

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

Appeal of the Erie Condominium Association, *et al*

BZA Appeal 19174

DCRA'S JOINDER OF PERMIT HOLDER'S MOTION
TO DISMISS APPEAL AS UNTIMELY FILED

Appellants allege that the Zoning Administrator (the “**ZA**”) erred in approving Building Permit B1410680, issued on June 17, 2015 (the “**Permit**”), to construct a multistory residential building (the “**Project**”) at 2337-2345 Champlain Street, N.W. (the “**Property**”), in the R-5-B Zone District and in the Reed-Cooke Overlay District, because the proposed penthouse height above the roof differed from that depicted on the plans approved by the Board of Zoning Adjustment (the “**Board**”) in BZA Application 18330 (“**BZA Plans**”).

Respondent, the District of Columbia Department of Consumer and Regulatory Affairs (“**DCRA**”), asserts that the ZA properly reviewed and approved the Permit as in compliance with the Zoning Regulations, because the plans approved by the Permit (“**Approved Plans**”) do not conflict with the BZA Plans in those areas for which the Board granted relief. Furthermore, DCRA asserts that Appellants, who are very familiar with the building permit process and the Zoning Regulations and who have retained experience zoning counsel, failed to appeal the Permit until months after the appeal period had closed, despite having first hand knowledge of the issuance of the Permit and the ability to consult the Approved Plans as of the time of issuance.

Therefore, DCRA joins the Permit Holder’s Motion to Dismiss and respectfully requests the Board dismiss the Appeal as untimely filed. If however, the Board determines that it has jurisdiction to consider this case on the merits, then DCRA respectfully requests that the Board affirm the ZA’s approval of the Permit as compliant with the Zoning Regulations and deny this Appeal.

ARGUMENT

This appeal is of the issuance of the Permit, a DCRA action – not the private discussions and negotiations between private parties to which the ZA and DCRA are not privy

Appellants are mostly arguing a case that is private litigation between two parties – but here are attempting to involve the ZA and the Board to obtain leverage in this private battle. The vociferous allegations of dissembling and deceit asserted by Appellants against the Permit Holder are not at issue in this appeal, any more than any counter-allegations by the Permit Holder against Appellants – those are private matters between Appellants and the Permit Holder than are not the province of DCRA nor the Board and that should be resolved privately.

This appeal is instead about the validity of the Permit, and whether Appellants, who had notice of the Permit issuance that far exceeded that of most neighbors to development projects, filed this Appeal within the time frame specified by the Zoning Regulations. DCRA asserts that Appellants, despite having an extraordinary amount of notice, nonetheless chose to not consult the Approved Plans available to the public at DCRA at any time during the 60 day appeal period following the issuance of the Permit. Permitting this Appeal to be considered on the merits would substantially prejudice DCRA – apart from directly violating the clear language of the Zoning Regulations – by doubling the 60 day appeal period for any appellant who asserts that they relied upon representations by a private party as a justification for failing to consult the publicly available plans that are an integral part of a permit.

DCRA asserts that Appellants disqualified themselves from pursuing this Appeal by failing to consult the DCRA Approved Plans – there is no question that Appellants knew of the impending development and of the Permit before and after issuance. Yet Appellants claim they had no responsibility to consult the Approved Plans available at DCRA: “Before October of 2015, the [Permit Holder] never revealed its real plans for the roof level with clarity or candor”.¹ Appellants do not assert that the Permit Holder exceeded the scope of work of the Permit – because the Approved Plans issued on June 27, 2015 show the penthouse as built. An appeal of a building permit issued by DCRA should turn on the alleged reliance of an appellant on DCRA, not on the alleged reliance of an appellant on a private permit holder. Therefore DCRA respectfully requests that the Board deny this appeal as untimely filed because the Appellants had the clear responsibility to consult the publicly available Approved Plans and chose to not do so, despite having prodigious notice and extensive experience with zoning and permitting in the District.

¹ BZA 19174, Exhibit 19 (Appellants' Opposition to Owner's Motion to Dismiss), at 11.

