for the Board's jurisdiction. The Appellant appears to be arguing that since, without the curb cut, the building already had access to sufficient required parking, granting the curb cut was not proper because it facilitated parking in excess of the amount required. The Zoning Regulations, however, do not mandate parking maxima. On the contrary, § 2101.2 states, in relevant part, that: "[n]othing in this section shall be construed to prohibit the establishment of accessory parking spaces in an amount that exceeds that required by § 2101.1." 11 DCMR § 2101.2. Nor is there any allegation that § 2101, or any other Zoning Regulation, was violated by the granting of the curb cut.

It is clear from the testimony presented at the hearing that the PSC did not make any determination with respect to any Zoning Regulation and that it does not, in the usual course of its business, make any determinations with respect to parking on private property. *See,* June 10, 2008 Public Hearing Transcript at 407, lines 16-22, and at 408, lines 17-22. Such determinations are made by other responsible District agencies, including, where appropriate, this Board.

For all the reasons stated above, the Board concludes that this appeal did not arise out of the administration or enforcement of the Zoning Regulations, and that, therefore, the Board lacks subject matter jurisdiction over the appeal and must dismiss it. *See*, *Board Order No. 17585 of Darshan Shah,* 55 DCR 1201 ((2008) and cases cited therein. Because the Board lacks subject matter jurisdiction, it does not reach the question of the timeliness of the filing of the appeal.

It is hereby **ORDERED** that this appeal be **DISMISSED.**

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[1]During the hearing, § 1400.2 was also mentioned as a possible basis for the appeal, but this section merely states that where the provisions of the Overlay *conflict* with the underlying zone district, the more restrictive regulations govern. The Board was not directed to any such conflict, and even in the event of such a conflict, § 1400.2 is a procedural provision and, like the purposes provisions, does not set forth any standard on which the PSC could have based its decision. Therefore, it does not create the necessary jurisdictional nexus between the Zoning Regulations and the decision appealed.

VOTE: **3-0-2** (Ruthanne G. Miller, Shane L. Dettman and Mary Oates Walker to dismiss. No fourth member nor Zoning Commission member participating or voting.)

Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____
RICHARD S. NERO, JR.
Acting Director, Office of Zoning

FINAL DATE OF ORDER: JAN 12 2009

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 17746

As Director of the Office of Zoning, I hereby certify and attest that on **JANUARY 12, 2009**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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ATTESTED BY:

RICHARD S. NERO, JR.
Acting Director, Office of Zoning

TWR

BZA Appeal No. 17329 of Georgetown Residential Alliance

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17329 of Georgetown Residence Alliance, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) for failure to enforce the Zoning Regulations and from the issuance of Building Permit No. B-468701 for a roof hatch and mechanical access door at 1531 31st Street, N.W. in the R-3 zone (Square 1269, Lot 294).

HEARING DATE: July 12, 2005
DECISION DATE: July 12, 2005

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on March 25, 2005, challenging DCRA's issuance of a building permit allowing the construction of a roof hatch and mechanical access door at the premises, and also challenging DCRA's alleged failure to enforce the Zoning Regulations. Prior to the public hearing, the property owner moved to dismiss the appeal, claiming that it had been untimely filed. After hearing argument and reviewing the written submissions of the parties, the Board dismissed the appeal, finding that the appeal was untimely filed as to the building permit, and that the Board lacked subject matter jurisdiction to review other alleged errors.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for July 12, 2005. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellant, the property owner, and DCRA.

Parties

The Appellant in this case is the Georgetown Residence Alliance (the Appellant or the Alliance), a not-for-profit civic association represented by Don Crockett. The owner of the subject property is Reid Dunn, who was represented by Holland & Knight LLP, Mary

Carolyn Brown, Esq. As the property owner, Mr. Dunn is automatically a party under 11 DCMR § 3199. Appellee DCRA was represented by Lisa Bell, Esq.

FINDINGS OF FACT

Background

1. The subject property is located at 1531 31st Street, NW in the R-3 zone. Originally a single-family home, the building was converted into a four-unit apartment house prior to the enactment of the Zoning Regulations. Although the R-3 district permits only single-family dwellings and flats, the apartment house use is a lawfully existing non-conforming use.

2. Beginning on or about September, 2004, the current property owner proposed changes at the property for the purpose of converting the apartment house to a condominium. Several proposed changes were reviewed by the Old Georgetown Board of the US Commission on Fine Arts and monitored by the Alliance, including changes to the rooftop. The building permit issued by DCRA on or about May 17, 2004 provided only for renovation work to the building's interior, not the rooftop or any other portions of the exterior. The permit was not entered in the administrative record and there was disagreement about the exact date it was issued. However, both parties referred to the permit during the hearing and concurred that it was issued prior to November, 2004 when construction began.

