

Holland & Knight

800 17th Street, Suite 1100 | Washington, DC 20006 | T 202 955 3000 | F 202 955 5564
Holland & Knight LLP | www.hklaw.com

Christine Moseley Shiker
202 457 7167
christine.shiker@hklaw.com

March 10, 2016

VIA EMAIL AND HAND DELIVERY

D.C. Board of Zoning Adjustment
Suite 210
441 4th Street, N.W.
Washington, D.C. 20001

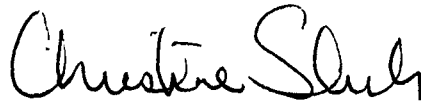
**Re: BZA Appeal No. 19174
2337 Champlain Street, NW (Square 2563, Lot 112)
Owner's Proposed Findings of Fact and Conclusions of Law**

Dear Members of the Board:

On behalf of 2337 Champlain, LLC, the owner of the above-referenced property, and pursuant to 11 DCMR § 3125.3, we hereby submit proposed findings of fact and conclusions of law for BZA Appeal No. 19174. Should you have any questions, please do not hesitate to have staff contact me.

Sincerely,

HOLLAND & KNIGHT LLP



Christine Moseley Shiker

Enclosure

Board of Zoning Adjustment
District of Columbia
CASE NO.19174
EXHIBIT NO.34

PROOF OF SERVICE

I hereby certify that a copy of the foregoing findings of fact and conclusions of law for BZA Appeal No. 19174 was filed via email and hand delivery with the Board of Zoning Adjustment and was sent by email, this 10th day of March, 2016, to the following:

Matthew LeGrant
Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th Street, SW
3rd Floor
Washington, DC 20024
matthew.legrant@dc.gov

Maximilian Tondro, Esq.
Associate General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, SW
Room E-500
Washington, DC 20024
maximilian.tondro@dc.gov

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BOARD OF ZONING ADJUSTMENT

Appeal No. 19174 of Unit Owners' Association of the Erie Condominium, pursuant to 11 DCMR §§ 3100 and 3101, from a June 17, 2015, decision by the District of Columbia Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1410680, to construct a new 40-unit residential building with underground garage parking in the RC/R-5-B District at premises 2337 Champlain Street, NW (Square 2563, Lot 887).

HEARING DATE: February 9, 2016

DECISION DATE: March 15, 2016

DECISION AND ORDER

The Unit Owners' Association of the Erie Condominium (the “Association”) and the Individual Unit Owners (together, “Appellants”) submitted this appeal on October 23, 2015. The appeal challenges a decision by the Zoning Administrator (the “ZA”) of the Department of Consumer and Regulatory Affairs (“DCRA”) for the District of Columbia to approve building permit plans dated February 6, 2015 (the “Building Permit Plans”) and to issue the associated building permit B-1410680, dated June 17, 2015 (the “Building Permit”) for construction of a new 40-unit residential building in the RC/R-5-B District at premises 2337 Champlain Street, NW (Square 2563, Lot 887¹) (the “Property”). Following a public hearing on February 9, 2016, the Board of Zoning Adjustment (the “Board” or “BZA”) voted on March 15, 2016, to dismiss the appeal because it was untimely filed. The Board also voted to deny the appeal based upon the findings that (i) the ZA properly interpreted the provisions of the Zoning Regulations in granting the Building Permit; (ii) the District of Columbia is estopped from revoking the Building Permit; and (iii) the appeal is barred by the doctrine of laches. A full discussion of the factual and legal basis of the Board’s decision follows.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated November 9, 2015, the Office of Zoning provided notice of the appeal to 2337 Champlain, LLC, the owner of the Property (“Owner”), the ZA at DCRA, Advisory Neighborhood Commission (“ANC”) 1C, the ANC in which the Property is located, the ANC Commissioner for the affected Single-Member District, the Councilmember for Ward 1, and the DC Office of Planning. Pursuant to 11 DCMR § 3112.14, on November 10, 2015, the Office of Zoning mailed letters providing notice of the hearing to the Owner, the Appellants, the ZA, and ANC 1C. Notice was also published in the *DC Register* on November 20, 2015 (62 DCR 48).

Party Status. Appellants, Owner, DCRA (the Appellee), and ANC 1C were automatically parties in this matter. On January 8, 2016, Owner submitted a letter entering its appearance in the appeal.

¹ As of the date of this Order, the Property is known as Lot 112, Square 2563.

(Exhibit [“Ex.”] 14.) Owner was represented by Christine Shiker, Esq. of the law firm of Holland & Knight, LLP. Appellants were represented by Laurie Horvitz, Esq. of the Law Office of Laurie B. Horvitz, LLC. DCRA was represented by Maximilian Tondro, Esq. of the Office of the General Counsel. ANC 1C did not participate in the proceeding or otherwise take a position on the appeal.

Motion to Dismiss. Owner filed a motion to dismiss the appeal on the grounds that it was untimely filed. (Ex. 16.) DCRA joined the Owner’s Motion to Dismiss the appeal. (Ex. 23.) After consideration of the factual circumstances of the case and the parties’ legal arguments, the Board determined that the appeal was not timely filed.