Appellants are very familiar with the permitting process and zoning regulations, and had retained an attorney, Ms. Horvitz, who specializes in zoning and permits and who had represented Appellants from their initial challenges to the Project in Appellant's opposition to Permit Holder's application to the Board for relief in BZA 18330.² For Appellants to argue that they were naively led as lambs to slaughter by a conniving Permit Holder, when Appellants had every opportunity and expertise to determine the precise parameters of what could be built under the Permit and still refused to spend the time to do so, ignores the fundamental fact that the Permit was issued by DCRA, not by the Permit Holder, and that the Approved Plans were publicly available for consultation by Appellants, who nevertheless made the decision to rely on the Permit Holder's alleged representations. Deliberate ignorance should not extend an appellant's appeal rights, especially as it significantly prejudices DCRA which has to devote energy and resources to appeals months after the appeal period is closed, as well as to permit holders who justifiably rely upon the appeal period established in the Zoning Regulations to make major financial and legal decisions.

The Zoning Regulations allow appeals only within 60 days of notice of a zoning approval except in "exceptional circumstances"

Section 3112.2(a) establishes a sixty day appeal period "from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice of knowledge of the decision complained of, whichever is earlier." The Board has consistently held that the "administrative decision" is the approval of the ZA upon publication in the DCRA PIVS/Permit Tracking website prior to the issuance of the permit, which shortens the appeal period to less than 60 days after permit issuance.³ Nonetheless, in this case, Appellants did not even act within the 60 days after the issuance of the Permit on June 17, 2015. The appeal period closed on August 16, 2015. Yet Appellants waited another 68 days -

² BZA 18330 Exhibit 28, at 1 (request for party status, March 16, 2012).

³ *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 9, 2013) (denotation of "approved" in PIVS sufficient to announce Zoning Administrator's approval and so trigger the Board's appeal period).

until October 23, 2015⁴ – to file this Appeal, more than twice the maximum 60 day period permitted under Subsection 3112.2(a).

Appellants had extensive notice of the Permit prior to and after issuance

Appellants have been continuously involved in objecting to, and appealing, the development of the Property, since Appellants filed to be parties in opposition to BZA Application 18330 on March 19, 2012.⁵ For more than three years after that date, Appellants objected to the development proposed at the Property, before the Board and then before the Court of Appeals, and then in negotiations with the Permit Holder.⁶ Appellants provide evidence of continued interaction with the Permit Holder seeking to change the design of the Project over this three plus year period.⁷ Over this time period, Appellants clearly indicated a concern and distrust of what would actually be built on the Property as evidenced by their continuous questioning of and negotiating with the Permit Holder over aspects of the Project's design (e.g., email from Appellants to Permit Holder, September 27, 2014: "we've notice some activity on your lot. Can you please give me an update as to what is going on and under what plan you are constructing"⁸). Furthermore, during this time period, Appellants have retained experienced zoning counsel – the same counsel who therefore was intimately familiar with the background.⁹

Yet Appellants assert that they were reasonable in their choice to rely only on what they themselves describe as unsatisfactory responses from the Permit Holder (e.g., Appellants repeated their November 18, 2014 request for information from the Permit Holder on February 17, 2015¹⁰, etc.). If Appellants were dubious as to the candor of the Permit Holder, why did Appellants choose to not consult the publicly available plans approved with the Permit – the only set of plans that controlled what the Permit Holder could actually build? Appellants indicated a

⁴ BZA 19174 Exhibit 1, at 1 (relying on DCOZ date stamp of October 23, 2015, not the October 22, 2014 date on application, or the October 27, 2015 date of upload to IZIS).

⁵ BZA Application 18330, Exhibits 28 and 29.

⁶ BZA 19174, Exhibit 19 (Appellants' Opposition to Owner's Motion to Dismiss), at 2-3.

⁷ Ibid, at 2-14.

⁸ BZA 19174 Exhibit 16H (Permit Holder's Motion to Dismiss, Exhibit H), at 1.

⁹ BZA 19174 Exhibit 16G (Permit Holder's Motion to Dismiss, Exhibit G), at 1 (email from Permit Holder to Appellants dated April 29, 2014 at 3:47pm).