3. Shortly after construction began, the Alliance initiated a series of communications with the DC Historic Preservation Office (HPO), the Historic Preservation Review Board (HBRB)[1], and the Zoning Administrator of DCRA, complaining that construction was proceeding illegally. The Alliance complained that the owner had unlawfully removed part of a large ornamental turret that occupied part of the roof space, and was about to construct an unauthorized roof deck.

4. HPO and DCRA both inspected the site, and determined that construction – including the partial removal of the turret -- had occurred without the necessary building permits. The HPO inspected the site and issued a stop work order on or about November 16, 2004, and DCRA inspected the site and issued a stop work order on or about December 27, 2004. According to an e-mail from the Zoning Administrator to Mr. Crockett, DCRA's stop work order was issued because the rooftop work went beyond the interior

[1] The District of Columbia Historic Preservation Review Board advises the State Historic Preservation Officer. The Historic Preservation Office is part of the Office of Planning and serves as staff to the State Historic Preservation Officer and the Historic Preservation Review Board.

renovations allowed by the building permit. The e-mail also stated that Board approval would be required before the owner could expand the non-conforming use and construct a roof deck (Exhibit 2, Appellant's Statement in Support of their Appeal, Appendix I at 18).

5. The owner promptly applied to DCRA for a permit to allow him to construct rooftop access. The revised plans submitted with the application showed a proposed roof hatch but no roof deck (Exhibit 2, Appendix I at 18). DCRA lifted the December 27 stop work order and issued Building Permit No. 468701 (the access permit) on December 28, 2004. The access permit is the subject of this appeal. It allowed the owner to construct a roof hatch and a mechanical access door at the rear of the rooftop turret (Attachment to Exhibit 11). It did not authorize a roof deck.

6. On December 29, 2004, The Zoning Administrator notified the Appellant by e-mail that DCRA's stop work order had been lifted and the access permit had been issued.

7. The Appellant continued to communicate with the HPO, HPRB, and DCRA after the access permit was issued, and requested that the rooftop turret be restored to its original condition. Appellant's own submissions show written communications dated January 24, 25, and 26 of 2005 (Exhibit 2, Appendix I at 10, 21, 24, and 26). During the hearing of this matter, Appellant also referred to his "constant communication" with District agencies (See, for instance, T., p. 111). Although Appellant stated in these written communications that the turret had been "demolished", HPO and DCRA disagreed, stating that a portion of the turret was altered to allow for mechanical access to the roof (Exhibit 2, Appendix I at31).

The Appeal

8. The appeal was filed on March 25, 2005 alleging that DCRA "refuse[d] to enforce the Zoning Regulations and Zoning Laws against the unlawful and un-permitted extension and expansion of the non-conforming apartment house use" at the premises (Exhibit 1).

9. In an undated statement submitted April 8, 2005, the Appellant alleged that on or about December 28, 2004, DCRA improperly issued Building Permit No. B468701 (the access permit) allowing the owner to construct a roof hatch and mechanical access door at the premises (Exhibit 11).

10. During the public hearing, the Appellant alleged that the appeal stemmed from: (a) the owner's unlawful rooftop demolition and construction work without a permit (T. p. 104, 120), (b) the HPRB's failure to order that the roof be restored to its original

condition, and (c) the issuance of the access permit that allegedly improperly authorized the rooftop expansion of a non-conforming use.

The Motion to Dismiss

11. Prior to the public hearing, the owner filed a motion to dismiss the appeal, contending that the appeal of the access permit was untimely. The owner also claims that DCRA's issuance of the access permit is the only administrative decision which can be appealed to this Board.

12. As stated above, Appellant's view of the appeal is broader. He contends that the appeal was timely filed because it was filed when "it was clear no one would do anything" (T. p. 166). Appellant cites the 3 letters he sent to the HPRB chair asking him "to look into the situation and take action" (T. p. 110), with copies to "everyone involved", including the Zoning Administrator and Timothy Dennee of the HPO (T. 112). Appellant also claims that his appeal was timely because it was filed "about a month after, or less than a month after" Mr. Dennee failed to respond to his last letter (T. p. 166), and because Mr. Dennee's office and the HPRB office is each a "subsidiary" office of DCRA (T. p. 112).

13. Given the Appellant's close scrutiny of the project, the Board is persuaded that the Appellant knew about the access permit on or about the date it was issued, on December 28, 2004, but at least by December 29, 2004 after the e-mail communication from the Zoning Administrator.

14. Appellant filed this appeal on March 25, 2005, approximately 87 days after the access permit was issued. Although Appellant may have been frustrated in his dealings with DCRA, there is no evidence that DCRA's actions substantially impaired Appellant's ability to file an appeal.