Appellant’s Case. Appellants are the owners of the Erie Condominium building (“Erie Building”), which is located immediately to the north of and abuts the Property. Appellants presented testimony from Richard Wiedis, president of the Association (“Wiedis”). Appellants contend that the building being constructed on the Property is inconsistent with plans approved by the Board in BZA Case No. 18330, and subsequent determination letters issued by the ZA in 2014 and 2015. Specifically, Appellants allege that Owner “elected to increase the height of the penthouse structures and related parapet above the elevations depicted in prior plans that were submitted to the BZA and the ZA. DCRA and the ZA have wrongfully approved permit applications by the Owner that authorize such construction.” See Appellants’ Statement to Supplement Form 125. (Ex. 3, pp. 3-4.)

DCRA’s Case. DCRA presented testimony by the ZA, Matthew LeGrant. DCRA requested that the Board dismiss the appeal as untimely filed because Appellants waited 125 days after issuance of the Building Permit to bring the appeal and made no efforts to review the Building Permit Plans even though the Building Permit was properly posted at the Property and Appellants had actual knowledge of the Building Permit and ongoing construction under the Building Permit. DCRA further testified that the ZA properly approved the Building Permit in accordance with the Zoning Regulations, because (i) the Building Permit Plans do not conflict with the BZA-approved plans in the areas for which the Board granted relief, (ii) the height of the penthouse approved in the Building Permit Plans complies with the Zoning Regulations, and (iii) the construction on the Property is in accordance with the Building Permit Plans. See DCRA’s Joinder of Permit Holder’s Motion to Dismiss Appeal as Untimely Filed. (Ex. 23, p.1.)

Owner’s Case. Owner presented testimony from Brian Papke, a representative of Owner. Owner asserted that the appeal was untimely filed and must be dismissed. Owner asserted that based upon the clear language of the Zoning Regulations and upon prior rulings by the Board and the DC Court of Appeals, the appeal was untimely because it was filed more than 60 days after issuance of the Building Permit and that there was no basis for extending the 60-day appeal period, as set forth in 11 DCMR § 3112.2. Owner further testified that all construction activity at the Property complies with the Building Permit Plans and with the relief granted by BZA Order No. 18330. In addition, Owner argued that the appeal was without merit and should be dismissed for three reasons: (i) the ZA routinely grants building permits for projects that include modifications to BZA-approved plans, so long as the plans do not impact the relief granted or the conditions set forth in the BZA order; (ii) the District of Columbia is estopped from revoking the Building Permit; and (iii) the appeal is barred by the doctrine of laches.

Closing of the Record. The record closed at the conclusion of the hearing on February 9, 2016, with the exception of the parties' proposed findings of fact and conclusions of law, which were filed on March 10, 2016.

Decision Meeting. At the Board's public meeting of March 15, 2016, the Board voted to grant the Owner's and DCRA's motion to dismiss the appeal based on untimeliness. The Board also voted to deny the appeal on the merits.

FINDINGS OF FACT

The Property and Prior BZA Approval

1. The Property is located at 2337 Champlain Street, NW, which has frontage on Champlain Street, NW to the west, a public alley to the east, and private property to the north and south.
2. On November 18, 2011, FCP Champlain, LLC, the prior owner of the Property (the "Prior Owner") filed an application with the Board to develop the Property with a new residential building.
3. The Prior Owner's BZA application included a request for special exception relief for additional height under 11 DCMR § 1403 and a variance from the floor area ratio ("FAR") requirements under 11 DCMR § 402.
4. The Association participated as a party in opposition to the BZA case.
5. Pursuant to BZA Order No. 18330, effective on July 26, 2012 (the "BZA Order"), the Board approved the requested special exception and variance relief for the Property. The approved BZA plans (the "BZA Plans") showed a maximum building height of 48 feet, 9 inches (elevation 198 feet 10 inches)² to the top of the building roof, elevation 199 feet, 11 inches to the top of the building parapet, and elevation 207 feet, 10 inches to the top of the penthouse. The approved plans showed a maximum density of 2.41 FAR.
6. The BZA Order imposed two conditions as part of the approval: "(1) Access to the roof deck shall be limited to occupants of the seven residential units on the top floor of the front bar of the [s]ubject [b]uilding, as identified on the plans presented to the Board in the record at Exhibit 44; and (2) The roof deck space for the [s]ubject [b]uilding shall be set back at least 20 feet from the north property line and shall be demarcated by an open metal railing." Appellants do not contend that Owner has violated these two conditions. The BZA Order did not impose any condition related to the height of the penthouse.
7. The Association appealed the BZA Order to the District of Columbia Court of Appeals. Prior Owner and the Association settled the appeal by signing an Adjacent Property Owner Agreement (the "Agreement").

² All heights are referenced at the actual elevation (i.e., in feet and inches above sea level), not above the building height measuring point.

8. On April 9, 2013, the ZA issued a determination letter approving a slightly lower height of the building's roof and parapet as being in accordance with the BZA Order, which Prior Owner requested as part of the Agreement.

