DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington D.C. 20001

Appeal of Dr. Joan Evelyn Kinland | Appeal No. 18827

DCRA'S RESPONSE TO APPELLANT'S MOTION TO FILE AN UNTIMELY BRIEF

Appellant has filed a supplemental brief arguing that her challenge to the child development center is timely. The brief should be rejected because it was not filed within 14 days of the hearing date. 11 D.C.M.R. 3112.10. But even if the Board accepts the late brief, the arguments in it are without merit.

ARGUMENT

1. The Appeal is untimely.

In 2011 a Certificate of Occupancy was issued allowing a child development center to be operated on the premises. But this Appeal was not filed until 2014. As a result, the challenge to the child development center is too late. See 11 D.C.M.R. § 3112.2(a)(requiring appeal to be filed within 60 days of the decision at issue).

2. The decision appealed is the issuance of the C of O.

Despite the fact that this Appeal was not filed until nearly 3 years after the Certificate of Occupancy was issued, Appellant alleges that the appeal is timely. She does not, however, allege that she was unaware of the fact that a child

development center was being operated on the premises. Nor does she contend that there were other factors that prevented her from challenging the Certificate of Occupancy in a timely manner. Instead, she argues that the decision being appealed is not the issuance of a Certificate of Occupancy but "the Zoning Administrator's refusal to revoke the Certificate of Occupancy."

The problem with this semantic argument is twofold. First, and most importantly, it is inconsistent with prior decisions of the D.C. Court of Appeals and this Board. The Court of Appeals and this Board have held that a zoning decision is appealable only if it is the first decision on the issue involved. See *Basken v. DCBZA*, 946 A.2d 356, 367 (D.C. 2008)(A decision "is separately appealable [only] where it provides the first notice from which an aggrieved person knew or 'reasonably should have ... know[n],'.... of the resolution or decision that the certificate represents..... [A letter reaffirming a prior decision] does not, however, start another sixty-day appeal period as to any and all DCRA zoning decisions affecting a project that preceded issuance of the [letter]."); Exhibit 1, *Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F* (2005)("The Board does not find it in the interests of judicial economy or fairness to allow an appeal of a second or subsequent determination on the same basic issue, which can come months or years after the initial determination, at a point where the permittee has progressed beyond mere preparation. Such a subsequent determination should not 're-start' the 60-day time period.")

So the rule is that a decision that simply reaffirms a prior zoning decision is not appealable. As applied to this case, the decision not to revoke the prior Certificate of Occupancy is essentially just a reaffirmance of the decision to issue

the Certificate of Occupancy. Therefore, the decision not to revoke is not an appealable event. The only appealable event was the issuance of the Certificate of Occupancy and Appellant did not file a timely challenge to the Certificate.

The second problem with Appellant's position is that it would result in absurd results. Appellant argues that the Zoning Administrator could have revoked the Certificate of Occupancy because it was issued in error. But the same could be said of all Certificates of Occupancy and Building Permits since 12A DCMR §§ 105.6 and 110.5 provide that a Certificate of Occupancy or a Building Permit can be revoked if issued in error. So if the Board decides that Appellant can appeal the Zoning Administrator's decision to not revoke in this case, then the Board will have created a loop hole that will essentially allow a party to appeal at any time. The party could simply ask the Zoning Administrator to revoke a Certificate of Occupancy or Building Permit that was issued years ago and when the Zoning Administrator refuses to do so, they could appeal. The result would be that parties could restart the 60 day appeal deadline at will. Obviously, such an absurd and unfair result should be avoided.

3. The Board has no jurisdiction over the child development center issue.

Appellant also seems to argue that even if the Appeal is untimely the Board itself can revoke the Certificate of Occupancy because "the Board exercise[s] the powers of the code official." But what Appellant overlooks is that timeliness is a prerequisite to this Board having jurisdiction over an issue. If the Board does not have jurisdiction because a challenge is untimely, it has no power to take any action. *BZA Appeal No. 18300 of Lawrence and Kathleen Ausubel*

(2012)("[i]f an appeal is not timely filed, the Board is without power to consider it.") And, as explained, the challenge to the child development center was made too late. So the Board simply does not have the power to order revocation of the Certificate of Occupancy since the Appeal of that issue is untimely.