CONCLUSIONS OF LAW

The Appellant did not clearly identify the error that was being complained of in this appeal. After extensive exploration of Appellant's concerns at the hearing, the Board determined that Appellant was appealing the access permit and the DCRA and HPRB decisions not to require the property owner to restore the rooftop turret to its original condition. For the reasons discussed below, the Board concludes that it lacks jurisdiction over the claim related to the access permit because the appeal of its issuance was not timely filed, and it lacks subject matter jurisdiction over the enforcement claim because the alleged violations did not involve zoning regulations. The reasons for these conclusions follow.

The Appeal of the Access Permit was Untimely

The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days after the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may be extended only if the appellant shows that: (1) "There are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) "The extension of time will not prejudice the parties to the appeal." 11 DCMR 3112.2(d).

As stated in the Findings of Fact, the access permit was issued on December 28, 2004, and Appellant knew about this approval when the permit was issued ,or shortly thereafter on December 29, 2004, when it was notified by the Zoning Administrator. Thus, under section 3112.2(a) of the Regulations, the appeal should have been filed within 60 days after that date, or on or about February 27, 2005. Instead, the appeal was filed on March 25, 2005, approximately 86 days after the Appellant was charged with notice of the decision complained of. During this 86 day period, Appellant pursued other avenues to resolve its dispute and engaged in extensive communications with the Zoning Administrator and HPO staff. However, 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. *Waste Management of Maryland, Inc. v. DC Board of Zoning Adjustment*, 775 A.2d 1117 (D.C. 2001); *Woodley Park Community Ass'n v District of Columbia Board of Zoning Adjustment,* 490 A.2d 628 (D.C. 1985).

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). This appeal, filed March 25, 2005, was untimely filed as to the access permit and the Board, therefore, lacks jurisdiction to hear it.

The Board Lacks Subject Matter Jurisdiction Over The Other Alleged Errors

As to the other issue raised by the appeal, the claimed refusal of DCRA and HPRB to enforce the Zoning Regulations, the Board lacks subject matter jurisdiction because no violations of the Zoning Regulations are alleged.

The Appellant is essentially claiming that DCRA should have required the turret to be restored because the rooftop work was performed without a building permit, as is required by section 10 of the Zoning Act of 1938, codified at D.C. Official Code § 6-

641.08 (2001). Similarly the Appellant contends that HPRB or the HPO should have ordered restoration, presumably based upon section 5 of the Historic Landmark and Historic District Protection Act of 1978 ("Historic Preservation Act"), codified at D.C. Official Code § 6-1104, which requires review by the Mayor before all or part of a historic landmark or contributing building is demolished.

Neither of these requirements may be found in the Zoning Regulations. Yet, the Board's jurisdiction is limited to hearing and deciding appeals "where it is alleged by the appellant that there is error in any order, requirement, decision[2], determination, or refusal made by any ... administrative officer or body in the carrying out or enforcement ***of any regulation adopted pursuant to" the Zoning Act.*** D.C. Official Code § 6-641.07 (f) (2001). With respect to the lack of a building permit, this Board has twice held in the context of Civil Infraction Act appeals that its jurisdiction does not extend to violations of the Zoning Act that are not also included in the Zoning Regulations, such as the requirement for a building permit. *Appeal of Peter Choharis*, BZA No. 03-0001, 51 DCR 8210 (2004); *Appeal of William Robinson*, BZA No. 04-0001 52 DCR 3677 (2005). The requirement for the Mayor to review applications to demolish historic or contributing buildings is not even in the Zoning Act, but in an entirely different law.

The Board has no jurisdiction to hear complaints over the alleged inaction of District officials in enforcing the Zoning Act, the Historic Preservation Act, or any other statutory or regulatory provisions other than those contained the Zoning Regulations. Since Appellant does not claim that any zoning regulation was violated, the alleged lack of enforcement cannot be addressed by this Board.

Therefore, for the reasons stated above, it is hereby **ORDERED**:

1. The motion to dismiss the appeal of the building permit as untimely is **GRANTED**.

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II and Anthony J. Hood, in favor of the motion; Curtis L. Etherly, Jr. being necessarily absent)

Vote taken on July 12, 2005

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[2] To the extent that the Appellant was also appealing the construction and demolition activities of the property owner, as opposed to the decisions made by District officials with respect to those activities, the Board also has no jurisdiction. The Zoning Act limits the Board's appellate jurisdiction to actions taken by District officials in carrying out and enforcing the Zoning Regulations, not to actions taken by private citizens.

2. The motion to dismiss the appeal on the ground that it lacks subject matter jurisdiction is **GRANTED** with respect to the alleged failure to enforce by DCRA and the HPRB/HPO

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II and Anthony J. Hood in favor of the motion; Curtis L. Etherly, Jr. being necessarily absent)

Vote taken on July 12, 2005

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 12 2006

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 17329

As Director of the Office of Zoning, I hereby certify and attest that on **JULY 12, 2006**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR