

February 3, 2015

ELECTRONIC DELIVERY

Lloyd Jordan, Chairperson
D.C. Board of Zoning Adjustment
Office of Zoning
441 4th Street, NW, Suite 200 South
Washington, DC 20001

Re: Appeal No. 18888: Proposed Findings of Fact and Conclusions of Law on Motion
to Dismiss

Dear Chairperson Jordan:

Enclosed is the Intervenor's draft order on its motion to dismiss in the above-referenced appeal of Building Permit No. B1309151. Intervenor looks forward to resolving this appeal as soon as possible and appreciates the Board's consideration of the motion to dismiss at its public meeting on February 10, 2015.

Sincerely,



Christine A. Roddy

Board of Zoning Adjustment

District of Columbia

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Certificate of Service

I hereby certify that the foregoing document was sent by first class mail and electronic delivery on February 3, 2015 to the following:

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Appeal No. 18888 of Adams Morgan for Reasonable Development, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to approve Building Permit No. B1309151 for construction of a mixed-use building at 1700 Columbia Road, NW and located in the C-2-B Zone District (Square 2565, Lot 52).

HEARING DATE: January 13, 2015

DECISION DATE: February 10, 2015

ORDER GRANTING MOTION TO DISMISS APPEAL

This appeal was submitted to the Board of Zoning Adjustment (“**Board**” or “**BZA**”) on September 24, 2014, by Christopher Otten on behalf of Adams Morgan for Reasonable Development (“**AMFRD**” or “**Appellant**”). The appeal challenges the issuance of Building Permit No. B1309151 (“**Building Permit**”) on July 24, 2014, for construction of a new six-story residential building with ground floor retail and a below-grade garage (“**Building**”) at 1700 Columbia Road, NW (“**Property**”). AMFRD initially alleged that the proposed construction violated the rear yard requirements of Section 774 of Title 11, D.C. Municipal Regulations (“**Zoning Regulations**”). AMFRD amended its appeal on December 30, 2014, to allege that the rooftop structures violate Sections 411.3, 411.5, 411.6, 411.7 and 411.8 of the Zoning Regulations.

On December 30, 2014, Ontario Residential LLC (“**Ontario**” or “**Intervenor**”) filed a motion to dismiss the appeal on the grounds that it was not timely filed and that it failed to state a claim for which relief could be granted. Ontario argued that even if you took AMFRD’s allegations as true, its claims must be dismissed as a substantive matter as they fail to allege a violation of the Zoning Regulations.

The Department of Consumer and Regulatory Affairs (“**DCRA**”) filed its pre-hearing statement on January 8, 2015, refuting each of AMFRD’s allegations.

Based on evidence in the record, the Board grants Ontario’s Motion to Dismiss as the appeal was not timely filed.

PROCEDURAL HISTORY

Ontario and AMFRD were parties to BZA Case No. 18506. Ontario sought variance and special exception relief for its mixed-use residential building at 1700 Columbia Road, NW. AMFRD was granted party status in opposition to the application. The Board voted unanimously to approve Ontario’s requests for relief on February 26, 2013, and issued Order No. 18506 on September 27, 2013. See Order No. 18506. Order No. 18506 granted approval for

variance relief from the loading requirements of Section 2201.1 and the parking requirements of Sections 2101.1 and 2115.4. The Board also granted special exception relief from the roof structure requirements of Section 777.1 (subsections 411.2, 411.3, and 411.5). (*Id.*).

On October 9, 2013, AMFRD filed a motion for reconsideration of the Board's decision. The Board unanimously denied AMFRD's request at its public meeting on October 29, 2013, which was memorialized in Order No. 18506A.