CONCLUSION

For the above reasons, the Board should refuse to accept the untimely brief and deny the appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October 2014, a copy of the foregoing Brief was served to:

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EXHIBIT 1

52 DCR 3904
52 D.C.Reg. 3904

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Board of Zoning Adjustment - Appeal No. 16982 (J. Brendan **Herron** Jr. and ANC 3F)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F, pursuant to §§ 3100 and 3101 of the Zoning Regulations, from the administrative decision of the Department of Consumer and Regulatory Affairs ("DCRA" or "Appellee") in the issuance of building permit Nos. B446312, and B446316, issued on June 13, 2002, to Zuckerman Brothers, Inc. ("Property Owner"), allowing the construction of two single family dwellings at 2900 and 2902 Albemarle Street, N.W. ("Property"), and from the administrative decision to allow the subdivision of the Property on April 17, 2002.

HEARING DATE:	March 4, 2003
DECISION DATE:	March 11, 2003

DECISION AND ORDER

J. Brendan **Herron** Jr. filed an appeal with the Board of Zoning Adjustment ("Board" or "BZA") on December 14, 2002. ANC 3F later joined in the appeal. Mr. **Herron** and ANC 3F will be collectively referred to as the "Appellants." They appeal an October 23, 2002 decision of David Clark, the then Director of DCRA, as that decision relates to the building permits [FN1] issued on June 13, 2002, for the Property, as well as the subdivision of the Property.

Appellants allege that DCRA erred because it did not process the building permits in accordance with the Forest Hills Tree and Slope Protection Overlay ("FHTSP" or "Overlay"). Because the building permit applications were filed before the Zoning Commission decided to "set down" the Overlay for hearing, 11 DCMR §3202.5 (a) ("set down rule") would ordinarily allow the permits to be processed in accordance with the zoning in place as of the date of application. However, Appellants' claim that the building permit applications were incomplete and therefore, under the same rule, must be processed under the more restrictive zoning designation proposed to be set down. Appellants contend that the development on each newly subdivided lot was noncompliant with the FHTSP provisions.

Appellants also assert that the subdivision of the Property created lots that were not in conformance with the side yard requirements of 11 DCMR § 405.9, and therefore was in violation of 11 DCMR § 410.6(c). The Appellants allege that the error

occurred as a result of DCRA's failure to consider the existing house on the Property at the time of the subdivision.

Lastly, Appellants allege that a statutorily required 30-days notice to the ANC of a pending permit application was not given to ANC 3F for the permits at issue. Section 8 of the Zoning Act of 1938 limits the Board's jurisdiction alleged errors that are made "in the administration or enforcement of the Zoning Regulations." D.C. Official Code § 6-601.07 (2001). A failure to provide ANC notice in this context stems from § 13(b) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.10(b) (2001)), not the Zoning Regulations. Therefore, only the first two grounds are considered to be properly before the Board and the portion of the appeal regarding notice to the ANC is dismissed.

Representing ANC 3F in this appeal were David J. Bardin and Cathy Wiss. Appellant **Herron** represented himself. Appellee was represented by Laura Gisolfi Gilbert, DCRA, and Brenda Walls, Office of the Corporation Counsel (now the Office of the Attorney General for the District of Columbia). The Property Owner, Zuckerman Brothers Inc., was represented by John Epting, from the law firm of Shaw Pittman.

The Property Owner filed a Motion for Leave to Intervene and Dismiss for lack of jurisdiction based on timeliness on January 9, 2003. He was granted leave to intervene as a preliminary matter on the day in which the hearing was scheduled.

The Property Owner also filed a Motion to Schedule Hearing on Motion to Dismiss and Postpone Public Hearing on Merits. On the day of the scheduled hearing for this case, this motion was withdrawn.

Appellants' Opposition to the Property Owner's Motion for Leave to Intervene and Dismiss was received on February 20, 2003.

