

December 30, 2014

VIA ELECTRONIC SUBMISSION

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

Re: **BZA Appeal No. 18888– Motion to Intervene and Motion to Dismiss**

Dear Members of the Board:

Ontario Residential LLC (“Ontario”) hereby moves the Board of Zoning Adjustment (“BZA” or “Board”) to allow it to intervene in the above-referenced appeal (the “Appeal”) of the issuance of Building Permit No. B1309151 for a mixed-use project located at 1700 Columbia Road, NW. It also moves that the appeal should be dismissed because it was not timely filed and it has no substantive basis.

A. Motion to Intervene

Pursuant to Section 3112.15 of the Zoning Regulations (11 DCMR § 3112.15), Ontario requests that the Board permit it to intervene in the Appeal. The basis of this appeal is the issuance of Building Permit No. B1309151 (“Permit”) for a mixed-use building located at 1700 Columbia Road, NW. The building permit authorized a “new six story 80 unit residential building, with retail on first floor, and one level of below grade parking” (“Project”). The building permit was issued to Ontario, the property owner and the developer of the Project. As such, Ontario will be directly and uniquely affected by the outcome of this appeal. Indeed, it has already started construction of the six-story building and is 50% complete, with an anticipated opening date of May 2015. The outcome of this appeal will either support or undermine the last five months of construction and \$22,000,000 spent on said construction. Accordingly, Ontario asks to be made a party to these proceedings.

B. Motion to Dismiss

1. The Appeal was Untimely Filed and Should be Dismissed

Ontario moves that the appeal filed by Adams Morgan for Reasonable Development (“AMFRD”) should be dismissed as it was not filed within the 60 day time period permitted by

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EXHIBIT NO. 14

the Zoning Regulations. It is well settled that “[t]he timely filing of an appeal with the Board is mandatory and jurisdictional.” *Mendelson v. District of Columbia Bd. Of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). See also *Waste Mgmt. of Md., Inc. v. District of Columbia Bd. Of Zoning Adjustment*, 775 A.2d 1090 (D.C. 2001), *BZA Appeal No. 18469 of Susan L. Lynch* (March 19, 2013), *BZA Appeal No. 18300 of Lawrence and Kathleen Ausubel* (April 11, 2012). Section 3112.2(a) of the Zoning Regulations states that an appeal must be filed within 60 days from the date the person filing the appeal first had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever date is earlier. AMFRD had knowledge that the Zoning Administrator’s Office had approved the permit from a zoning perspective by at least July 24, 2014 (62 days before the appeal was filed), if not earlier, making this appeal untimely.

On September 29, 2014, AMFRD filed a request for an immediate hearing in Case No. 18506, the underlying case approving relief for the Project. Included in its filings, AMFRD included a series of emails and one such email is from Mr. Otten to District officials, dated July 24, 2014. A full copy of Mr. Otten’s submission is attached as Exhibit E; the pertinent excerpt (page 59) is attached as Exhibit A. In that email, Mr. Otten clearly states he had been checking the status of the permit on PIVS to determine when it had been reviewed by certain disciplines and when it would ultimately be issued. While the Permit was issued that very day, he maintains that it was not yet reflected in PIVS; nevertheless, he would have no doubt noticed that the permit had already been approved by Zoning, which gave its stamp of approval on July 14, 2014. See Exhibit B (page 90 of Exhibit E).

In *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 366 (D.C. 2008), the Court noted that “[t]he zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specified type of notice.” In *BZA Appeal No. 18469 of Susan L. Lynch*, (March 19, 2013), the Board found that “[t]he word “approved next to zoning in PIVS, without any qualifications whatsoever, was unequivocal: the permit had been cleared by zoning for issuance. Thus any member of the public accessing this information, including the Appellant, knew that the ZA had approved the revised permit applications for zoning purposes.” In the instant matter, zoning signed off on the permit on July 14, 2014. When AMFRD checked the status of the permit on July 24, 2014, it was put on notice that zoning had already approved the permit. The 60 day appeal period was triggered.