Mr. Otten and AMFRD appealed both Order No. 18506 and Order No. 18506A to the Court of Appeals challenging the basis of relief for the roof structures. The Court of Appeals remanded the roof plan to the BZA for further findings with respect to the number of structures and the varying height of the structures. The Court upheld the setback relief granted to the Project. (*Adams Morgan for Reasonable Development v. D.C. Bd. of Zoning Adjustment*, D.C. Court of Appeals No. 13-AA-1356, decided on June 5, 2014). All other areas of relief remained unchanged. Ontario subsequently revised its roof plan to make it fully compliant with the Zoning Regulations and the Building Permit was issued on July 24, 2014. Ontario subsequently withdrew any request for roof structure relief pending before the Board on July 29, 2014. (Case No. 18506, Exhibit 42). Despite the fact that no application for relief was pending before the BZA, AMFRD filed a request for an immediate hearing on October 1, 2014; the Board denied this request at its public meeting on November 18, 2014. (Case No. 18506, Exhibit 45). On August 7, 2014, AMFRD appealed the issuance of the Building Permit to the Office of Administrative Hearings ("OAH"). (Exhibit 14E). OAH denied AMFRD's appeals on all grounds and dismissed it with prejudice. AMFRD filed a motion for reconsideration December 23, 2014, which is still pending before OAH. Finally, AMFRD filed the instant appeal on September 24, 2014, challenging the issuance of the Building Permit. (Exhibit 1). As noted above, Ontario filed a motion to dismiss AMFRD's appeal; the Board held a hearing on the motion to dismiss on January 13, 2015.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on January 13, 2015. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 1C (the ANC in which the property is located), the property owners, and DCRA. (Exhibits 3-11.)

Parties

The Appellant in this case is Adams Morgan for Reasonable Development, represented by Mr. Otten. DCRA is the Appellee, as the "person" whose administrative decision is the subject of the instant appeal, pursuant to 11 DCMR § 3199.1(a)(2). The alleged zoning error

was the Zoning Administrator's determination confirming that the approved plans are consistent with the Zoning Regulation's requirements for rear yards and rooftop structures. Ontario Residential LLC, the owner of the property and developer of the Building, filed a motion to intervene in this case and was automatically a party to the proceeding under 11 DCMR § 3199.1(a)(3). The ANC was also automatically a party in the case but did not participate. The ANC voted in support of the Project in underlying Case No. 18506. (Case No. 18506, Exhibit 23).

Motion to Dismiss

Ontario filed a motion to dismiss the appeal because it was not timely filed. Ontario further argued that even if the appeal was timely filed and each of AMFRD's allegations was taken as true, it did not state a claim for relief.

Pre-Hearing Submissions

The Board received prehearing materials from AMFRD on December 30, 2014, in which it amended its appeal. Ontario also submitted pre-hearing materials for the Board's consideration on December 30, 2014. DCRA filed pre-hearing materials on January 8, 2015, for the Board's consideration. (Exhibits 14, 15 and 16)

Appellant's Case

AMFRD filed its appeal on September 24, 2014. The appeal challenged the issuance of the Building Permit on the basis that the garage ramp and the below-grade garage are located in the required rear yard. AMFRD's appeal states "the Ontario project impedes onto the rear yard requirements as shown on the record, and noted by the Office of Planning, that half of the rear yard is taken up by the ramp structures leading down to the subterranean garage." AMFRD relies on the definition of the rear yard to argue that the yard "shall be for the full width of the lot and shall be unoccupied, except as specifically authorized in this title." AMFRD does not dispute that a fifteen foot rear yard is provided; its argument is that the garage ramp and the garage improperly occupy the required rear yard. (Exhibits 1-2).

AMFRD subsequently supplemented its appeal on December 30, 2014, to argue that the Building Permit was issued in error because the roof structures violate the Zoning Regulations. AMFRD argues that (1) there is more than one rooftop enclosure and that a trellis is not sufficient to connect the structures to create a single structure, (2) the roof structure is of varying heights, (3) the mechanical equipment is not fully enclosed, (4) that the roof structures exceed permitted floor area ratio, and (5) that the roof structures assume more than one third of the total roof area. AMFRD offered no support for these claims, nevertheless, even if taken as true, they do not present a sufficient basis for appeal as outlined in the Conclusions of Law below. (Exhibits 12-17).