On February 24, 2003, the Property Owner also submitted a Motion to Dismiss for Failure to Comply with the Requirements of 11 DCMR § 3110 *et seq.* In that Motion, Property Owner argued that Appellants failed to adhere to the filing requirements of § 3112.10 when filing their pre-hearing statement and Opposition to Motion for Leave to Intervene and Dismiss. The pre-hearing statement was filed on February 12, 2003, only twelve days before the scheduled hearing, two days beyond the limited established in § 3112.10. However, Appellants did send a letter on the date that the filing was due stating their delay and explaining that a snowstorm prevented easy communication between the two Appellants, and that Appellants therefore had difficulty submitting the pre-hearing statement on time. The Board therefore determined that Appellants met their burden of proof to establish good cause, pursuant to 11 DCMR § 3110.4, and the pre-hearing statement was accepted into the record. As to the Appellants' Opposition to Motion for Leave to Intervene and Dismiss, there is no provision establishing the timeliness of such a submission. Subsection 3112.10 does not apply to motions or oppositions thereto. Therefore, the Property Owner's motion was considered on this point and denied.

After hearing from all parties on the Property Owner's Motion to Dismiss for lack of jurisdiction, the Board granted the motion and dismissed the remainder of the appeal at its March 11, 2003, public meeting. The Board therefore does not address the Appellants' arguments regarding the merits of the case.

Notice of Appeal and Notice of Public Hearing. By memoranda dated January 6, 2003, the Office of Zoning advised the Zoning Administrator, the Office of the Corporation Counsel, the Property Owner, ANC 3F, the ANC for the area within which the property is located, the ANC Commissioner for the affected Single-Member District, the affected Ward Councilmember, and the D.C. Office of Planning, of the appeal.

Pursuant to 11 DCMR § 3113.14, the Office of Zoning, on January 9, 2003, mailed to the Appellant, the Zoning Administrator, ANC 3F, and the Property Owner's counsel, notice of hearing. Notice of Public Hearing was also published in the *D.C Register* on January 17, 2003, at 50 DCR 547.

ANC Report. The ANC, being a party to this appeal, did not submit a report to the BZA. A report to the Board of Appeals and Review ("BAR") [FN2] was submitted, but, because it only addressed the proceeding before the BAR, it was not given great weight.

Hearing and Decision. On March 11, 2003, the Board voted to grant the Property Owner's motion to dismiss the appeal

based upon timeliness, by a vote of 3 to 1.