Further, AMFRD would be hard pressed to argue that it didn’t have knowledge of Zoning’s approval sooner than July 24, 2014. AMFRD makes it clear that it constantly monitored the project. In fact, it had taken photographs of the site on July, 23, 2014. See Exhibit C (pages 37, 38, 40, and 41 of Exhibit E). At that point in time, Ontario was proceeding with work under its foundation permit;¹ however, AMFRD erroneously viewed this as work improperly moving forward without a building permit. Indeed, it made this very argument when it appealed the issuance of the Permit to the Office of Administrative Hearings. This argument

¹ The Office of Administrative Hearings confirmed that the work properly proceeded under the foundation permit based on testimony of Mr. Jatinder Khokhar, Interim Chief Building Official for the District of Columbia.

confirms that AMFRD monitored the status of the Permit on a daily basis and AMFRD presumably checked the status of the Permit on July 23, 2014. AMFRD further notes in the very same filing that it contacted DCRA on July 21, 2014, to notify them of what they erroneously termed “illegal” construction on the site; again, conceding that they had presumably checked the status of the permit as early as July 21. The email is attached as Exhibit D (page 60 of Exhibit E). While the Permit had not been issued on July 21 or 23, 2014, AMFRD would have noticed that the zoning review of the permit had been completed and approved. Accordingly, the 60 day appeal period was triggered as early as July 21, but no later than July 24.

AMFRD was clearly monitoring the Project on a daily basis. It was not a coincidence that it had pictures of the state of work on July 23, 2014; it had been checking the permit status on a daily basis. Between its admissions of constant monitoring and its photographs of the site, it is obvious that the 60-day appeal period was triggered days before AMFRD received certified notice from undersigned counsel that the Permit was issued.

2. AMFRD has Failed to Allege a Substantive Claim and the Appeal Should be Dismissed.

The crux of AMFRD’s appeal is that the Permit was improperly issued because the garage structure is located in the required rear yard. (AMFRD Appeal, p. 4). As AMFRD notes, a rear yard “shall be unoccupied, except as specifically authorized in this title.” AMFRD’s argument is fundamentally flawed as the garage does not “occupy” any portion of the rear yard, as it is located below grade. To the extent AMFRD is arguing that access to the garage is a “structure” and disallowed in the required rear yard, Ontario would first take issue with characterizing an access drive as a structure. Even if it were to concede that the drive is a structure, it is located at grade and is permitted pursuant to Section 2502.3. Section 2502.3 explicitly permits structures below four feet in height to be located in required rear yards. As no portion of the garage, or its access, exceeds a height of four feet in the required rear yard, it is permitted by the letter of the Zoning Regulations. There is no ambiguity in this section; the garage and affiliated access is below four feet in height and is permitted within the required 15 foot rear yard setback.

AMFRD has not alleged any other basis for its appeal, thus the appeal should be dismissed.

C. Conclusion

AMFRD has made it clear that it does not want the Project to move forward. It first opposed the Project before the BZA when it applied for party status in opposition to Case No. 18506. When the Board unanimously approved Case No. 18506, AMFRD filed a Motion for Reconsideration. The Board promptly denied AMFRD’s Motion and, again, unanimously upheld its decision in Case No. 18506. Not satisfied, AMFRD appealed Order No. 18506 to the District of Columbia Court of Appeals. The Court of Appeals upheld every aspect of the Board’s Order with the exception of two areas of roof structure relief. In response, Ontario elected take on the additional cost to modify its roof structure so that it fully complied with the Zoning Regulations, obviating the need for any further review. The Zoning Administrator

agreed that the roof structures, and every other aspect of the Project, complied with the Zoning Regulations, and it approved the plans from a zoning perspective. Still not satisfied, AMFRD appealed the issuance of the Permit to the Office of Administrative Hearings ("OAH"). The OAH dismissed AMFRD's appeal with prejudice finding that it had no basis. Specifically, the OAH found that AMFRD did not sustain its burden in proving there was a basis for revoking the building permit. AMFRD has filed a motion for OAH to reconsider its findings, which is still pending before OAH. Simultaneous with proceedings before OAH, AMFRD filed a request before the Board for an immediate hearing in Case No. 18506 to evaluate the roof structures. At its public meeting on November 18, 2014, the Board denied AMFRD's request stating that the issue AMFRD complained of was moot and no further proceedings were necessary or required. We now find ourselves before the Board, yet again, on this same matter. At this point, however, Ontario has invested over \$ 22,000,000 on the Project and the building is five months from settling and moving in its first condominium owners. This is a project that has the full support of Advisory Neighborhood Commission 1C; yet, AMFRD has attempted to thwart the Project at every turn. AMFRD has raised unsuccessful objections to the Project on numerous occasions. Ontario asks that the Board summarily dismiss AMFRD's most recent attempt to thwart the Project and allow this project that has the support of its neighbors and the community to move forward.

Respectfully

Christine Roddy

Paul Tummonds

December 30, 2014

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I hereby certify that on December 30, 2014, a copy of the foregoing document was provided by electronic mail to the following:

Petitioner:

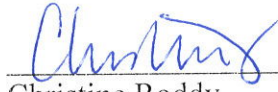
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