¹⁰ Ibid, at 12.

willingness to “call the City [to] request a stop work order”¹¹ – why did they not request the Approved Plans directly from DCRA?

Appellants had advanced notice of when the Permit was likely to be issued since they lived next door and saw the preliminary site work conducted under the Sheeting and Shoring Permit (SH1400066) that was issued on January 22, 2015 – as of February 17, 2015, Appellants indicated that they saw construction ongoing¹². Appellants then saw, from their location next door, the start of actual construction under the Permit, which was posted at the site. Appellants were sophisticated enough to navigate both the process of opposing the original application before the Board as well as appealing to the Court of Appeals – and yet Appellants now assert they were too naïve to consult the publicly available Approved Plans at DCRA? “Unbeknownst to Erie Condominium, the permit set provided much more information that had never been share with Erie Condominium” (italics and underscore added).¹³ Appellants asked the Permit Holder for the plans submitted with the application for the Permit in February 2015 – but never asked DCRA to see the Approved Plans, instead waiting until October 2015, four months after the issuance of the Permit and after months of construction to ask the Permit Holder again?¹⁴

Appellants assert that the Permit “itself did not include any information about the height of the building, the height of the penthouse structure or other specifics relating to the roof level.”¹⁵ This is disingenuous and inaccurate – the “permit” is a single page, with room for no more than one hundred words in the scope of work, yet Appellants somehow assert that all details necessary to construct a six-story, 40-unit building can be contained in this hundred word description of the scope of work? More importantly, all permits do explicitly state on that single page the following:

“As a condition precedent to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District Government ...”¹⁶ (italics and underscore added)

¹¹ BZA 19174 Exhibit 16J (Permit Holder’s Motion to Dismiss, Exhibit J), at 1 (email from Appellants to Permit Holder dated March 25, 2015 at 4:51pm).

¹² BZA 19174 Exhibit 16I (Permit Holder’s Motion to Dismiss, Exhibit I), at 1 (email from Rich Wiedis to Christian Cronin, February 17, 2015 at 5:41pm).

¹³ Ibid, at 12.

¹⁴ Ibid, at 14.

¹⁵ Ibid, at 16.

¹⁶ BZA 19174 Exhibit 16K (Permit Holder’s Motion to Dismiss, Exhibit K), at 1.

And yet Appellants assert that it never occurred to them, nor to their experienced zoning counsel, to check the plans approved by the Permit that were publicly available. As a result, Appellants assert the right to arbitrarily extend the appeal deadline to more than twice the maximum allowed because they chose to not consult the public records - despite being on notice from multiple sources: from the protracted negotiations/hostilities between Appellants and the Permit Holder; from the actual construction next door; and from the Permit. Any of these would create sufficient notice to Appellants to make a reasonable person check with the publicly available records – the Approved Plans that accompany the Permit.

Appellants' choice to not consult public records disqualifies them

from the “exceptional circumstances” exception to the 60 day appeal period

Section 3112.2(d) is very clear as to the threshold required to extend the appeal window:

“(d) The Board may extend the sixty- (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 will not prejudice the parties to the appeal, as identified in § 3199.1.” (bold, italics and underscore added)

Appellants have the burden of proof – both as appellants, and additionally here to justify their failure to exercise their rights within the time period established by Section 3112.2. Appellants must convincingly demonstrate that both prongs of this exception are met: (i) that Appellants were prevented from timely filing by “exceptional circumstances outside of appellant's control” and (ii) that no prejudice to DCRA and the Permit Holder will result from the time extension.

Appellants have manifestly failed to demonstrate that they were somehow incapacitated from the simple step of consulting the Approved Plans at DCRA. The simple fact is that Appellants made the decision, for whatever reason, to not check that the Approved Plans conformed to Appellants' understanding of what the Project would look like. How is that possibly “outside of Appellants' control”, let alone exceptional circumstances?

Having made this elemental mistake, Appellants now seek to make DCRA pay for Appellants' error. Yet Appellants allege no error on DCRA's part in publishing the Permit and Approved Plans. So DCRA now is forced to expend significant resources to defend this Appeal – and if the Board denies the Motion to Dismiss, for all future appeals – despite being a

completely innocent party in its publication of the Permit and Approved Plans. This is completely prejudicial to DCRA and profoundly inequitable – which alone should bar the application of this exception to Appellants in this Appeal as the exception is equitable relief from the established 60 day period.