FINDINGS OF FACT

1. The Property is Lot 9 in Square 2043, with an address of 2900 and 2902 Albemarle Street, N.W.
2. Appellant J. Brendan **Herron** Jr. lives across the street from the Property.
3. ANC 3F is the ANC in which the Property is located.
4. On April 5, 2002, the Property Owner applied to DCRA to subdivide the Property into two lots.
5. The Property Owner applied for raze permit B446310 on March 1, 2002, and for building permits B446312 and B446316 on April 4, 2002.
6. On April 17, 2002, DCRA granted the Property Owner's application to subdivide the Property.
7. Appellants knew of the subdivision on or around the time it was approved by DCRA.
8. The subdivision bisected an existing house on the Property.
9. On April 19, 2002, the Zoning Commission set down for a hearing the Forest Hills Tree and Slope Protection Overlay. Pursuant to 11 DCMR § 3202.5, applications for building permits filed prior to a Commission decision to hear a zoning map change are processed under existing zoning controls provided that the application is "sufficiently complete to permit processing without substantial change or deviation". Incomplete applications and applications filed after a "set down" decision is made are processed "only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site".
10. Appellants allege that the proposed Overlay's geographic area includes the Property that the building permit application was incomplete, and that, therefore, the application should have been processed as if the provisions of the proposed Overlay were in effect. This, presumably, would have made the proposed buildings or lots noncompliant. [FN3]
11. Appellant **Herron** requested copies of the subdivision application from DCRA on April 22, 2002.
12. During April and May of 2002, Appellants submitted letters and emails to DCRA expressing their concerns regarding the building permit applications for the Property.
13. The ANC 3F resolution dated April 29, 2002, indicated that several neighbors had reviewed building plans for the Property and had objections to those plans.
14. By email dated May 9, 2002, Theresa Lewis, Deputy Director for Operations, DCRA, informed Phil Cogan, from ANC 3F, that DCRA would "withhold issuance of the building permits until June 3, 2002, to allow [the ANC] time to fully review the information submitted."
15. On May 28, 2002, Theresa Lewis met with Appellant **Herron** and representatives of Appellant ANC 3F to discuss Appellants' concerns regarding the building permits for the Property.
16. On June 11, 2002, Theresa Lewis sent Appellants a letter (Property Owner's Exhibit L) informing them that the subject permits would be issued on June 12, 2002. The letter also discussed the subdivision plan for the Property.
17. Permit B446310, for the razing of an existing structure, and permits B446312 and B446316, for construction of two single-family dwellings, were issued on June 13, 2002.
18. On June 20, 2002, Steven Sher of the law firm of Holland and Knight, on behalf of the Property Owner, mailed a letter to Appellants and neighboring property owners, informing them that the subject permits had been issued. (Property Owner's exhibit N).
19. By email dated July 2, 2002, Appellant **Herron** asked DCRA whether he was correct in his understanding that Building Code issues may be appealed to the BAR and issues related to the "zoning code" may be appealed to the BZA.
20. By email dated July 19, DCRA's Customer Services Advocate, stated, in response to Appellant **Herron's** July 2, 2002

email, that the procedures for appealing building permits were in DCMR Title 12A, Section 122, (Appellants' exhibit A-5). A copy of that section was attached to the email. Nothing was stated in the email regarding zoning issues.

21. Title 12A, D.C. Building Code Supplement, Section 122, Subsection 122.2 reads as follows:

Appeal to Board of Appeals and Review: The owner of a building or structure or any other person may appeal to the D.C. Board of Appeals and Review for a final decision of the code official. The appeal shall specify that the true intent of the Construction Codes or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of the Construction Codes do not fully apply, or an equally good or better form of construction can be used.

Section 122 does not discuss appeals related to the Zoning Regulations nor does it mention the Board of Zoning Adjustment.

22. On July 3, 2002, Appellant **Herron** appealed the issuance of the building permits to the BAR, pursuant to § 122.2 of the Building Code Supplement. In his submission to the BAR, Appellant **Herron** included, in addition to building code issues, a brief discussion of the § 3202.5 zoning issue.

23. On July 3, 2002, Appellant **Herron** sent a letter to David A. Clark, then the DCRA Director, asking that the issues outlined in the BAR complaint be reviewed.

24. On July 9 and October 18, 2002, David A. Clark sent Appellant **Herron** letters that indicated that DCRA would respond to his request to overturn the building permits. (Appellants' exhibits A-6 and A-7). These letters, however, did not indicate that DCRA would review the merits of Appellant **Herron's** request.

25. Appellant **Herron** sent a copy of the BAR appeal to DCRA, on or around the time of filing, asking that they "reconsider and/or follow their own appeal process regarding the issuance of these permits" and requesting that they issue a stop work order. (Property Owner's exhibit P).

26. Appellant **Herron's** brief to the BAR referenced the May 9, 2002, email exchange between Appellant **Herron** and Theresa Lewis, DCRA. Appellant **Herron** informed the BAR that he disagreed with Ms. Lewis' contention therein that the FHTSP did not apply to the permit applications.

27. On July 18, 2002, the Property Owner filed a motion with the BAR to dismiss the zoning issues from the BAR appeal on the grounds that the BZA, and not the BAR, had jurisdiction to hear an appeal involving such subject matter. (Property Owner's exhibit Q). Appellant **Herron** received this motion by first class mail.

28. In response to the July 18, 2002, motion to the BAR, Appellant **Herron**, on August 1, 2002, countered that his appeal was of building code issues and was therefore properly before the BAR. (Property Owner's exhibit R at 3).