Owner's Revisions to Approved Plans

9. Owner purchased the Property in November, 2013, and revised the design of the building to create better efficiencies. The design revisions did not impact any of the relief approved by the BZA.
10. The initial version of Owner's revised plans incorporated various changes to benefit the Erie Building, including moving the penthouse farther from the Erie Building, but slightly increasing its height from 207 feet, 10 inches as shown on the BZA Plans to 208 feet, 9.36 inches (i.e., 208.78 feet). The revised penthouse height complied with 11 DCMR § 400.7. The revised plans did not change the height or FAR of the building, and were in accordance with the relief granted by the BZA Order.
11. Owner reviewed the revised plans with the ZA in November, 2013. On December 27, 2013, the ZA issued a determination letter stating that the revised drawings were consistent with the BZA Order and did not expand or create any new areas of zoning relief. (Ex. 16B.)
12. Owner also reached out to the Association at that time through Wiedis and met with him on December 10, 2013, to discuss the revised plans for the building.
13. On January 2, 2014, Wiedis emailed Owner expressing general support for the revised plans and agreed that the refinements should be submitted to the ZA for review. Wiedis indicated that proceeding with the plans developed by the Prior Owner would result in additional objections from the Association. The plans submitted to the ZA showed a penthouse height at 208.78 feet. (Ex. 16D.)
14. Owner contacted the ZA for a second time to provide additional information on the project's revisions and its work with the Association. On February 10, 2014, the ZA issued a second determination letter to the Owner, concluding that the proposed revisions were consistent with the BZA Order and the applicable Zoning Regulations. (Ex. 16C.)

Owner's Outreach and Information Provided to Appellants

15. Following Wiedis's general statement of support for the revised project and the ZA's confirmation that the revised plans were consistent with the BZA approved plans, Owner continued with the preparation of design and construction documents. Given Appellants' active involvement in the project, Owner took significant steps to outreach to Appellants and work through further refinements to the project in response to specific requests and concerns from Appellants:

- a. December 10, 2013: Owner met with Wiedis to present the revised plans.
- b. January 2, 2014: Wiedis emailed Owner expressing general support for the refinements and agreed that the refinements could be submitted to the ZA for the requested determination letter.
- c. January-March, 2014: Owner and Appellants exchanged multiple emails specifically regarding the penthouse and Appellants' concerns regarding the location of the rooftop air handling units. (Ex. 16E.)
- d. March 18, 2014: Owner presented a modified penthouse structure to Appellants that included a penthouse parapet so that the air handling units could be located on top of the penthouse and screened, instead of being located on the building's main roof as previously proposed. This change was in direct response to Appellants' concerns regarding the location of the air handling units. In the plans presented to Appellants at the March 18, 2014 meeting, the height of the penthouse was shown at 212.28 feet (i.e., the 208.78-foot penthouse structure plus 3.5 additional feet for the parapet to screen the air handling units). The height of the revised penthouse complied with 11 DCMR § 400.7.
- e. March 19, 2014: Owner emailed Wiedis the plans that were presented at the March 18, 2014 meeting (the "March Plans"). The March Plans showed the height of the penthouse at 212.28 feet (i.e., 212 feet, 3.36 inches). (See email and relevant plan pages at Ex. 16F.) The height of the revised penthouse complied with 11 DCMR § 400.7.
- f. April 29, 2014: Owner re-sent Wiedis the March Plans via email and affirmatively stated that Owner was nearing completion of the building permit plans which were being developed in accordance with the March Plans. (Ex. 16G.)
- g. September 27, 2014: Wiedis emailed Owner, noting that there was activity on the Property and requested a status update. Owner responded on September 30, 2014, indicating that it planned to build the project in accordance with the March Plans. (Ex. 16H.)
- h. February 17, 2015: Wiedis emailed questions to Owner regarding site work and requested clarification as to the plans for the proposed project. The following day, Owner reaffirmed that the building would be constructed in accordance with the March Plans. Owner agreed to meet with Appellants to review those plans. (Ex. 16I.)
- i. March, 2015: Owner and Wiedis had multiple email correspondence regarding the status of permits and construction based on Appellants' active monitoring of the construction site. Owner provided a copy of the Foundation to Grade permit to Wiedis. (Ex. 16J.)
- j. May 12, 2015: Owner met with Appellants to review the Building Permit Plans. The parties visited the roof of Appellants' property and discussed the planned height

of the penthouse and setbacks from Appellants' property. Owner informed Appellants that the Building Permit Plans had been finalized and were submitted for approval to DCRA.