Appellants' citation to *Appeal of Kalorama Citizens Association, BZA Appeal No. 17109* is not only inapposite for Appellants' argument, but also reinforces DCRA's argument because in BZA 17109 "[the appellant] demonstrated considerable diligence in its efforts to acquire information about [the permit holder]'s permit and construction plans from DCRA, but these efforts were thwarted. DCRA did not provide the plans attached to the Original Permit until [more than seven months after the issuance of the permit]."¹⁷ Appellants have made no such allegations against DCRA in this Appeal. Appellants simply failed to perform their due diligence, that is required of any neighbor to a development project – to consult the publicly available plans as filed with DCRA that constitute the sole authorization for the construction.

Appellants' allegations and extended analysis of their interactions with the Permit Holder obfuscate the fact that the appeal is of DCRA's action in issuing the Permit. Appellants had the opportunity to appeal DCRA's action; had extraordinary notice of the Permit; had experienced and sophisticated expert counsel and experience in zoning and permitting; and had ample evidence, if their assertions are to be believed, that Appellants could not rely on the Permit Holder – and yet, when push came to shove and the Permit was actually issued, Appellants did not even bother to ask DCRA to consult the publicly available Approved Plans. How can they seek equitable relief to waive the 60 day appeal period under these circumstances? How was this failure on their part possibly "outside of Appellants' control"?

DCRA is extremely concerned that if the Board grants Appellants' claim to extend the 60 day appeal period on these completely unjustified circumstances, that the 60 day appeal period will effectively be overruled, allowing any potential appellant to wait for months after a permit is issued and construction well under way to file an appeal. This will have dramatic and profound prejudicial effects on DCRA which will have to further extend its limited resources to defending appeals months after the permit is issued, as well as on development in the District, as permit holders will not be able to rely on the 60 day appeal period as providing closure to the potential risk of an appeal. DCRA therefore respectfully requests that the Board not grant Appellants'

¹⁷ BZA Appeal 17109, at 7.

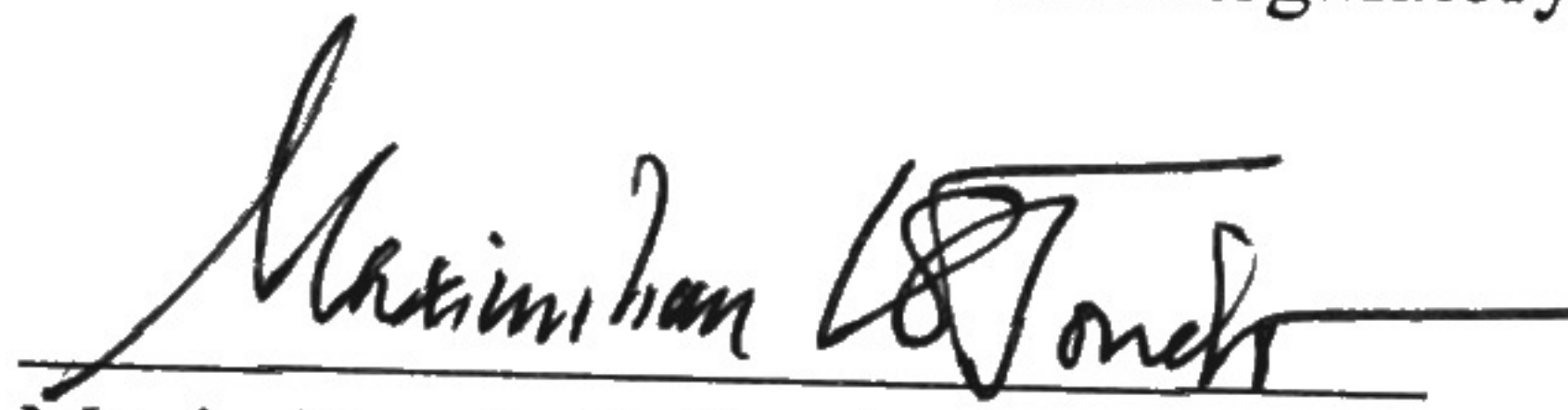
claim to the “exceptional circumstances” exception under Section 3112.2(d), and therefore find that Appellants’ filing more than two months after the closing of the 60 day appeal period established by Section 3112.2(a) was untimely.