29. On July 18, 2003, Appellant **Herron** received the following documents: copies of the subject permits, the subdivision record from the Office of Tax and Revenue, copies of the corresponding amended permit applications, and other supporting documents and plans (other than the storm water management plans). (Appellants' Opposition to Motion to Dismiss).

30. On or around July 18, 2002, Appellant **Herron** received a copy of the subdivision application, which included the proposed lot lines drawn on the application but did not depict the existing house, which the Property Owner intended to raze. (Transcript at 186).

31. Appellant **Herron** mailed a letter dated October 11, 2002, to Gregory Love, then the Administrator of the Building and Land Regulation Administration, and David A Clark, DCRA Director, asking for a stay, a stop work order, or to vacate the permits for the Property. Appellant **Herron's** letter alleges various building code violations related to the subject permits and that the Zoning Regulations were improperly applied because the FHTSP should have been given effect pursuant to the requirements of § 3202.5. In that letter, Appellant **Herron** does not go so far as to allege a violation of the FHTSP in the issuance of the building permits, but merely states that the permit applications should not have been allowed to proceed.

32. DCRA Director Clark stated on October 23, 2002, in a letter to Appellant **Herron**, that, after considering all the correspondence submitted, including the July 3 and October 11 letters, the permits in question "were correctly issued and [DCRA] stands by its decision issuing the [permits]. Therefore, your request for a stay of the permits, stop work order or order to revoke permits B446310, B44[6]316 and B446312 is hereby formally denied by DCRA."

33. A decision by the BAR on the Property Owner's motion to dismiss was mailed to Appellant **Herron** on October 29, 2002. The BAR's Order stated that the BAR did not have jurisdiction over the zoning issues raised in the appeal.
34. By letter dated November 20, 2002, DCRA's General Counsel's Office stated that 11 DCMR § 3202.5 was not violated by accepting the subject building permit applications.
35. On November 25, 2002, the Property Owner began razing the existing structure.
36. Appellants filed this appeal with the Board of Zoning Adjustment on December 14, 2002.

CONCLUSIONS OF LAW

The Property Owner, in its Motion to Dismiss, argued that the Board lacks jurisdiction to hear this appeal because it was not timely filed by Appellant.

At the time the events giving rise to this appeal transpired, the Zoning Regulations did not specify a particular number of days within which a decision had to be appealed to the Board. The Board and the courts had long applied a standard of reasonableness, which required appeals to be brought within a ""reasonable" period of time in order to invoke the appellate jurisdiction of the Board. The "reasonableness" of the timing of an appeal had historically been judged on a case-by-case basis depending on the circumstances and factors that caused the delay.

In *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001), the Court of Appeals re-affirmed that the Board lacks jurisdiction to consider an appeal which is not timely filed and articulated a test for timeliness:

> [e]xperience teaches that in the ordinary scheme of things, two months is ample time in which to decide whether to seek appellate review and act accordingly. At least in the absence of *exceptional circumstances substantially impairing the ability of an aggrieved party to appeal-- circumstances outside the party's control*--we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness. [FN4]

(Emphasis added.) If actual notice was not given, "the time for filing the appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of." *Id.*

As a threshold matter, the Board must determine what is the "decision complained of". Appellant asserts that it is the October 23, 2002 letter from the Director of DCRA. That position is supported by recent Board precedent.

Thus in *Appeal No. 16764 of Darryl J. Grinstead,* 49 DCR 5227 (2002)., the Board determined that it had jurisdiction to hear an appeal from a DCRA letter affirming a previous decision, made seven months earlier, to issue a building permit. There, DCRA had clearly stated in the letter that it had re-reviewed the zoning issue and the errors alleged, and after this more thorough review, found no violation. The Board found that this letter represented another decision from which an appeal could be taken, the first being the decision to issue the building permit.

