



BEFORE THE ZONING COMMISSION OR
BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA



FORM 150 – MOTION FORM

THIS FORM IS FOR PARTIES ONLY. IF YOU ARE NOT A PARTY PLEASE FILE A
FORM 153 – REQUEST TO ACCEPT AN UNTIMELY FILING OR TO REOPEN THE RECORD.

Before completing this form, please review the instructions on the reverse side. Print or type all information unless otherwise indicated. All information must be completely filled out.

CASE NO.: 18999

Motion of:

☐ Applicant

☐ Petitioner

☐ Appellant

☒ Party

☐ Intervenor

☐ Other _____

PLEASE TAKE NOTICE, that the undersigned will bring a motion to:

Dismiss

Points and Authorities:

Please state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion, including relevant references to the Zoning Regulations or Map and where appropriate a concise statement of material facts. If you are requesting the record be reopened, the document(s) that you are requesting the record to be reopened for must be submitted separately from this form. No substantive information should be included on this form.

See attached letter

CERTIFICATE OF SERVICE

I hereby certify that on this

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day of

May

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I served a copy of the foregoing Motion to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of Planning

in the above-referenced ZC or BZA case via:

☐ Mailed letter

☐ Hand delivery

☒ E-Mail

☐ Other _____

Signature:

Print Name:

Cary Kadlecek

Address:

Goulston & Storrs, 1999 K Street NW, Suite 500, Washington, DC 20005

Phone No.:

202-721-0011

E-Mail:

ckadlecek@goulstonstorr.com

Board of Zoning Adjustment
District of Columbia
CASE NO. 18999
EXHIBIT NO. 21

May 8, 2015

VIA IZIS

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

Re: **BZA Appeal No. 18999 – Property Owner’s Motion to Dismiss**

Dear Chairman Jordan and Members of the Board:

2307 Ontario Rd NW LLC (“**Developer**”), owner of the subject property, hereby moves that the Board of Zoning Adjustment (“**BZA**” or “**Board**”) should dismiss Appeal No. 18999 (the “**Appeal**”) because it was not timely filed.

1. The Appeal Must Have been Filed within 60 days of the Zoning Administrator’s Decision.

The Appeal filed by Advisory Neighborhood Commission 1C (“**ANC**” or “**Appellant**”) should be dismissed because it was not filed within the 60-day time period prescribed by the Zoning Regulations. Under § 3112.2(a) of the Zoning Regulations, an appeal must be filed “within sixty (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...” (emphasis added). It is well settled that “[t]he timely filing of an appeal with the Board is mandatory and jurisdictional.” *Mendelson v. D.C. Bd. of Zoning Adj.*, 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* (2013); *BZA Appeal No. 18300 of Lawrence and Kathleen Ausubel* (2012). In this case, as the Appellant’s own evidence shows, the Appellant knew of the Zoning Administrator’s final decision nearly 90 days before filing the Appeal. Therefore, the Appeal is untimely and should be dismissed accordingly.

2. The Zoning Administrator’s December 19, 2014 Decision was an Appealable Action that Started the 60-Day Clock.

The issuance of a zoning decision other than a building permit often is an appealable decision. Several cases indicate that an appealable decision may be in a form other than a building permit. In *Basken v. D.C. Bd. of Zoning Adj.*, 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... [O]ur case law specifically recognizes that a *letter*

from DCRA or the Zoning Administrator conveying a zoning decision may be an appealable decision” (emphasis added). For example, in *Appeal No. 18469 (Lynch)*, the Board found that a zoning approval published on PIVS (the building permit tracking system) in advance of the actual issuance of the building permit constituted an appealable decision. In the *Lynch* case, the appellant actively engaged the Zoning Administrator about the complained-of decision and consistently monitored the building permit status before and after the zoning approval was published on PIVS. Therefore, the Board found that the date that the appellant had knowledge of the zoning approval, and not the date of the permit issuance, started the 60-day clock for the appeal. Since the appellant in that case filed her appeal more than 60 days after the published zoning decision, the Board dismissed her appeal as untimely.

In this Appeal, the Appellant (Mr. Roell acting on behalf of the Appellant) regularly corresponded with the Zoning Administrator (“ZA”) over many months about the proposed project, and the parking credit in particular. This extensive correspondence is included in the Appellant’s brief (pages 33-63 in Exhibit 2 of the record), and much of this correspondence was about the parking credit. As described in his August 20, 2014 letter and his August 22, 2014 email to the ZA (pages 44-46 and 48 of Exhibit 2 of the record), Mr. Roell expansively reviewed and commented on the project plans. Some of Mr. Roell’s comments directly addressed the project’s FAR and areaways. Mr. Roell sent additional emails to the ZA on August 29, November 20, December 1, and December 19, 2014 regarding the zoning aspects of the project. Clearly, Mr. Roell was regularly reviewing the plans, was closely monitoring all of the zoning actions, and knew when the ZA made decisions.

The ZA decided to approve the project on December 19, 2014, as described in an email to Mr. Roell (page 61 of Exhibit 2 of the record). In his email, the ZA explicitly granted a credit of one parking space to 2307 Ontario Road NW and stated his approval of the project’s building permit. The ZA stated, “... I have concluded that my office’s original granting of the parking credit one [sic] parking space is valid and the project is compliant with the zoning regulations... My office will proceed with approving permit application number B1408491.” This determination was unambiguous and final for all zoning matters, so it clearly constituted an appealable decision. Also, the ZA sent it directly to the Appellant. Thus, the ZA’s decision to grant the parking credit and approve all zoning aspects of the project’s plans was appealable and unmistakably known to the Appellant on December 19, 2014.¹

3. The Appeal Period Expired More than 20 Days before the Appeal was Filed.

The appeal period for the Zoning Administrator’s decision in this case expired on February 17, 2015, which was 60 days after the decision. The Appellant did not file the Appeal until March 13, 2015, which was 24 days after the appeal period ended. Even though the building permit was issued on January 15, 2015, the Appellant plainly knew of the ZA’s final

¹ ANC members were copied on at least the December 1 and December 19 emails from Mr. Roell, so the ANC, itself, had direct knowledge of the status of the ZA’s decisions and the ongoing correspondence about the project. Accordingly, the ANC reasonably should have had knowledge of the ZA’s December 19, 2014 decision.

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decision to approve the building permit on December 19, 2014, so it had ample time to appeal it. The issuance of the building permit was not a separately appealable event because it incorporated the exact December 19, 2014 decision. Since the Appellant closely corresponded with the ZA about the project and directly received the ZA's decision, there are no exceptional circumstances that warrant extending the appeal period. Thus, the Appeal was filed untimely and the Board should dismiss it for lack of jurisdiction.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Cary R. Kadlec', with a stylized flourish at the end.

Cary R. Kadlec
Counsel for Developer

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing document to the following parties on May 8, 2015, via electronic mail.

Maximilian L.S. Tondro
Assistant General Counsel
Department of Consumer & Regulatory Affairs
maximilian.tondro@dc.gov

Advisory Neighborhood Commission 1C
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roellarchpc@aol.com


Cary R. Kadlecek