Building Permit and Construction

16. Relying on Appellants' representation that the penthouse shown in the March Plans was the best solution, Owner finalized the plans and submitted them to DCRA in July, 2014. The Building Permit Plans showed a penthouse height of 213.10 feet, which complied with 11 DCMR § 400.7.
17. The Building Permit Plans were dated for permit as of July 18, 2014, and revised as of February 6, 2015, for construction drawings.
18. DCRA issued the Building Permit on June 17, 2015. (Ex. 16K.) The Building Permit Plans showed a building height and FAR that complied with the relief granted by the Board in the BZA Order. The Building Permit Plans showed a penthouse height of elevation 213.10 feet. The height of the penthouse complied with 11 DCMR § 400.7.
19. By the time the Building Permit was issued, Owner had already undertaken the following pre-construction activities at the Property: (i) broke ground at the end of January/beginning of February, 2015; (ii) undertook excavation, underpinning, and sheeting/shoring activities during February and March, 2015; and (iii) completed the building's foundation in April, 2015.
20. Owner commenced construction on the Property pursuant to the Building Permit immediately following its issuance. Foundation to grade construction had commenced in April, 2015. Owner laminated and displayed the Building Permit on a plywood board at the front of the Property, along with all other permits and Traffic Control Plans for the construction activity on the Property. In June and July, 2015, Owner constructed the building's podium and other items with structural concrete. In August, 2015, Owner started framing the building. The Owner continued construction through early October, 2015, without hearing any opposition from Appellants.

Appeal

21. Appellants filed the appeal on October 23, 2015, which was more than 125 days after DCRA issued the Building Permit. When the appeal was filed, construction on the project was nearly complete. The roof of the main building and all of the parapet walls were complete. The elevator shaft and stair towers were constructed at their full heights and the roof was framed. The penthouse walls were erected and most of the roof trusses were in place.
22. In early October, 2015, Appellants first notified Owner of their opposition to the constructed penthouse. Prior to receiving this notice, Owner had no knowledge of Appellants' concern with the penthouse based on the many interactions with Appellants.

Case on the Merits

Building Permit was Properly Issued

23. Owner and DCRA requested that the Board deny the appeal and affirm the ZA's approval of the Building Permit as compliant with the Zoning Regulations. Owner asserted that modifications to BZA-approved plans that do not impact the relief granted have been permitted for many years by the ZA. Section 3125.8 of the Zoning Regulations requires that "[a]n applicant shall be required to carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board, unless the Board orders otherwise." Owner provided evidence that this provision of the Zoning Regulations has consistently and historically been interpreted to mean that an applicant must carry out construction of a project in accordance with the approved plans as it relates to the relief granted by the Board. The ZA testified that changes to the plans that do not affect the relief granted have been and may be approved by his office so long as the changes comply with the Zoning Regulations.
24. The ZA reviewed proposed modifications to the BZA-approved plans on multiple occasions, and each time determined that the revised plans were within the scope of the plans approved by the BZA, did not extend the relief granted by the BZA, and did not create any new areas of non-conformity.
25. When the ZA approved the Building Permit, the ZA found that the Building Permit Plans complied with the relief granted by the BZA and the penthouse complied with 11 DCMR § 400.7. Thus, the ZA's determination to approve the Building Permit Plans was appropriate.

Appeal is Barred by Equitable Estoppel

26. Owner argued that the appeal was barred by the doctrine of equitable estoppel. The elements of estoppel are as follows: "a party (a) acting in good faith; (b) on affirmative acts of a municipal corporation; (c) makes expensive and permanent improvements in reliance thereon; and (d) the equities strongly favor the party seeking to evoke the doctrine." *Wieck v. D.C. Bd. of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. App. 1978). Owner asserted that all four elements of the doctrine of estoppel were met for the following reasons:
- a. Owner acted in good faith by (i) repeatedly seeking the ZA's approval for plan modifications and receiving determinations that the project was in compliance with the Zoning Regulations; (ii) filing all required plans with DCRA; (iii) obtaining all issued permits and posting them in a conspicuous location on the Property; (iv) continually working with Appellants to gain support for refinements to the project throughout the process; and (v) designing a penthouse that complied with the relevant height requirement of 11 DCMR § 400.7;
 - b. There was an affirmative act of a municipal corporation by virtue of the issuance of multiple ZA determination letters and the Building Permit by the properly empowered administrative official;

- c. Owner made expensive and permanent improvements in reliance on the ZA's determinations and the issuance of the Building Permit, such as excavating the Property, constructing the building to its full height under roof, and expending a tremendous amount of time, energy, and money in the construction of the building. By the time Appellants filed the appeal, Owner had expended over \$4 million on the project; and
- d. Equities favor the Owner since revocation of the Building Permit would result in the Owner being unable to occupy or sell units in the building that has been constructed fully in accordance with the Building Permit.

Appeal is Barred by Laches

27. Owner argued that under the equitable doctrine of laches, Appellants were barred from taking an appeal. The doctrine of laches comprises two basic elements, namely (a) unreasonable delay in bringing the appeal; and (b) prejudice to the party asserting laches. *Goto v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. App. 1980). Owner indicated that it met both elements of laches as follows:

- a. Appellants knew of Owner's plans to construct the building according to the Building Permit Plans since before the Building Permit was issued, or, at the very latest, by June, 2015 (when the Building Permit was issued and posted on the Property), but Appellants waited to file an appeal until construction was nearly complete; and
- b. Owner would be prejudiced upon granting the appeal because doing so would prevent Owner from occupying or selling units in the building that has been constructed fully in accordance with the Building Permit.