At the hearing on the motions to dismiss on January 13, 2015, Ontario raised additional issues with respect to the rear yard. It argued that the platform on which the generator sits, the generator, the louver and the walls surrounding the garage ramp were improperly located in the rear yard. The Board finds that these claims are without merit as explained in further detail below.

Ontario's Case

Ontario asserted that the appeal should be dismissed because it was not filed timely. More specifically, Ontario argued that the proper determination for appeal was the Zoning Administrator's approval of the building permit plans, which occurred on July 14, 2014. Ontario pointed to evidence that AMFRD had knowledge of this zoning determination on July 24, 2014, when AMFRD acknowledged that it checked on the status of the Building Permit on the Property Information Verification System ("PIVS") to determine which disciplines had approved the Building Permit. The 60-day appeal period was triggered on July 24, 2014, and expired on Monday, September 22, 2014. Because AMFRD filed its appeal on September 24, 2014, it was not timely and the Board does not have jurisdiction to consider the appeal. Ontario further argued that even if the Board were to determine that the appeal period was triggered by AMFRD's knowledge of the issuance of the Building Permit, which it acknowledges it had as of July 26, 2014, any challenges to the roof structures must be dismissed as untimely, as they were raised 157 days later, well beyond the 60 day appeal period. (Exhibits 14, 14A-14E, January 13, 2015 Transcript "**Transcript**", p.56.)

Ontario further argued that even if the Board found the appeal to be timely, AMFRD did not allege a substantive violation of the Zoning Regulations. AMFRD argued that the rear yard was occupied by both the garage ramp, which is partially located at grade, and the "subterranean" garage, which is located below grade. AMFRD's appeal overlooks the definition of yard, which requires the rear yard to "be open to the sky from the ground up" and does not preclude at-grade or below-grade improvements. Neither the garage ramp nor the garage structure are above-grade and "occupy" the rear yard, thus they do not violate the definition of yard. AMFRD amended its appeal of the rear yard at the public hearing on January 13, 2015, to argue that there were additional structures in the rear yard, including the generator, the platform on which the generator sits, the walls surrounding the garage ramp, and a louver. AMFRD admitted at the public hearing that the generator was not located in the rear yard. AMFRD's other allegations disregard Section 2503.2, which allows structures less than four feet above grade to be located in a required yard. Neither the platform nor the walls surrounding the garage ramp are greater than 4 feet above grade. The louver referenced by AMFRD is no longer located in the rear yard, which AMFRD had knowledge of based on plans it submitted in Case No. 18506. (Exhibits 14, 14A-14E, 16A-16C; Transcript, pp. 62-64, 73-78, 82-85, 102-105).

Ontario also argued that AMFRD's appeal of the roof structures must fail. AMFRD argued that a trellis was not sufficient to connect the roof structures to create a single structure; however, BZA precedent is clear that a trellis is sufficient to connect structures for purposes of creating a single structure. At the public hearing, AMFRD acknowledged that if the trellis were in fact deemed sufficient, the roof structures would be of uniform height. AMFRD also testified that all of the mechanical equipment that it referenced in its complaint was less than four feet tall. Section 411.17 of the Zoning Regulations specifically exempts all roof structures less than four feet tall from the rooftop requirements. AMFRD further testified that it had no basis to dispute the rooftop floor area ratio calculations offered by Ontario, thus there is no evidence disputing that the rooftop structures are within the permitted floor area ratio. Finally, AMFRD alleges that the rooftop structures assume more than one third of the roof. While AMFRD does not offer a calculation to support this allegation, it is of no consequence as Section 411.8 does not apply to the C-2-B Zone District since it does not impose a limit on the number of stories. Ontario also noted at the hearing that AMFRD raised its complaint against the roof structures before the Office of Administrative Hearings, which explicitly denied its allegations. (Transcript, pp. 60, 91-95, 102-105).