CONCLUSION

Based on the argument and evidence provided above, DCRA joins the Permit Holder’s Motion to Dismiss and respectfully requests that the Board grant this Motion and dismiss the Appeal as untimely filed.

Respectfully submitted,
CHARLES THOMAS
General Counsel
Department of Consumer and Regulatory Affairs

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Maximilian L. S. Tondro*
Assistant General Counsel, Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., Suite 5266
Washington, D.C. 20024
(202) 442-8403 (office) / (202) 442-9477 (fax)
maximilian.tondro@dc.gov

Attorney for Department of Consumer and Regulatory Affairs

* Admitted to practice in Maryland. Practicing in the District of Columbia pursuant to D.C. Court of Appeals Rule 49(c)(4).

CERTIFICATE OF SERVICE

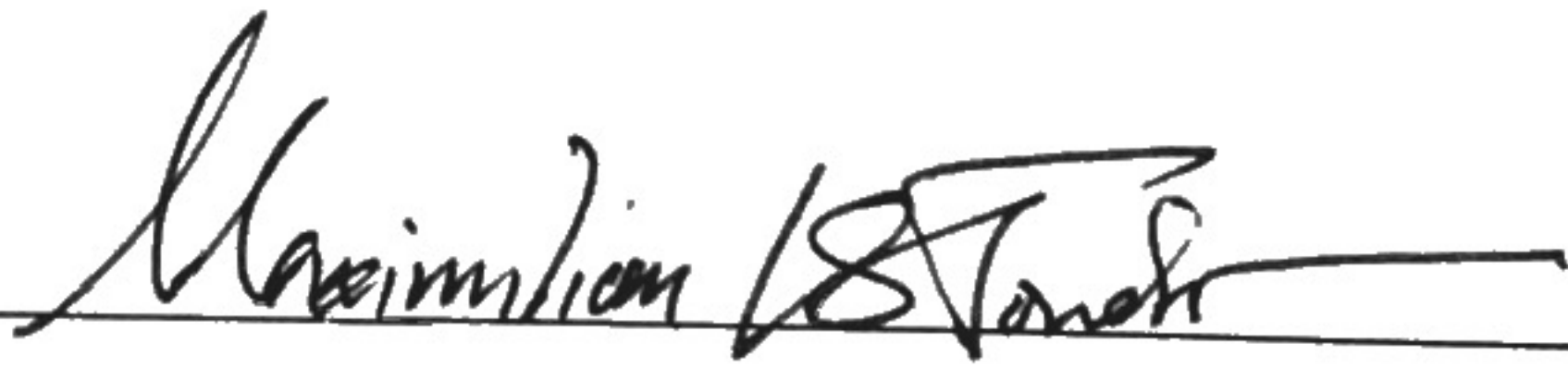
I hereby certify that on this 5th day of February 2016, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

Laurie B. Horvitz
Law Office of Laurie B. Horvitz
4520 East West Highway, Suite 700
Bethesda, MD 20814
laurie@horvitzlegal.com
Counsel for Appellants

Christine Moseley Shiker
Philip T. Evans
Holland & Knight, LLP
800 17th Street, N.W.
Washington, D.C. 20006
christine.shiker@hklaw.com
philip.evans@hklaw.com
Counsel for Permit Holder

Ted Guthrie, Chairperson
Advisory Neighborhood Commission, ANC-1C
1849 Kalorama Road, N.W., Apt. 2
Washington, D.C. 20009
1C@anc.dc.gov
1C03@anc.dc.gov

Wilson Reynolds, Single Member Advisory
Neighborhood Commission, ANC-1C07
2370 Champlain Street, N.W., #23
Washington, D.C. 20009
1C07@anc.dc.gov



Maximilian L.S. Tondro