CONCLUSIONS OF LAW

Before ruling on the merits of an appeal, the Board is bound to consider a motion to dismiss an appeal for lack of jurisdiction on timeliness grounds. *See Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008). If an appeal is not timely filed, the Board is without power to consider it. *Economides v. D.C. Bd. of Zoning Adjustment*, 954 A.2d 427 (D.C. 2008); *Waste Mgmt. of Md., Inc. v. D.C. Bd. of Zoning Adjustment*, 775 A.2d 1117 (D.C. 2001).

MOTION TO DISMISS

Appeal was Untimely Filed

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Paragraph (a) provides that "an appeal must be filed within 60 days from the date the person filing the appeal first had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier." *See also Waste Mgmt.*, 775 A.2d at 1121-22. The Zoning Commission adopted this provision in Z.C. Order No. 02-01, dated February 7, 2003, "in order to reduce uncertainty and litigation over the timeliness of Board of Zoning Adjustment appeals."

Once an individual has actual or constructive notice or knowledge that a zoning decision has been made, he is obligated to undertake due diligence to determine the nature of the decision in order to timely appeal. See *Diamond v. Davis*, 680 A.2d 364, 372 (D.C. 1996) (the period for filing a claim is triggered by inquiry notice, which is the knowledge which "a plaintiff would have possessed after due investigation"). "Ordinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure, and its intended use as described in the permit application, conform to the zoning regulations." *Basken*, 946 A.2d at 364; see also *Schonberger v. D.C. Bd. of Zoning Adjustment*, 940 A.2d 159, 161 n. 2 (D.C. 2008) (describing the BZA's determination that a building permit "contained the relevant zoning decision").

In the present case, Appellants had actual knowledge of the penthouse height prior to the issuance of the Building Permit. Appellants were actively involved in the development of the plans for the Property, knew of Owner's multiple discussions with the ZA, communicated frequently with Owner regarding status of plans and approvals, and actively monitored the status of construction on the Property. DCRA issued the Building Permit on June 17, 2015. Owner posted the permit on the Property and commenced construction immediately thereafter. Based on the evidence in the record, the Board concludes that Appellants knew or should have known about the issuance of the Building Permit no later than June 17, 2015.

Appellants were required to file this appeal by August 16, 2015, which is 60 days after the issuance of the Building Permit on June 17, 2015. See *Georgetown Residents Alliance v. D.C. Bd. of Zoning Adjustment*, 816 A.2d 41, 49-50 (D.C. 2003) (upholding Board's decision that appeal was untimely where record was clear that ANC had knowledge of the issuance of the permit, the community generally was aware of it, and the developer of the project had engaged with the ANC and community concerning the permit); see also Appeal Nos. 17468 and 17966.

The Board is not persuaded by Appellants' attempt to make the appeal timely by stating that they were unaware of the penthouse height until Owner began construction of the penthouse in October, 2015. First, Appellants testified that they made no effort to review or request the Building Permit Plans during the 60 day period, even though the Building Permit Plans were available to the public on an ongoing basis at DCRA. Second, Owner presented the March Plans to Appellants on March 18, 2014, which showed an increased penthouse height. Owner emailed the March Plans to Appellants the following day, and emailed them again to Appellants in April, 2014. Owner reviewed the submitted Building Permit Plans with Appellants in May, 2015, which plans showed the final approved penthouse height at elevation 213.10 feet. Thus, Appellants had actual knowledge of the increased height. Third, the Appellants acutely monitored construction activity on the Property for a number of years and asked for and were provided all information that they requested. Appellants should have, at the very minimum, requested to see the approved Building Permit Plans from DCRA following the issuance of the Building Permit. Appellants had 60 days to do so, but neglected to make that effort at all.

Notwithstanding their significant involvement in the development process, Appellants claim that they only had notice of the plans for the Property once the Owner commenced construction of the penthouse, after the building was constructed to its full height. This position is inconsistent with the factual record based on (i) Appellant's active monitoring of the project and the Property, (ii) Owner's active outreach to Appellants regarding the plans for the project, (iii) Owner's agreement

to modify the plans to address concerns of Appellants; and (iv) Appellants admission that they did not even request a copy of the plans after the Building Permit was issued.

The Board concludes that the date that the Building Permit was issued is the absolute latest that Appellants should have known of the decision. In fact, Appellants had actual knowledge of the proposed plans much earlier than that. Given that Appellants waited more than 125 days after the issuance of the Building Permit to file the appeal, the Board concludes that this appeal was filed untimely.

Appeal Period Should Not Be Extended Beyond the 60-day Appeal Period

Section 3112.2(d) of the Zoning Regulations allows the Board to hear an appeal untimely filed only if both (i) there are exceptional circumstances outside the Appellants' control, which could not have been reasonably anticipated, and that substantially impaired the Appellants' ability to file this appeal to the Board; and (ii) the extension of time will not prejudice the Owner.