In Appeal of Robert Lehrman, BZA No. 16849, 50 DCR 4055, (2003), the Board sought to narrow the *Grinstead* precedent. In *Lehrman* the appellant received a letter from DCRA rejecting assertions that DCRA had violated the Zoning Regulations. This letter represented the first decisions on the issues raised. Then, after continued attempts to resolve the dispute, an additional DCRA letter was sent. Because the second letter merely reaffirmed the first decision, and did not actually represent a more thorough review of the issues raised, the Board held that only the first letter gave rise to an appeal In the instant case, the October 23, 2003 letter from DCRA stated that, after considering all the correspondence submitted, the permits in question "were correctly issued and [DCRA] stands by its decision issuing the [permits]." The October 23 letter was therefore akin to the letter in *Grinstead* in that it reconsidered the initial decision, and represented that action was taken beyond that which was represented to have been taken in the second letters in *Lehrman.*

This appeal was filed less than sixty days after the October 23 letter. Therefore, if the Board followed *Grinstead* in this case, it would have no choice but to allow this appeal of a second determination (contained in the October 23, 2003, letter) regarding

the same underlying zoning issue, but purporting to contain a more thorough review of that issue.

The Board is convinced that it must go beyond limiting the *Grinstead* precedent, and overrule it. The Board does not find it in the interests of judicial economy or fairness to allow an appeal of a second or subsequent determination on the same basic issue, which can come months or years after the initial determination, at a point where the permittee has progressed beyond mere preparation. Such a subsequent determination should not "re-start" the 60-day time period. If such "re-starting" were allowed, there would be no certainty for a permittee, whose project could be halted at any point by an appeal of a subsequent affirmation of the initial permit issuance decision. The permittee might have such affirmative defenses as laches and estoppel available to it, [FN5] but the Board cannot countenance creating such uncertainty and forcing the parties to come before it at such a late date. Nor can it be said that the permit holder proceeds at its own risk, since it may not even know that a potential appellant has written to DCRA. And because there are no DCRA rules establishing a timeframe for this process, a permit holder may never know when it is safe to proceed.

The *Lehrman* decision only compounded the uncertainty. The distinction between a "mere affirmation" and a "more thorough review" letter puts a potential appellant in an untenable position, since a potential appellant cannot know which type of letter will issue, or even if a letter will be issued at all. Indeed, in this case, Appellant **Herron's** July 2002 letter was not responded to until after he wrote a second letter in October. A potential appellant who lets the 60-day appeal period expire in the hopes of receiving a DCRA response to a letter, may end up getting non-appealable "mere affirmation," or no letter at all. In either case their right to appeal would be lost.

In *Grinstead*, the Board stated that it needed to recognize the right of appeal of a second determination in order to allow DCRA "the opportunity to correct its errors internally before the appeal process begins - an opportunity that promotes administrative efficiency, the prompt correction of errors, and the resolution of disputes." *Grinstead*, 49 DCR at 5237. The Board still recognizes that DCRA should have an opportunity to correct alleged errors, but notes that there is nothing preventing a potential appellant from filing a timely appeal before the BZA while continuing to try to resolve any issues with DCRA. The fact that a potential appellant is working with DCRA to resolve issues does not "substantially impair" the ability of that potential appellant to appeal to the BZA.

For the rules to be applied fairly the timeframe for the appeal must be clear to all concerned and the starting point for this timeframe must be definite. The facts in this appeal demonstrate that the *Grinstead* and *Lehrman* precedents accomplished the very opposite and are therefore overruled.

The Board thus holds that when an appeal challenges the grant or denial of a building permit or subdivision, no subsequent communication from DCRA may be appealed, including, but not limited to, a refusal to issue a stop work order or take other enforcement actions. Obviously a DCRA decision to reverse its position (*i.e.* the revocation of a building permit) may be appealed. Although this holding specifically addressed whether the 60-day appeal timeframe established in *Waste Management* may be re-started by a subsequent DCRA communication, its analysis is equally applicable to appeals governed by the codification of the *Waste Management* ruling that is now found in section 3112.2 of the Board's Rules of Practice and Procedure.