DCRA's Case

DCRA further argued that AMFRD's appeal was without basis as the project provides the required rear yard and the roof plan fully complies with the requirements of Section 411. With respect to the rear yard, DCRA notes that Section 2503 explicitly allows structures less than four feet in a required rear yard, undermining AMFRD's allegations.

DCRA also confirms that that it is without dispute that the roof structures are connected by a trellis, at a uniform height. DCRA also notes that Section 411.6 is not pertinent in the instant application as the roof structure does not consist solely of mechanical equipment. DCRA also noted that Section 411.5 did not apply to all roof structures as they were not all used for purposes of enclosing an area. (Exhibits 16A-16C; Transcript, p. 108).

Closing of the Record on the Motion to Dismiss

The Board closed the record with respect to the motion to dismiss and scheduled its decision on the pending motion for February 10, 2015, at which time it voted 5-0 to grant the motion to dismiss the appeal on the grounds that it was not filed timely.

FINDINGS OF FACT

The Property and Project

1. The Property that is the subject of this appeal is located at 1700 Columbia Road, NW (Square 2565, Lot 52). (Exhibit 1)

2. The Property is located in the C-2-B Zone District in the Adams Morgan neighborhood. (Exhibit 14E, Exhibit 16A).
3. All parties agree that the Project provides a rear yard with a depth of at least fifteen feet. (Exhibit 15).
4. All parties agree that the garage ramp is located at-grade, within the fifteen foot setback. (Transcript, p. 84).
5. All parties agree that the garage is located below grade. (Exhibit 1).
6. All parties agree that the walls surrounding the garage ramp are less than four feet in height. (Transcript, p.85.)
7. All parties agree that the generator is not located within the required rear yard. (Transcript, p.77)
8. All parties agree that the platform upon which the generator sits is located in the required rear yard and is less than four feet in height. (Transcript, p. 83)
9. AMFRD's own exhibits depict that there is no louver located in the required rear yard. (Exhibit 14E, Attachment 13)
10. All parties agree that the rooftop structures are connected with a trellis at a uniform height. (Transcript pp. 93-94).
11. All parties agree that Section 411.8 is not applicable in the instant case. (Transcript, p. 66)
12. All parties agree that the mechanical equipment on the roof is less than four feet in height. (Transcript, p. 94)
13. There is no evidence in the record to dispute Ontario's calculation of the floor area ratio of the rooftop structures; consequently, there is no evidence in the record to dispute that the floor area ratio is within the range permitted by the Zoning Regulations. (Transcript, p. 95)

Procedural Background

14. The BZA unanimously approved relief from the parking, loading, and roof structure requirements for the Project in 2013. The Board unanimously denied AMFRD's Motion for Reconsideration of Order No. 18506. (See Orders No. 18506 and 18506A)
15. AMFRD appealed both Orders No. 18506 and 18506A to the District of Columbia Court of Appeals. (Exhibit 14E)

16. The Court of Appeals remanded Ontario's request for relief from Sections 411.3 and 411.5 for further proceedings before the Board. Ontario subsequently revised its roof structure so that it complied with Sections 411.3 and 411.5 and no longer required relief from the Board. Ontario withdrew its former request for relief from before the Board. (Exhibit 14E)
17. The Building Permit was approved by the Zoning Administrator on July 14, 2014. The Building Permit was issued on July 24, 2014. (Exhibits 2, 14B)
18. AMFRD appealed the issuance of the Building Permit to the Office of Administrative Hearings on August 7, 2014, citing, among other things, that the Building Permit was issued in error because the roof structures did not comply with the Zoning Regulations. The OAH denied AMFRD's appeal, including its allegations concerning the roof structures, with prejudice on December 8, 2014. (Exhibit 14E; Transcript, pp. 60, 104)
19. AMFRD appealed the issuance of the Building Permit to the BZA on September 24, 2014, arguing that the Building Permit was issued in error because the Project does not comply with the rear yard requirements. (Exhibits 1, 2)
20. The Board conducted a limited hearing on the motion to dismiss on January 13, 2015.

