

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

APPEAL OF:

**Advisory Neighborhood Commission 6A
of the Administrative Decision of DCRA to
Issue Building Permit # B1209455
(Square 1049, Lots 36)**

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BZA Appeal No. 18499

GROUND LESSEE'S MOTION TO DISMISS APPEAL

**I.
INTRODUCTION**

DAG Realty LLC ("Ground Lessee"), the Ground Lessee of the subject property, and a party to the subject appeal pursuant to § 3199.9 of the Zoning Regulations (11 DCMR), hereby moves to dismiss the appeal filed on November 14, 2012 (the "Appeal") of Advisory Neighborhood Commission 6A ("Appellant" or "ANC 6A") of the Administrative Decision of the Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit No. B1209455 dated November 1, 2012 ("November Permit"). The Appeal should be dismissed for several reasons. First, it should be dismissed because it is not timely filed, and therefore the Board does not have jurisdiction. As explained below, the Appeal was filed on November 14, 2012, but the issues raised by the Appellant actually relate to issues which were determined in Building Permit No. B1107494 dated May 4, 2012 ("May Permit"). As such, filing the Appeal in November exceeds the sixty day time limit for appeals. Second, the issues raised in the Appeal have already been decided by the Board of Zoning Adjustment ("BZA") in Appeal No. 18439, and therefore under the doctrine of administrative collateral estoppel, a subsequent appeal about the same matter should be dismissed. Finally, even if the Board reached the merits of the

Appeal, it is plain that the arguments set forth in the Appeal are without merit and should be summarily dismissed.

II. FACTS

The property that is the subject of this appeal is located at 1400 Maryland Avenue, N.E. at the corner of Maryland Avenue and 14th Street, N.E. (Square 1049, Lot 36) (the "Property"). The Property was previously known as Lots 803 and 21 in Square 1049. Lots 803 and 21 were combined to create Lot 36 by Subdivision Plat recorded in Book 207, Page 25 on January 10, 2013. The Property was originally zoned C-3-A but was rezoned to HS-A/C-2-A by Zoning Commission Order No. 10-19, effective December 9, 2011.

The chronology of the permits, licenses, and appeals to date is as follows:

January 26, 2010: BZA Order No. 17825 was issued granting a special exception allowing for the establishment of a gasoline service station at the Property. The plans submitted to the Board show that the applicant intended to alter the existing, one story building on the Property and to use it to house the attendant for a gas station and a grocery store.¹

May 31, 2011: The application for the May Permit was filed. Initially, the plans for that permit included the interior layout of the grocery store, but those plans were revised to change the use of that space to storage.

May 4, 2012: The May Permit was issued, allowing for interior and exterior work to allow a gasoline service station at the Property pursuant to BZA Order No. 17825.

¹ The term "convenience store" in BZA Order No. 17825 is not an established use under the Zoning Regulations. The Board has previously determined that, for the purposes of the Zoning Regulations, a convenience store is synonymous with a grocery store, which is an established use. *See* BZA Order No. 18146 at p. 4. All subsequent references to that use in this Motion will be to a grocery store.

May 29, 2012: An application for an additional building permit was filed with DCRA. The proposed scope of work for that permit was to involve interior alteration to the building authorization by the May Permit to include the grocery store use in the existing building.

July 2, 2012: ANC 6A filed BZA Appeal No. 18438 challenging the issuance of the May Permit.

July 3, 2012: Valor 1350 Maryland, LLC ("Valor") filed Appeal No. 18439 challenging the issuance of the May Permit and argued that it was issued in violation of the applicable Zoning Regulations and BZA Order No. 17825.

October 12, 2012: ANC 6A withdrew Appeal No. 18438.

November 1, 2012: The November Permit was issued for a "grocery store to be added to existing vehicle service station under separate Building Permit No. B1107494."

November 13, 2012: Valor filed a Motion to Amend its Appeal and for a Continuance, to include a challenge to the November Permit. This Motion was subsequently withdrawn as set forth below.

November 13, 2012: ANC 6A filed a letter stating that at its regularly scheduled meeting held on November 8, 2012, ANC 6A voted 6-0-0 to support Appeal No. 18439. ANC further stated that it shared Valor's concerns that the November Permit was improperly issued for a C-3-A zone when the correct zoning is HS-A/C-2-A.

November 14, 2012: ANC 6A filed the subject appeal, Appeal No. 18499.

November 20, 2012: The Ground Lessee filed its Opposition to Appellant's Motion to Amend the Appeal and For a Continuance in response to Appeal No. 18439.

November 26, 2012: The DCRA filed its Pre-Hearing Statement in response to Appeal No. 18439.

November 27, 2012: A BZA hearing was held on Appeal No. 18439. At the hearing, Valor withdrew its Motion to Amend the Appeal and for a Continuance that was filed on November 13, 2012.

January 15, 2013: The Board voted to deny Appeal No. 18439 by a vote of 4-0-0.

