

BZA APPEAL NO. 19049

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

**PROPERTY OWNER’S MOTION TO DISMISS
FOR FAILURE TO TIMELY FILE THE APPEAL**

I. Introduction.

I am writing on behalf of 1351 LLC (“Owner”), the owner of 1351 Wisconsin Avenue, NW (the “Subject Property”), the property which is the subject of Appeal No. 19049 (the “Appeal”). The Subject Property is improved with a building known as the Georgetown Movie Theater (the “Building”), as well as a carriage house at the rear of the Subject Property (the “Carriage House”). As the owner of the Property, 1351 LLC is automatically a party to the Appeal, pursuant to 11 DCMR 3199.1(a)(3).

The Appeal was filed well beyond the deadline for filing of appeals provided in 11 DCMR § 3112.2. The facts in support of this Motion are not in dispute. In fact, most of the information and dates discussed below are in the record by way of the Appellant’s submissions.

II. The Law on Timeliness.

11 DCMR § 3112.2(a) requires that an appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision knew or should have known of the decision complained of. In addition to the 60-day limit, Section 3112.2(b) provides that if the “[i]f the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, . . . [n]o appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof.”¹

Section 3112.2(d) provides that the Board may extend the appeal period only (i) if the appellant demonstrates that 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

¹ This section goes on to provide that: “the phrase “under roof” means the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place.”

ability to file an appeal to the Board; and (ii) the extension cannot prejudice the parties to an appeal, including in this case, the property owner.

III. Motion to Dismiss The Appeal.

The relevant dates for consideration of this Motion are not in dispute.

(i) Building Permit No. B1400387 (the “Permit”) was issued on December 10, 2014.

(ii) The Appeal was filed on May 7, 2015, almost five (5) months after the Permit was issued. There were no revisions to the Permit after its issuance.

(iii) On May 5, 2014, the Owner received an e-mail from zoning lawyer Andrea Ferster (a copy of which is attached as Exhibit A) which stated, in part:

“My clients request an opportunity to meet with you this week (preferably May 6 or 7, after 6 pm) to discuss a mutually agreeable way to move forward with your plans to develop the property. I will not participate in this meeting, as it is their hope to negotiate an agreement that avoids the necessity of future adversarial proceedings concerning the various zoning and building code violations that have been identified with the permit plans pending before DCRA.”

(iv) On May 7, 2014, the Appellants sent an e-mail to the Deputy Zoning Administrator presenting five very specific and detailed arguments for why they believed that the permit plans were not in compliance with the Zoning Regulations. In that e-mail, the Appellants noted that they “have been advised that the project plans approved by the CFA on the 18th of April are not a matter of right.” (BZA Exhibit No. 3, Page 8-10). The e-mail’s distribution list included the Appellants’ zoning attorney, Ms. Ferster, presumably the person who had reviewed the permit plans and “advised” the Appellants on potential zoning issues.

Based on these undisputed dates, the Appellants had hired zoning counsel and formulated and communicated their arguments for zoning non-compliance by May 7, 2014 - based on that attorney’s review of “the permit plans pending before DCRA” - seven (7) months prior to the building permit issuance date and a year before the Appeal was filed. The Permit was posted and construction began immediately after the Permit was issued in December, 2014. No material changes were made to the permit plans following Permit issuance. IN addition to missing the 60-day filing deadline, the Building was “under roof” on or about April 16, 2015, more than ten (10) days prior to the filing of the Appeal.

From the Appellants' Statement (BZA Exhibit 3), it is known that the Appellants were familiar with the PIVS permit tracking system. The Appellants therefore likely knew about the final decision being complained of even before the permit was issued, but certainly no later than the permit issuance date or a few days thereafter. Also from the Appellant's Statement, it is known that the Appellants had zoning counsel advise them on the permit plans in May, 2014.

Yet, notwithstanding the fact that the Appellants had hired zoning counsel, and notwithstanding the fact that the Appellants' group includes an architect, the Appellants chose to file the Appeal about 150 days after issuance of the Permit and commencement of construction.