The *Grinstead* appeal was decided by the Board in December 2001, but not published in the *D.C. Register* until June 7, 2002; almost two months after the subdivision was granted and four days after the building permits were issued. Therefore, for most of the period between the decisions complained of and the filing of this appeal, *Grinstead* was good law.

In *Smith v. District of Columbia Bd. of Zoning Adjustment*, 342 A.2d 356, 359 (D.C. 1975), the Court of Appeals, though noting that the Board is "not bound for all time by its prior positions", remanded the appeal back to the Board because it failed to explain why its reversal of its past rulings and Zoning Administrator interpretation should be applied retroactively.

In *Appeal of Southeast Citizens for Smart Development, Inc., and ANC 6B*, BZA No. 16791, 49 DCR 6607 (2002), also involving a retroactive application of a holding, the Board noted that:

The Court of Appeals has outlined a number of factors to be considered in determining whether to apply a new rule of law retroactively in a pending case or prospectively only, including:

(1) The extent of reliance by the parties on the previous rule;
(2) The need to avoid any alteration of property or contract rights;
(3) The policy of rewarding plaintiffs who seek to initiate just changes in the law; and
(4) The desire to avoid unduly burdening the administration of justice with retroactive changes in the law.
French v. District of Columbia Bd. of Zoning Adjustment, 658 A.2d 1023, 1031 (D.C. 1995). Any reliance must be reasonable to avoid retroactive application of the new interpretation. *Id.*
Id. at 6632.

Unlike the permit holders in *Smith, t*here is nothing in the record to suggest that the Appellants either knew of or relied upon this particular Board precedent. Indeed, Appellant **Herron** contended throughout the BAR proceeding that the BZA appeals process, including its timeliness rule and precedent, were irrelevant. The Board will therefore analyze the timeliness of the appeal starting from the dates that the Appellants' knew or should have known of the decisions to grant the subdivision and issue the building permits.

As to that issue there is no real dispute. Appellants concede that they knew of the grant of the subdivision on or about April 17, 2002, the day on which it was approved. (FF 6 and 7) The Appellants were informed by DCRA that the building permits would issue after June 12, 2002 (FF 16) and were advised of their June 13th issuance in a letter sent June 20, 2002. (FF 18). Assuming three days for mailing, the Board finds that the Appellants had notice of the issuance of the building permits on or about June 23, 2002. The Appeal was not filed until December 14, 2002, more than sixty days after Appellants were chargeable with notice of the decisions complained of. Therefore, under the *Waste Management* test, the Board must now consider whether Appellants have demonstrated "exceptional circumstances substantially impairing the ability ... to appeal--circumstances outside the party's control." Since the subdivision decision was made at a different time than the building permits decision, two distinct timeframes for appeal exist, each of which must be separately examined to determine whether exceptional circumstances arose within the sixty day period following notice.

As to the building permits, Appellant **Herron** claims that DCRA failure to furnish documentation hindered his ability to file a timely BZA appeal. Yet, even without such information, he was able to appeal these same permits, on the same zoning grounds, to the BAR on July 3, 2002, well within the 60-day period. Mr. **Herron's** BAR appeal thus disproves his claim that DCRA's unresponsiveness constituted an exceptional circumstance.

Mr. **Herron** also claims that he filed the BAR appeal in reliance upon a DCRA communication, which delayed his appeal to the Board. To prove this, Mr. **Herron** points to an email from a DCRA Customer Services Advocate that responded to his request for verification that zoning issues are appealed to the BZA and building code issues to the BAR. This email merely provided Appellant **Herron** with the provision governing appeals of the "Construction Code," which directed a person to appeal building code issues to the BAR. Nothing in that provision covered appeals of administrative decisions of the Zoning Regulations. If anything, the omitted reference should have convinced Mr. **Herron** that his understanding of the BZA's role was correct. At worse, the response was ambiguous and could not have reasonably been relied upon one way or the other.