In this case, the Board finds no exceptional circumstances outside of Appellants' control that substantially impaired their ability to file a timely appeal. Appellants knew of the planned height and configuration of the penthouse with more than sufficient time to file an appeal within 60 days of issuance of the Building Permit. Owner presented multiple updates to Appellants in early 2015, corresponded numerous times with Appellants regarding these updates, and met again with Appellants in May, 2015. Following issuance of the Building Permit in July, 2015, the Building Permit Plans were on file at DCRA and available for review. However, as testified by Appellants, they did not submit a request to review those plans until October, 2015, which was more than 60 days past the appeal deadline.

There are no exceptional circumstances outside of Appellants' control that could have substantially impaired their ability to file an appeal. Appellants argue that they were not provided with plans prior to October 22, 2015. That statement is not accurate based on the undisputable facts set forth in the record. Owner informed Appellants at every possible step that it planned to build the project with the penthouse as modified based on numerous discussions with Appellants. In this case, "the Board need not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision." BZA Appeal No. 17411 of *Basken*, at p. 6.

In addition, the Board concludes that allowing this appeal to proceed will cause substantial prejudice to the Owner. Owner repeatedly sought the ZA's approval and Appellants' support for refinements to the project. Before construction began, Owner spent a great deal of time and money working with its neighbors and the ZA to ensure that the project complied with applicable regulations. The changes that were made after the issuance of the February, 2014, ZA determination letter were made in direct response to requests from Appellants and were presented to Appellants in multiple ways (via email, in person, through plans, etc.).

Appellants waited until construction was nearly complete to put the Owner on notice of their complaints. As a practical matter and as a direct result of Appellants' delay, construction on the project was nearly complete before the Owner had notice of the challenge. The project is presently on schedule to deliver imminently. If the Board permitted this very delayed appeal to move forward, the Owner would not be able to obtain its certificate of occupancy or sell any of the

residential units in the building, which include both market rate and affordable units. As a result, Owner would be significantly prejudiced if this Board allows this untimely appeal to proceed.

Appellants did not file the appeal within the required timeframe and cannot satisfy either test for exceptional situation. For the reasons discussed above, the Board finds that the appeal is dismissed due to being untimely filed.

DECISION ON THE MERITS

The Building Permit was Properly Granted

Based on the foregoing findings of fact, the Board concludes that the ZA's decision to issue the Building Permit must be upheld. The Board finds that the ZA properly approved the Building Permit Plans and granted the Building Permit.

Modifications to BZA-approved plans that do not impact the zoning relief granted have been permitted for many years by the ZA. Section 3125.8 of the Zoning Regulations requires that "[a]n applicant shall be required to carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board, unless the Board orders otherwise." Based on the precedents provided by Owner and the testimony of the ZA, this provision has consistently and historically been interpreted to mean that an applicant must carry out construction of a project in accordance with the approved plans *as it relates to the relief granted by the Board*. The Board finds that the ZA routinely grants building permits for projects that include modifications to BZA-approved plans and is permitted to do so if the revised plans do not impact the relief granted or the conditions set forth in the applicable BZA order and the changes comply with the Zoning Regulations.

In the present case, the ZA reviewed proposed modifications to the plans on multiple occasions, including (i) in April, 2013, for the Prior Owner, to confirm that a reduction in height of the roof and parapet was consistent with the BZA-approved plans and the BZA order; (ii) in December, 2013, for the Owner, to confirm that the revised building design was consistent with the BZA-approved plans and the BZA order; (iii) in February, 2014, again for the Owner, to confirm that further modifications to the plans were still consistent with the BZA-approved plans and BZA Order; and (iv) in June, 2015, for the Owner, with the issuance of the Building Permit. All of the ZA's determination letters arrive at the same conclusion: that the revised plans do not change any areas of zoning relief or create any new areas of non-conformity, and that therefore the revised plans are within scope of the BZA Order.

The ZA approved plans showing a penthouse height of 213.10 feet. Section 400.7 of the Zoning Regulations permits a penthouse height of up to 18 feet, 6 inches from the roof upon which it is located (in this case, elevation 215.14 feet). Thus, the penthouse height complies with the Zoning Regulations and is less than the maximum height permitted under 11 DCMR § 400.7.

Accordingly, the Board finds that the ZA properly approved the Building Permit Plans because they were consistent with the relief approved by the BZA Order and they complied in all other respects with the Zoning Regulations, including the height of the penthouse.

The Appeal is Barred by the Doctrine of Equitable Estoppel

Based on the evidence in the record and the testimony presented at the public hearing, the Board finds that Owner meets the four-prong test of equitable estoppel, and that the appeal should be dismissed for the reasons set forth below.

Good Faith

Owner acted in good faith through repeatedly seeking the ZA's approval for plan modifications, receiving determinations that the project was in compliance with the Zoning Regulations and the BZA Plans, continually seeking Appellants' support for refinements to the project, filing all required plans with DCRA, obtaining all issued permits, and exhibiting the permits in a conspicuous location at the front of the Property. Owner reasonably assumed it was proceeding in full conformity with all required regulations, the issued Building Permit, and with no objection from Appellants.