Motion to Dismiss Based on Timeliness

21. The Zoning Administrator reviewed and approved the Project on July 14, 2014. It simultaneously entered its approval on the PIVS website. (Exhibit 14B)
22. AMFRD emailed the Zoning Administrator on July 24, 2014, and stated "[w]e have checked the PIVS webpage at the DCRA website for information and we see that Building Permit #B1309151 has not yet been approved, as it is still under review by some DCRA disciplines." (Exhibit 14A)
23. DCRA issued the Building Permit on July 24, 2014. (Exhibit 2)
24. AMFRD received written notice of the Building Permit from Ontario on July 26, 2014. (Exhibit 2)
25. AMFRD filed its appeal on September 24, 2014, or 62 days after checking the PIVS website for the status of the Permit. (Exhibit 1, Exhibit 14A)
26. AMFRD amended its appeal to add an additional challenge to the Building Permit on December 30, 2014, or 161 day after checking the PIVS website for the status of the Permit. (Exhibits 15, 15A-15B)

CONCLUSIONS OF LAW

It is well settled that the timely filing of an appeal is mandatory and jurisdictional. *Waste Mgmt. of Md., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427 (D.C. 2008). If an appeal was not filed timely, the Board does not have jurisdiction to consider the appeal. Accordingly, before ruling on the merits of an appeal, the Board must consider a motion to dismiss an appeal for lack of jurisdiction on timeliness grounds. *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A. 2d 356 (D.C. 2008).

Section 3112.2 of the Zoning Regulations requires that an appeal be filed within 60 days of 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 is earlier. 11 DCMR Section 3112.2(a). The decision being appealed in the instant case is not the decision to issue the Building Permit, but the Zoning Administrator's determination that the Project's rear yard and rooftop structures comply with the Zoning Regulations. Accordingly, the appeal period does not run from the date the Building Permit was issued, but from the date AMFRD first had notice, or reasonably should have had notice, that the Zoning Administrator approved the permit plans for the Building and confirmed that the rear yard and roof structures comply with the Zoning Regulations. There is clear evidence in the record that AMFRD checked the PIVS website on July 24, 2014, to determine what disciplines, including zoning, approved the permit plans. Because zoning approved the plans on July 14, 2014, AMFRD would have noticed, or reasonably should have noticed, when it checked the PIVS website on July 24, 2014, that the Zoning Administrator had determined that the Project complied in all respects with the Zoning Regulations. Thus, the 60-day appeal period was triggered on July 24, 2014, and expired on September 22, 2014. Because AMFRD filed its appeal on September 24, 2014, it is untimely and this appeal must be dismissed.

There is ample evidence upon which the Board bases its decision. The Board faced a very similar fact pattern in BZA Appeal No. 18469, Appeal of Susan Lynch. In that case the Board noted that "there is no dispute that the zoning decision complained of is the ZA's determination that the proposed elevated platform structure complied with the provisions of the Zoning Regulations. The question is whether the appealable form of that decision was the ZA's approval issued on May 30, 2012, of which the Appellant had actual knowledge or the "RW" permits issued on June 29, 2012. The Board concludes it was the former." The Board held that the Zoning Administrator's approval of permit plans was unequivocal and could be relayed to the public via the PIVS website. In fact, it noted, "[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. And, similar to the Appellants in Basken and Ausubel, Ms. Lynch's knowledge of the approval

gave her the first notice of the zoning decision being complained of.” BZA Appeal No. 18469, p.8.