III. ARGUMENT

A. The Subject Appeal is Not Timely

Timeliness is a threshold requirement of the Board's jurisdiction. *Goto v. D.C. Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). In order to appeal a decision of the Zoning Administrator to the Board of Zoning Adjustment, Section 3112.2 of the Zoning Regulations requires that an aggrieved person must file an appeal within sixty days of actual or constructive knowledge of the decision being appealed. 11 DCMR § 3112.2. Section 3112.2(d) of the Zoning Regulations further provides that the Board may extend the sixty day deadline only if two separate requirements are satisfied, including the following: (1) the existence of exceptional circumstances outside of the appellant's control and that 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). If either one of these requirements has not been met, then the Board may not grant an extension. As discussed below, Appeal No. 18499 is untimely and the requirements for an extension of the sixty day period have not been met.

The Appeal is untimely because it was filed on November 14, 2012 and it relates to issues raised by the Appellant which were determined in the May Permit. Specifically, Appellant asserts that the reason for the Appeal is that "DCRA issued the permit for the wrong

zone (C-3-A) and did not require the applicant comply with 11 DCMR §§ 1324.2 and 1324.10, which was required by the correct zone (HS-A/C-2-A)." (Statement of the Appellant, p. 1). The Appellant further asserts that the building plans show that the proposed structure does not comply with 11 DCMR §§ 1324.2 and 1324.10.

First, the Zoning District identified on the May Permit was the same as identified on the November Permit which is the subject of this Appeal. Second, the plans approved as part of the May Permit clearly showed the location and design of the building about which the Appellant now complains. Attached to this Motion are reduced sized sheets from the approved plans for the May Permit, including the Cover Sheet (CS), the Site Plan (C10) and the Architectural Plan (A1). Each of those sheets contains the signature of the zoning technician, attesting that the plans complied with the requirements of the Zoning Regulations (see Exhibit A). The plans clearly show the building located at the north side of the Property, behind the pump islands and canopy, and indicate that the building was to be used to house the cashier for the gas station and for storage.

The drawings associated with the November Permit clearly show that the focus of that permit was on the interior alterations proposed to make the building suitable for the grocery store use. Attached to this response are reduced sized sheets from the approved plans for the November Permit, including the Cover Sheet (A1) and the Floor Plan (A2). Both of those sheets contain the initials of the Zoning Administrator, attesting that the plans complied with the requirements of the Zoning Regulations (see Exhibit B).

The size and location of the building did not change between the issuance of the May Permit and the November Permit. Accordingly, any noncompliance with §§ 1324.2 and 1324.10 could have been discerned from a review of the plans on file for the May Permit and for which

ANC 6A submitted and withdrew an appeal and for which Valor submitted and processed an appeal.

Accordingly, the Appellant is out of time to raise issues which were decided in the May Permit, issued over six months prior to the Appeal being filed. Furthermore, the Appellant has not asserted any exceptional circumstances to justify the Board extending the sixty day deadline. Therefore, the Board must dismiss the Appeal as untimely.

B. The Subject Appeal is Barred by Administrative Collateral Estoppel

The Appellants' claims have been previously litigated and determined in this forum, and therefore they are barred under the well-settled principle of administrative collateral estoppel. The D.C. Court of Appeals has stated that "[c]ollateral estoppel...precludes relitigation of issues of fact or law determined in a prior proceeding which were essential to that judgment." *Oubre v. D.C. Department of Employment Services*, 630 A.2d 699, 703 (D.C. 1993). Importantly, the Court of Appeals has held collateral estoppel "appl[ies] to the results of administrative proceedings when the agency is acting in a judicial capacity, resolving disputed issues of fact properly before it which the parties have an adequate opportunity to litigate." *Borger Management v. Sindram*, 886 A.2d 52, 59 (D.C. 2005) (punctuation and internal citation omitted); *see also Hogue v. Hopper*, 728 A.2d 611, 614 (D.C. 1999) (holding that collateral estoppel "applies not only to judicial adjudications, but also to determinations made by agencies other than courts, when such agencies are acting in a judicial capacity"). The doctrine of collateral estoppel can preclude the relitigation of a specific issue "where (1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment." *Wilson v. Hart*, 829 A.2d 511, 514 (D.C. 2003).

The Board has applied the doctrine of collateral estoppel to preclude the relitigation of issues determined in an earlier BZA proceeding. *See Appeal No. 16679A of Spring Valley Wesley Heights Citizen's Association* (June 10, 2005); *see also Appeal No. 17830 of L. Napoleon Cooper* (Feb. 18, 2009). The Board has already determined that the Zoning Administrator did not err in approving the May Permit, allowing the repair and renovation of a gasoline station in the HS-A/C-2-A District at 1400 Maryland Avenue, N.E., and therefore collateral estoppel precludes relitigation of the same issue in this Appeal.