The Court of Appeals decision in *Felicity's Inc. v DCRA*, 817 A.2d 825 (D.C. 2003), cited by Appellants, is easily distinguished. In *Felicity's*, the Court of Appeals allowed an appeal to the BZA after the appellant was directed to the BAR in an Administrative Law Judge's final written order. The direction was unequivocal and contained in the very document that would be the subject of the appeal. Here, the communication neither instructed Mr. **Herron** to appeal erroneous zoning interpretations to the BAR nor constituted a document of any legal standing. Whereas Felicity's reliance was understandable, Mr. **Herron's** claimed reliance was not.

Even if the DCRA communication could be viewed as an exceptional circumstance, its relevance vanished on July 18, 2002, when the Property Owner filed a motion with the BAR stating that the BAR had no jurisdiction over zoning issues. Appellant **Herron** was served with this motion and could have timely appealed his zoning issues to the BZA thereafter. Instead, he responded on August 1, 2002, still within the 60-day time period for filing an appeal with the BZA, and asserted that all aspects of

the appeal were properly before the BAR. From this point on, Mr. **Herron** was relying upon nothing other than his own misinterpretation of the law.

The appeal with regard to the issuance of Building Permits B446312, and B446316 should have been filed within 60-days of their June 13, 2002 issuance date. Because this aspect of the appeal was not filed until December 14, 2002, it is untimely.

With respect to the subdivision decision, Appellant **Herron** requested copies of the subdivision plans on April 22, 2002, but did not receive subdivision plans until July 18th of that year. However, it would not require plans or any other documents to determine the particular violation alleged. Appellant **Herron** lives across the street from the property. He undoubtedly noticed that a house still stood on it when he learned that the lot was subdivided and that therefore the line separating the new lots almost certainly would pass through the building. In any event, the Appellants clearly should have known of the alleged violation when they received the building plans for the Property on July 18, 2002 and a copy of the subdivision application on or around that time, both of which delineated the new lot lines. While what Appellants received did not depict the still-standing house, it would have been relatively easy to determine where the house generally stood in relation to those lines. At most this would permit the extension of the time for filing the subdivision appeal to the end of July, but not to mid-December.

Therefore, the appeal regarding the decision to grant the application to subdivide the Property should have been filed within 60-days of the April 17, 2002, subdivision issuance date. Because the appeal was not filed until December 14, 2002, it is also untimely as to the subdivision.

It is therefore **ORDERED** that the **MOTION TO DISMISS** be **GRANTED**, and this appeal be **DISMISSED** for lack of jurisdiction.

VOTE: 4-0-1 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., David A. Zaidain and James Hannaham, by proxy, to grant Owner's Motion and dismiss the appeal, Anne M. Renshaw opposed to the motion)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: APR - 7 2005

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT.

FN1. The Board must first clear up an inconsistency resulting from the information filed by Appellants. Appellant **Herron** listed permits "B446310", ""B446312" and "B44316" in his initial filing for this appeal. Appellant **Herron** incorrectly identified permit B446316 as "B44316" in this filing, omitting the first number 6. In Appellants' statement filed on December 19, 2002, Appellants referenced only permits B446312 and B446316. At the hearing, Appellants withdrew their appeal of the raze permit B446310 (Hearing Transcript at 152). In light of the above, the Board has determined that this appeal concerns building permits B446312 and B446316.

FN2. The BAR's responsibilities have since been transferred to the Office of Administrative Hearings, but at all times relevant to this case the BAR was in existence. Therefore, the term "BAR" is used herein.

FN3. Section 3202.5 does not by its terms apply to the processing of subdivision applications.

FN4. This standard was later codified in Zoning Commission Order No. 02-01, published together with a notice of final rulemaking in the *D.C. Register* on February 9, 200, at 50 DCR 1200. The Order amends subsection 3112.2 of the Zoning Regulations.

FN5. An estoppel defenses, however, does not lie against a party other than the municipality which issued the permit. *See, e.g., Rafferty v. District of Columbia Zoning Commission,* 583 A.2d 169, 176 (D.C. 1990). ("[I]t is not clear that estoppel will bar a case brought by a neighboring landowner; arguably that defense may be asserted only against the municipality which rendered the decision on which a party relied.")
52 DCR 3904

52 D.C.Reg. 3904

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