The Appellants acknowledge that they filed the Appeal late, but argue that the Board must extend the filing date, for some reason. One of the Appellants arguments is that the permit plans were "ambiguous and confusing" to the Appellants, despite the fact that the Appellants (a group that includes an architect) had hired zoning counsel that had reviewed the actual building permit plans and claimed to have found zoning violations back in May, 2014. At any rate, the exception for the Board to extend the filing deadline does not include an "ambiguous and confusing" exception. This is particularly true when a group of Appellants includes an architect and is represented by an attorney that specializes in land use law, as does Ms. Ferster. Such a comment is even more disingenuous when considering the confident assertions of zoning violations made in Ms. Ferster's email a year before the current claims of confusion.

The Appellants alternately argue that the filing deadline should be extended because, on April 10, 2015, the Zoning Administrator issued a memorandum to the Office of Planning explaining the decisions his office had made as part of the permit review process that culminated in a zoning approval on October 22, 2014 (per the PIVS report included in the Applicant's Statement (BZA Exhibit 3)). But the Zoning Administrator's memorandum was a mere explanation of decisions made many months earlier. This was not "NEW" information, as the Appellant contends, and it did not represent any change in the permit plans underlying the December-issued Permit. In any event, the April 10 memorandum certainly could not have "substantially impaired the appellant's ability to file an appeal," and the Appellants don't even make such a claim. Finally, the memorandum was issued (April 10) well after the 60-day appeal filing deadline (February 9) anyway.

IV. Estoppel and Laches.

1351 LLC received its zoning approval for this project in October, 2014. It received the Building Permit on December 10, 2014. As noted in the Appellants own filing, the Appellants have had knowledge of the building permit plans – including enlisting professional assistance in reviewing same – since at least May, 2014; one year before the filing of this Appeal. From the time the permit was issued until the time the Appellants opted to finally file the Appeal, the property owner undertook significant and sensitive construction, historic in nature and difficult to execute. The Owner could present evidence of hundreds of thousands of dollars being spent on reliance on the Permit, should the Board not dismiss the Appeal based on the failure to timely file.

In order to make out a claim for laches, a party must establish an "omission to assert a right for an *unreasonable and unsatisfactorily explained length of time* under circumstances prejudicial to the party asserting laches." *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C.1978) (quoting 3 RATHKOPF, LAW OF ZONING AND PLANNING 67-1 (3d ed. 1972)) (emphasis added); *see also Goto v. District of Columbia Board of Zoning Adjustment, supra*, 423 A.2d at 925. The elements required to establish estoppel are: "a party (1) acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party invoking the doctrine." *Wieck v. BZA, supra*, 383 A.2d at 11. In this case, 1351 LLC made the permanent and expensive improvements noted above in justifiable reliance on the affirmative act of DCRA in approving the subject Building Permit. The Appellant chose not to file an appeal until five (5) months after construction began. The equities strongly favor 1351 LLC in this case, as it would be catastrophically damaged by a reversal of the Permit. The Georgetown community would also suffer in seeing the project delayed or altered, as approve by the Commission of Fine Arts and as desired by the larger community. Should an Appeal succeed, it would have little benefit to the Appellants, compared to the damage caused to 1351 LLC.

V. Conclusion.

The Appeal was filed about 150 days after the Permit was issued. The Appellants admit that they had their zoning counsel review the permit plans one year before filing the Appeal. The Appeal was also filed later than ten (10) days after the structure was "under roof." There were no

revisions made to the permit plans following issuance of the Permit. There were no exceptional circumstances beyond the Appellants' control that impaired their ability to file the Appeal, and extending the filing deadline would greatly prejudice the property owner. For these reasons, the Appeal should be summarily dismissed, without further proceedings.

Respectfully,

A handwritten signature in black ink, appearing to read "Martin P. Sullivan". The signature is written in a cursive, slightly slanted style.

Martin P. Sullivan, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2015, a copy of the foregoing was served via electronic mail to:

Caesar Junker
Caesar.junker@gmail.com

Jeffrey Jones, ANC 2E-03
Jeffrey.jones@anc.dc.gov

Maximilian Tondro, DCRA
Maximilian.tondro@dc.gov

A handwritten signature in black ink that reads "Martin P. Sullivan". The signature is written in a cursive, slightly slanted style.

Martin P. Sullivan