This Board has found that a property owner meets all procedural and substantive requirements in good faith by obtaining all permits for construction, with such permit plans having been determined to be in compliance with regulations by the appropriate city officials. BZA Appeal No. 14110, Finding of Fact ("FF") No. 18. Moreover, this Board found good faith because "the property owner had no reason to suspect that an appeal would be filed... since the project had been known to the community for two years and construction had commenced." *Id.* at FF 19. In that case, the appeal was filed six months after the building permit was issued and five months after construction began, during which time the property owner had no reason to suspect that there was any community opposition.

In the present case, the Board finds that Owner met all procedural and substantive requirements in good faith. Owner filed all required plans with DCRA, obtained all required permits for the construction of the building, and exhibited the permits in a conspicuous location. Owner reasonably assumed it was proceeding in full conformity with the Zoning Regulations and the Building Code, since the Building Permit Plans were reviewed and determined to be in compliance by the appropriate District officials. Owner obtained the required permits, constructed the building, and incurred substantial expenditures as a result of that reliance.

The Board finds that Owner also acted in good faith in meeting with Appellants on multiple occasions throughout the design and development process. Owner spent a significant amount of time and effort working with Appellants to ensure that Appellants were aware of changes to the project and to ensure that the project complied with the applicable regulations. Changes that Owner made to the project, particularly those related to the penthouse and the relocation of the air handling units, were in direct response to concerns raised by Appellants. Owner presented those changes to Appellants on multiple occasions and in many formats. There is no evidence in the record of Appellants giving Owner any indication of renewed opposition to the project until October, 2015, shortly before the appeal was filed. During construction, Owner had no reason to believe that Appellants had any further concerns with the revised plans and had no reason to suspect that an appeal would be filed.

Based on the foregoing, the Board finds that Owner acted in good faith throughout the development entitlement and construction process, such that the first prong of the estoppel test is clearly met.

Affirmative Act of the District

The Board finds that an affirmative act of the District was made in the issuance of the Building Permit.

“The issuance of [a] building permit [is] an affirmative act of the District government, satisfying the second element of estoppel.” BZA Appeal No. 18181, p. 8; *see also* BZA Appeal No. 14127, FF No. 38 (“lessee acted in good faith, in reliance on the affirmative action of the District of Columbia evidenced by the issuance of permits”). A developer’s reliance on a building permit to construct a building is justifiable “if the person who approved the building permits was the properly empowered administrative official to make such a decision.” BZA Appeal No. 16246, FF No. 19.

In this case, the ZA approved the Building Permit Plans, thus resulting in an affirmative act of the District government. The ZA is the properly empowered administrative official to review building permit plans and make decisions regarding their compliance with the Zoning Regulations. Owner acted in good faith on the affirmative decision of DCRA to issue the Building Permit in June, 2015.

Based on the foregoing, the Board concludes that there was an affirmative act made by the District, thus meeting the second prong of the test for equitable estoppel.

Expensive and Permanent Improvements in Reliance

The Board finds that Owner made expensive and permanent improvements in reliance on the affirmative acts of the District.

This Board has previously found sufficient evidence of expensive and permanent improvements through the expenditure of “\$45 million” and construction of a “ten story structure... [that] was under roof...[and] done with the appellant’s full knowledge” (BZA Appeal No. 13112, p. 6); “approximately \$15,125,100 [between] the issuance of the permit [and] the time of filing th[e] appeal” (BZA Appeal No. 14110, FF No. 19); and “a closed roof... exterior siding finish already in place... all electrical, plumbing, and HVAC rough-ins were done... and the Appellant had expended approximately \$350,000 in construction costs” (BZA Appeal No. 18181, FF 31-33, *citing Saah v. D.C. Bd. of Zoning Adjustment*, 433 A.2d 1114, 1116 (D.C. 1981) at p. 8 (“sixty percent completion of building reconstruction at a cost of approximately \$225,000... found to satisfy estoppel requirement”)).

In the present case, Owner invested a tremendous amount of time and money into the construction of the building, including undertaking the following activities: (i) broke ground at the Property at the end of January/beginning of February, 2015; (ii) undertook excavation, underpinning, and sheeting/shoring activities on the Property during February and March, 2015; (iii) completed the building’s foundation in April, 2015; (iv) constructed the building’s podium and other items with structural concrete in June and July, 2015; and (v) started framing at the beginning of August, 2015.

Based on evidence in the record and testimony at the public hearing, it is clear that by October, 2015, construction of the building was nearly complete. The roof of the main building and all of the parapet walls were complete. The elevator shaft and stair towers were constructed at their full heights and the roof was framed. The penthouse walls were erected and most of the roof trusses were in place. By the time Appellants filed the appeal, Owner had expended over \$4 million on the project. Appellants knew that the Building Permit had been issued and should have been aware of the modification to the penthouse height long before they filed the appeal or first complained of the penthouse height to Owner. By then, Owner had already made expensive and permanent improvements to the Property in reliance on the District's affirmative actions and the absence of any opposition from Appellants.

Based on the foregoing, there is substantial evidence in the record that Owner made expensive and permanent improvements to the Property in reliance on the affirmative acts of the District, thus meeting the third prong of the test for equitable estoppel.