The Board has long held that the appeal period is not necessarily triggered by the issuance of the Building Permit but by the Appellant’s knowledge of the zoning decision complained of. *See also* BZA Appeal No. 18300 of Lawrence and Kathleen Ausubel, in which the Board held that an email from the Zoning Administrator constituted an appealable decision. The Court of Appeals has also weighed in on this very issue. In *Basken*, the Court noted that “the zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specified type of notice... our case law specifically recognizes that a letter from DCRA or the Zoning Administrator conveying a zoning decision may be an appealable decision, and may start the time for appeal by a person who has notice of the letter.” *Basken v. Bd. of Zoning Adjustment*, 946 A. 2d at 366.

Just as the Board found in the Appeal of Susan Lynch, it finds that the Zoning Administrator’s approval of the Project for zoning purposes is unequivocal and notice of such approval on the PIVS website is sufficient notice of its decision to trigger the appeal period. Ontario provided indisputable evidence in the record confirming that AMFRD had checked the PIVS website to determine the status of the permit and to ascertain which District agencies had approved the application, including zoning. Ontario submitted an email from AMFRD, which confirms that AMFRD checked the PIVS website on July 24, 2014, to determine which disciplines had approved the permit. Accordingly, AMFRD knew, or reasonably should have known, on July 24, 2014, that zoning had already approved the plans from a zoning perspective. Thus, the 60-day appeal period began to run on July 24, 2014, and expired on September 22, 2014. AMFRD did not file its appeal until September 24, 2014, 62 days after it had notice of the Zoning Administrator’s decision. AMFRD did not argue that there were extraordinary circumstances that warranted an extension of the time to appeal, and the Board seeing none, it dismisses this appeal as untimely.

While the Board need not consider the merits of this case, indeed it is barred from doing so as a jurisdictional matter, it would like to note on the record that even if the appeal were not untimely, the Board would dismiss the appeal as having no substantive basis.

The appeal that AMFRD filed on September 24, 2014, raised one complaint: the required rear yard of the Project was occupied by a garage ramp and a subterranean garage in violation of the Zoning Regulations. Even if the Board accepts each alleged fact as true, AMFRD does not state a viable claim for relief.

Yard is defined in the Zoning Regulations as:

an exterior space, other than a court, on the same lot with a building or other structure. A yard required by the provisions of this title shall be open to the sky

from the ground up, and shall not be occupied by any building or structure, except as specifically provided in this title. No building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title. 11 DCMR §199.1

Rear yard is defined as:

a yard between the rear line of a building or other structure and the rear lot line, except as provided elsewhere in this title. The rear yard shall be for the full width of the lot and shall be unoccupied, except as specifically authorized in this title. 11 DCMR §199.1

The very definition of a rear yard requires that it be open to the sky “from the ground up.” Neither the garage ramp nor the garage run afoul of this definition. There is no dispute that the garage ramp is located at grade and that the garage is located below grade. Neither the ramp nor the garage “occupy” the rear yard as that term is defined in the Zoning Regulations; thus, they may be located along the property line. Further, any allegations that they occupy more than 50% of the rear yard must fail since they do not occupy the rear yard.¹

At the hearing, AMFRD alleged that the generator and a louver were located in the rear yard; however, AMFRD clarified that it alleged that the platform upon which the generator sits is located in the rear yard and not the generator itself. AMFRD also noted that it was not sure if the plans it submitted depicting a louver were the most recent plans. Other plans submitted by AMFRD to this office confirm that the latest plans do not include a louver in the rear yard. Accordingly, the Board need not address whether the generator or louver are improperly in the rear yard as neither are located in the required rear yard.

AMFRD contended at the hearing that the platform upon which the generator sits as well as the walls surrounding the garage ramp are improperly in the rear yard; however, Mr. Otten further testified that each of these structures is less than four feet above grade. The Zoning Regulations specifically allow such structures within the required rear yard. Section 2503.2 states:

A structure, not including a building no part of which is more than four feet (4 ft.) above the grade at any appoint, may occupy any yard required under the provisions of this title.

