

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001**

Appeal of Caesar Junker, et al.

BZA Appeal 19049

RESPONDENT’S MOTION TO DISMISS FOR FAILURE TO TIMELY FILE

Appellants alleges that the Zoning Administrator (the “**ZA**”) erred in approving Building Permit B11400387 issued on December 10, 2014 (the “**Permit**”) for the conversion of 1351 Wisconsin Avenue, N.W. (the “**Property**”), the front two-thirds of which is in a C-2-A zone district with the rear third in a R-3 zone district, to a mixed-use building with four residential units and a home office use in the rear carriage house.

Respondent, the District of Columbia Department of Consumer and Regulatory Affairs (“**DCRA**”), asserts that Appellants had notice of the Permit application before issuance as well as expert consultants, but nevertheless chose not to appeal the Permit for more than 180 days after the ZA’s approval of the Permit – more than three times the 60-day appeal period provided by the Zoning Regulations. Furthermore, by the time Appellants chose to appeal the Permit, the new roof of the C-2-A portion had already been installed, which the Zoning Regulations define as a definitive closure of any appeal.

DCRA therefore joins the Motion to Dismiss for Failure to Timely File submitted by the owner of the Property (the “**Permit Holder**”) and respectfully requests that the Board of Zoning Adjustment (the “**Board**”) dismiss this Appeal for failure to timely file.

BACKGROUND

The Board has heard a related case involving the Property – BZA 18884 – that requested special exception and variance relief to connect the rear carriage house in the R-3 zone portion to the principal structure in the C-2-A portion of the Property. This application for BZA relief was ultimately withdrawn. The Permit at issue in this Appeal differs from what was proposed in BZA 18884 – the Permit approved as a matter of right the expansion of the upper portion of the existing structure on the C-2-A portion.

APPELLANTS'S FAILURE TO TIMELY FILE

Section 3112.2 establishes two timelines for appeal of a decision of the ZA – (a) within sixty days of the date the appellant “had notice or knowledge of the decision complained or, or reasonably should have had notice or knowledge” thereof; and (b) within ten days of the date “the main roof or part thereof ... [is] in place.”

60-day appeal period

The Board has consistently ruled that where the administrative decision appealed to the Board is that of the ZA, the starting point for the appeal period is the date that the ZA’s decision is publicly announced, and the Board has accepted that the publication on the DCRA PIVS and Permit Status Tracking websites qualifies as public announcement sufficient to trigger the appeal period.¹

Appellant definitively had notice and knowledge of the Permit application as it went through the DCRA review process over six months before the ZA approved it on October 22, 2014.² Appellant provides an email dated May 5, 2014 to the ZA raising concerns with the Permit, then going through the permitting process.³ One of the individuals included in that email was a zoning attorney, Andrea Fernster, who on that same day introduced herself to the Permit Holder as the zoning lawyer retained by Appellants.⁴ That email included a screenshot of the DCRA Permit Tracking system, indicating that Appellants – over a year prior to their filing this Appeal – were familiar with the Permit Tracking system. Therefore, under established Board practice, the sixty day appeal period for Appellants started when the ZA’s approval of the Permit on October 22, 2014 was posted to the DCRA Permit Tracking system the next day. This appeal window closed on December 22, 2014 – yet Appellants chose to wait to appeal for another four months, over six months after the ZA had definitively and publicly approved the Permit.

Even if the Board was to determine that the actual issuance of the Permit on December 10, 2014 started the appeal period, this would have ended sixty days later on February 8, 2015.

¹ *Basken v. District of Columbia Board of Zoning Adjustment*, 946 A.2d 356, 366 (D.C. 2008)(no specific notice required to trigger the Board’s appeal period); *BZA Appeal No. 18469 of Susan L. Lynch* (March 19, 2013)(denotation of “approved” in PIVS sufficient to announce Zoning Administrator’s approval and so trigger the Board’s appeal period).

² BZA 19049, Exhibit 3, at 7 (Exhibit 2).

³ BZA 19049, Exhibit 3, at 8-10 (Exhibit 3) and Exhibit 6.

⁴ BZA 19049, Exhibit 22A.

Even in this case, Appellants chose to not appeal for over two additional months – more than four months after the Permit was issued.

Appellants argue that “new” information was provided in the ZA’s April 10, 2015 letter by the Office of Planning to the record of BZA 18884, and that this “new” information should qualify the Appeal to be permitted by the Board filed late. However, the ZA’s April 10, 2015 letter was not a “decision” by the ZA, but merely a statement that reiterated the ZA’s determination of how FAR is calculated under Section 2514.1. And Appellants had already challenged the Permit application’s interpretation of Section 2514.1 in their May 5, 2014 letter – so there is nothing new in the ZA’s April 20, 2015 letter. The plans approved under the Permit four months earlier did not change – if Appellants had problems with the Permit, they should have appealed it as soon as the ZA publicly announced his decision to approve the Permit – on October 20, 2014.

Section 3112.2(d) only permits the Board to extend the appeal deadline if there are “exceptional circumstances ...outside of the appellant’s control ... [that] could not have been reasonably anticipated that substantially impaired the appellant’s ability to file an appeal to the Board” and the extension would not prejudice the parties. As stated above, the ZA’s April 10, 2015 letter does not qualify as “exceptional circumstances”, since Appellants had access to the Permit and its associated plans, and these did not change from the October 20, 2014 approval by the ZA.

Moreover, extending the deadline – to more than 180 days after the ZA’s October 20, 2014 decision – would definitely prejudice the parties. The finite appeals period in Section 3112.2 was created to ensure that DCRA and permit holders could move onto other projects after the sixty days. Allowing an appeal this late vastly prejudices the Permit Holder who has relied on the appeal period of the Permit having expired months ago; and prejudices DCRA by devoting resources to responding to an appeal months after a permit’s appeal period closed.

“under roof”

Furthermore, Appellants admit and provide evidence that their Appeal was submitted after the main roof of the C-2-A structure was in place.⁵ Section 3112.2(b)(2) is an absolute deadline, not subject to the Board’s discretion to extend the sixty-day appeal period under

⁵ BZA 19049, Exhibit 3, at 3 and photos on 1 and 2.

Section 3112.2(d). Therefore if the Board determines that the Appeal was filed more than ten days after the project authorized by the Permit was “under roof”, the Appeal should be dismissed.

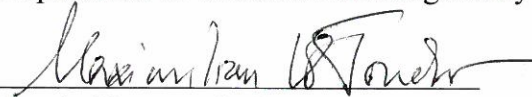
CONCLUSION

For the reasons stated above, DCRA respectfully requests that the Board dismiss this Appeal as untimely filed.

Respectfully submitted,
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General Counsel
Department of Consumer and Regulatory Affairs

Date:

July 16, 2015



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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July 2015, a copy of the foregoing Motion to Dismiss for Failure to Timely File was served via electronic mail to:

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A handwritten signature in black ink, appearing to read "Maximilian Tondro", written over a horizontal line.

Maximilian Tondro