

SULLIVAN & BARROS, LLP

Real Estate | Zoning | Business Law

Martin P. Sullivan, Partner
Direct: (202) 503-1704
Fax: (888) 318-2443
msullivan@sullivanbarros.com

September 8, 2015

Via Email

Lloyd Jordan, Chairman
Board of Zoning Adjustment
441 4th Street, NW, Suite 210S
Washington, DC 20001
bzasubmissions@dc.gov

Re: Draft Findings of Fact and Conclusions of Law – BZA Appeal No. 18980

Dear Chairman Jordan and Members of the Board:

Enclosed please find the Draft Findings of Fact and Conclusions of Law being submitted on behalf of the property owner, District Design and Development Argonne LLC (“District Design”).

Sincerely,



Martin P. Sullivan, Esq.

cc: Alan Gambrell, for ANC 1C and Appellant
Max Tondro, Counsel for DCRA

Board of Zoning Adjustment
District of Columbia
CASE NO.18980
EXHIBIT NO.43

DRAFT

**GOVERNMENT OF THE DISTRICT OF
COLUMBIA
Board of Zoning Adjustment**



Appeal No. 18980 of Concerned Citizens of Argonne Place, pursuant to 11 DCMR §§ 3100 and 3101, from decisions by the Zoning Administrator, Department of Consumer and Regulatory Affairs, underlying Building Permit No. B1404813 issued September 9, 2014, Building Permit No. B1409928 issued July 21, 2014, and Building Permit No. B1509180 issued June 24, 2015, approving the addition to and conversion of a one-family dwelling to a four-unit apartment house in the R-5-B District at premises 1636 Argonne Place, N.W. (Square 2589, Lots 460).

HEARING DATES: April 21, 2015; May 19, 2015; July 7, 2015
DECISION DATE: September 15, 2015

ORDER DISMISSING APPEAL IN PART AND DENYING APPEAL IN PART

This appeal was submitted on February 13, 2015 by Concerned Citizens of Argonne Place (“Appellant”) to challenge certain decisions of the Zoning Administrator (“ZA”), at the Department of Consumer and Regulatory Affairs (“DCRA”), which were part of work approved pursuant to Building Permit No. B1404813 issued September 9, 2014, Building Permit No. B1409928 issued July 21, 2014, and Building Permit No. B1509180 issued June 24, 2015, alleging, *inter alia*, that the Zoning Administrator incorrectly designated the entire lower level as cellar space for purposes of calculating the floor area ratio for the building and the addition on the property located at 1636 Argonne Place, N.W. (Square 2589, Lot 460). Following a public hearing, the Board voted on September 15, 2015 to dismiss the appeal as untimely.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated February 26, 2015, the Office of Zoning provided notice of the appeal to ANC 1C, the ANC in which the subject property is located as well as the Appellant; Single Member District/ANC 1C05; the Zoning Administrator, at DCRA, with a copy to District Design and Development Argonne LLC, as the owner of the property that is the subject of the appeal; the Office of Planning; and the Councilmember for Ward 1. Pursuant to 11 DCMR § 3112.14, on February 25, 2015, the Office of Zoning mailed letters providing notice of the hearing to the Appellant, the owner of the subject property, and the ZA. Notice was also published in the *D.C. Register*

on _____, 2015 (___ DCR ____).

Appellant's Case. The Appellant challenged the Zoning Administrator decisions underlying several building permits issued to the property owner, including Building Permit No. B1404813 issued September 9, 2014, Building Permit No. B1409928 issued July 21, 2014, and Building Permit No. B1509180 issued June 24, 2015, claiming several errors by the Zoning Administrator, including errors related to parking and FAR calculation.

ANC Report. By letter dated April 6, 2015 1C indicated that, at a duly noticed public meeting held on April 1, 2015, with a quorum present, the ANC voted 6-0 to support the Appeal and authorizing Commissioner Alan Gambrell to represent ANC 1C before the BZA in connection with the Appeal.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 1636 Argonne Place, NW (Square 2589, Lot 460). The subject property is zoned R-5-B.
2. All but one of the Zoning Administrator decisions challenged by the Appellants were made in connection with the issuance of Building Permit No. B1404813 on September 9, 2014.
3. The Appeal was not filed under February 13, 2015, approximately 155 days after issuance of Building Permit No. B1404813.
4. The Appellants had knowledge of the issuance of Building Permit No. B1404813 in September, 2014, at the latest. (BZA Exhibit 22.)
5. Building Permit No. B1509180 was issued on June 24, 2015, and was limited to the Zoning Administrator's decision to approve the property owner's proposal to construct a retaining wall at the rear of the property which would establish a revised grade at the rear of the building on the property.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.)) (*See also* 11 DCMR § 3100.2.) Appeals to the Board of Zoning Adjustment "may be taken by any person aggrieved, or organization authorized to represent that person, ... affected by any decision of an administrative officer...granting or withholding a certificate of occupancy...based in whole or part upon any zoning regulations or map" adopted pursuant to the Zoning Act. D.C. Official Code § 6-641.07(f) (2008 Repl.). *See also* 11 DCMR § 3200.2.

Pursuant to § 3112.2 of the Zoning Regulations, an appeal must be filed within 60 days "from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." (11 DCMR § 3112.2(a).) The Board may extend the 60-day deadline for the filing of an appeal only if the appellant demonstrates that (1) there are exceptional

circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) the extension of time would not prejudice the parties to the appeal.... (11 DCMR § 3112.2(d).)

In this case, the property owner submitted a motion to dismiss the appeal as untimely, which the Board must consider before ruling on the merits of an appeal. *See Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008).

The Board concludes that the Appellant's appeal is untimely insofar as it relates to any of the Zoning Administrator decisions made pursuant to the issuance of Building Permit No. B1404813, which was issued on September 9, 2014. Ordinarily, the building permit is the document that reflects a zoning decision or decisions about whether a proposed structure and its intended use, as described in the permit application, conform to the zoning regulations. *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008). As with a letter issued by a zoning official after a permit has been issued or a certificate of occupancy, a subsequent building permit cannot be appealed unless it contains a new decision. *See Appeal No. 17915 (Bolduc)*, 56 DCR 9698 (2009), citing *Appeal No. 16982 (Herron and ANC 3F)*, 52 DCR 3904 (2005), *Appeal No. 17411 (Basken and Meyer)*, 53 DCR 2495, *affirmed*, *Basken*, 946 A.2d at 362 (D.C. 2008); *Appeal No. 17830 (Cooper)*, 56 DCR 3737 (2009).

Regarding the merits of the one remaining issue, the approval of a retaining wall recessed under a building overhang at the rear of the building, the Appellant has not submitted any evidence or testimony to show that the Zoning Administrator's decision was in error. The Zoning Regulations do not prohibit the adjusting of the finished grade for purposes of FAR calculations, as they do for height measuring points. Therefore, the Zoning Administrator's decision is not inconsistent with customary practice, and the Appellant has not met his burden of proof.

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001).) In this case, ANC 1C concerns were considered by the Board, but for the same reason the Appellant has not its burden, the ANC's opinion cannot overcome the fact that no Zoning Administrator error has been shown. *See Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C. 1993) ("great weight" requirement applies to an ANC's issues and concerns that are legally relevant).

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not submitted a timely appeal with respect to all but one claim of error, and has not met its burden on the merits to prove that one remaining claim of error. Accordingly, is therefore **ORDERED** that the appeal is **DISMISSED in part and DENIED in part**.