AMFRD has not pointed to a single structure located in the rear yard that is not explicitly permitted under the Zoning Regulations. Because AMFRD did not state a claim for which relief can be granted, its appeal would also be dismissed as a substantive matter.

¹ To the extent AMFRD were to allege that the garage ramp and garage occupy more than 50% of the rear yard, the Board would deny this claim as baseless.

Similarly, even if each allegation with respect to the roof structures is accepted as fact, AMFRD does not state a claim for which relief can be granted. The Board first notes that AMFRD did not appeal the Zoning Administrator's determination with respect to the roof structures until 161 days after it approved the permit plans for the Project, well beyond the 60 day appeal period. Under no circumstances does the Board find AMFRD's appeal of the roof structures to be timely. Nevertheless, even if the Board entertained the appeal, it finds that there is no basis for it.

AMFRD states five violations of the roof structures: (1) there is more than one rooftop enclosure and that a trellis is not sufficient to connect the structures to create a single structure, (2) the roof structure is of varying heights, (3) the mechanical equipment is not fully enclosed, (4) that the roof structures exceed permitted floor area ratio, and (5) that the roof structures assume more than one third of the total roof area. The Board will discuss each allegation in turn.

AMFRD claims that there is more than one roof structure because a trellis is not sufficient to connect the structures and to create a single structure. AMFRD ignores the clear precedent of this Board that accepts trellises as proper elements to connect structures. In BZA Application No. 18263-B, the Board agreed with the Zoning Commission that "a trellis may constitute such a connection between separate portions of a structure that creates one building under the Zoning Regulations". BZA Application No. 18263-B of Stephanie and John Lester, p. 11. *See also* BZA Application No. 17331 of JPI Apartment Development LP, where the Board found that "the trellis provides an adequate connection between the existing single-family house and the addition to the rear to constitute one building under the Zoning Regulations." Accordingly, AMFRD's claim that a trellis is not sufficient to connect the roof structures to create single structure is unfounded and without basis and its claim must be dismissed.

Because AMFRD does not accept that the trellis is a part of the roof structure, it believes the structures are of varying height. Nevertheless, during the hearing for the motion to dismiss, AMFRD conceded that if the trellis was accepted as a part of the roof structure, that the structure would be of a uniform height; thus, AMFRD's claim that the roof structure is of varying heights must be dismissed.

AMFRD next argues that the mechanical equipment on the roof is not fully enclosed. AMFRD testified at the hearing for the motion to dismiss that the mechanical equipment was less than four feet in height. Section 411.17 provides,

Roof structures less than four feet (4 ft.) in height above a roof or parapet wall shall not be subject to the requirements of this section.

Because the mechanical equipment is less than four feet in height, it is not subject to the roof structure restrictions and AMFRD's claim must be dismissed.

AMFRD's fourth alleged violation of the roof structures is that the roof structure exceeds the floor area ratio permitted in Section 411.7, which states,

Solely for the uses designated in this section, an increase of allowable floor area ratio of not more than thirty-seven hundredths (0.37) shall be permitted.

DCRA submitted evidence into the record that the rooftop structure consists of .13 FAR. AMFRD testified that it did not measure the roof structure and cannot dispute the calculation proffered by Ontario's architect; accordingly, there is no basis for this complaint and it must be dismissed.

Finally, AMFRD testified that it acknowledged that Section 411.8 is inapplicable in this case since the Zoning Regulations do not impose a limitation on the number of stories for the Property. AMFRD abandoned this complaint.

Based on the findings of fact in this case, the Board is neither persuaded that this appeal was filed timely nor that there is a substantive basis for it. Nevertheless, because the timeliness of an appeal is a jurisdictional matter, the Board must dismiss this appeal without delving into the merits of this case.

DECISION

For reasons discussed above, the Board is divested of jurisdiction to hear this appeal due to its untimeliness. It is therefore and hereby **ORDERED** that the motion to **DISMISS** the appeal as untimely is **GRANTED**.