First, the correct zoning for the Property was raised and addressed by the parties in BZA Appeal No. 18439. In that appeal, Valor argued that HS-A/C-2-A was the correct zone and that the proposed grocery store was not permitted in the zone. In addition, ANC 6A submitted a letter dated November 13, 2012, stating that it voted to support Valor's appeal. Furthermore, ANC 6A letter stated that it shared Valor's concerns that the November Permit was improperly issued for a C-3-A zone when the correct zoning is HS-A/C-2-A. As was testified by the District at the public hearing in Appeal No. 18439, the Zoning Administrator is not in charge of the zone district which is printed on a building permit when issued. Therefore, the issue of the permitted use of the Property was "actually litigated" by the parties in BZA Appeal No. 18439.

Second, the issue was determined by the Board in the form of a valid, final judgment on the merits. As a party in Appeal No. 18439, ANC 6A submitted a letter regarding its position in that appeal. The Board gave the arguments raised by ANC 6A great weight, as required. However, the Board ultimately rejected those arguments and denied the appeal.

Third, ANC 6A was afforded a full and fair opportunity to litigate the validity of the challenged permit. As noted above, ANC 6A submitted a letter expressing its position and its support of Valor's appeal. ANC 6A was given proper notice of the hearing, but chose not to

participate in person at the hearing. Because all four of the elements of collateral estoppel are satisfied in this case, the present appeal is precluded by the Board's prior ruling upholding the Zoning Administrator's decision.

C. The Appeal is Without Merit

In addition to being untimely and duplicative, Appellants' arguments in this Appeal are without merit. The Appellant argues that the November Permit was incorrectly granted for a C-3-A zone, when the controlling zone should be HS-A/C-2-A, and that the building plans do not comply with the design requirements of §§ 1324.2 and 1324.10. However, the construction of the gas station and the building were appropriately authorized and vested under the C-3-A District, and the H Street Overlay District design standards are not applicable to the building.

1. The HS-A/C-2-A District Standards are Not Applicable

The construction undertaken pursuant to the May Permit, including the construction of the building on the Property, was authorized by the approval in BZA Order No. 17825 dated January 26, 2010. Under 11 DCMR § 3203.6, a building permit is subject to the Zoning Regulations in effect on the date BZA Order No. 17825 was promulgated. Specifically, § 3202.6 states:

All applications for building permits authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date those orders are promulgated; Provided, that all applications for building permits shall be accompanied by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation.

On January 26, 2010, the date BZA Order No. 17825 was issued, the Property was zoned C-3-A and was not included in the H Street Overlay District. The rezoning did not take effect until December 9, 2011. Accordingly, the construction of the gas station and the building were

appropriately authorized and vested under the C-3-A District, and the provisions referenced by the Appellant are not applicable to the building.

Moreover, the original plans for the November Permit included a grocery store in the building on the Property. Those plans were revised and the approved permit set shows the building but no grocery store use in the building. BZA Order No. 17825, dated January 26, 2010, was styled as a request "to establish a gasoline service station with convenience store under §§ 743, 706 and 2302." In the very first paragraph of the Decision and Order, the Board states: "Since a convenience store is a matter of right use in the C-3 District, the subject of this application and the sole focus of the Board's decision is the gasoline service station use." Notwithstanding that statement, the plans that are in the record and which are cited in the Board's Order (Exhibits 60 and 66A) clearly show the grocery store use even though Board approval was not necessary.

2. A Grocery Store is a Use Permitted Under All Applicable Zoning Districts

A grocery store is a use permitted under any of the arguably applicable zoning districts. A grocery store is a use permitted as a matter-of-right in a C-1 District pursuant to 11 DCMR § 701.4(1). Furthermore, grocery store use is permitted as a matter-of-right in a C-2 District by incorporation through §§ 721.1 and 721.3 and in C-3-A by incorporation under § 741.1. Moreover, notwithstanding the Appellant's assertion, there is nothing in the Neighborhood Commercial Overlay District regulations (§ 1302) nor in the H Street Overlay District regulations (§§ 1320 -1323) which disallows a grocery store as permitted by the underlying zone. To the contrary, § 1302.2 expressly permits as a "designated use" any use permitted as a matter-of-right in a C-1 District pursuant to § 701.4, which includes a grocery store. The grocery store on the Property is permitted as an accessory use to the gas station, and it would also be

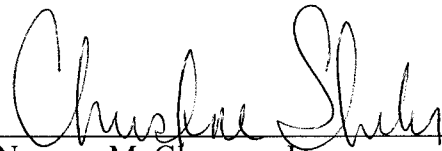
permitted as a principal use in the HS-A Overlay and as a matter of right under 11 DCMR § 701.4, which is incorporated into the HS-A Overlay by 11 DCMR §§ 1302.2 and 1320.3.

**IV.
CONCLUSION**

Based on all of the reasons set forth herein, the Board should dismiss the present appeal.

Respectfully submitted,

Holland & Knight LLP

A handwritten signature in cursive script, appearing to read "Christy M. Shiker", written over a horizontal line.

Norman M. Glasgow, Jr.

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