Equities Strongly Favor the Owner

The Board finds that equities in this case strongly favor Owner. Revocation of the Building Permit would result in Owner being unable to occupy the constructed five-story building and would result in the units, both affordable and market rate, not being able to be sold.

In evaluating the balance of equities, this Board has previously found that equities strongly favored the property owner when an appeal would have "cause[d] the revocation of a building permit for a nine-story mixed-use structure six months after the building permit was issued and five months after construction was started." BZA Appeal No. 14110, FF No. 20. In that case, the appellant "sat by while the property owner changed its position to its substantial detriment. If the appellant had timely filed the appeal, the issues raised in the appeal could have been resolved before the property owner made substantial expenditures pursuant to the issuance of the building permit." *Id.*

Moreover, this Board has found in favor of property owners when balancing equities, asserting that "a redesign and the variance process take time and carry additional costs... without any assurance of success. During this period of time the Applicant will continue to pay the mortgage, insurance, and property taxes... with no offsetting income in sight for months to come." BZA Appeal No. 18181, p. 9.

Appellants waited until construction of the building was nearly complete to put Owner on notice of their opposition, despite having at least 125 days of notice that the building was being constructed (based on the date of issuance of the Building Permit). Appellants sat by while Owner obtained the Building Permit, excavated the Property, constructed the building, and built the majority of the penthouse, thoroughly changing its position to its substantial detriment. Had Appellants expressed their concerns relating to the penthouse height during the period in which Owner reviewed the plans and responded to Appellants concerns, the issues raised by Appellants could have been resolved before Owner made substantial expenditures. However, between June, 2015, when the Building Permit was issued, and early October, 2015, when Appellants first voiced their concerns, Owner invested significant time and money into construction of the building, all without knowledge of Appellants' opposition. The Board finds that it was a direct result of

Appellants' delay that construction of the building was nearly complete before Owner was given notice of the challenge.

Based on the facts of this case, the Board concludes that the fourth and final prong of the test for equitable estoppel has been met, and thus dismisses the appeal on the basis of equitable estoppel.

The Appeal is Barred by the Doctrine of Laches

The Board further concludes that the doctrine of laches applies in the subject case. Laches will bar the claim of an appellant if they "delayed unreasonably in bringing their appeal to the Board to [Appellee's] prejudice. The principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself." *Goto*, 423 at 925. In BZA Appeal No. 14110, this Board found that the doctrine of laches barred the appeal when the appellant was aware of the issuance of the building permit and the onset of construction, yet delayed filing of the appeal for several months. "The appellant's failure to act in a timely manner permitted the owners to incur substantial expense for construction in good faith reliance upon their building permit." BZA Appeal No. 14110, p. 8.

In the present case, Owner had no knowledge of Appellants' continued opposition to the project when it filed its Building Permit application, was granted the Building Permit, or began and continued construction on the project. Owner had no reason to believe that Appellants would challenge the issuance of the Building Permit, particularly because Owner had redesigned the roof and relocated the air handling units in direct response to Appellants' requests and specific concerns. In May, 2015, Owner met with Appellants to present the Building Permit Plans that were ultimately approved by DCRA, and those same plans were readily available at DCRA to the public on an on-going bases. Appellants testified that they did not make any effort to secure a copy of the Building Permit Plans following issuance of the Building Permit and did not voice any additional concerns regarding the penthouse height between May, 2015 and October, 2015.

Due to Appellants' actual knowledge of the changes to the height of the penthouse but failure to voice their objections to Owner, the Board finds that Appellants inexcusably waited an unreasonable and unsatisfactorily explained length of time so as to make a determination against Owner unfair. Appellants knew of the planned height and configuration of the penthouse for many months prior to issuance of the Building Permit but did not make any indication that they would oppose the project or file this appeal.

Moreover, the Board finds that Appellants were also aware of the issuance of the Building Permit and the onset of construction, yet delayed filing the appeal for several months. Appellants did not notify Owner of its opposition to the Building Permit or the approved Building Permit Plans until the beginning of October, 2015, such that Owner's construction activities were taken in good faith. The prejudice to Owner resulted from the timing of the filing of the appeal, not Owner's purposeful decision to proceed with construction despite clear or ongoing opposition. As a result, Appellants' failure to act in a timely manner permitted Owner to incur substantial expense for construction, such that the doctrine of laches should rightfully bar a successful appeal of this case.

For the reasons stated above and based on prior rulings by this Board, the Board concludes that the allegations contained in this appeal are without merit. The Board finds that the ZA

appropriately approved the Building Permits Plans and the Building Permit, and that Owner carried out construction of the building in accordance with the Building Permit Plans, which did not increase any of the zoning relief granted by the BZA or create any new nonconformities. Moreover, the Board concludes that the appeal should be dismissed on the basis of the doctrines of equitable estoppel and laches, as set forth above.

Based on the foregoing, it is hereby **ORDERED** that the appeal is **DISMISSED** based on timeliness and **DENIED** based on the merits of the appeal and that the decision of DCRA to issue Building Permit No. B1410680 is hereby **UPHELD**.

VOTE: