

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

Appeal of the Erie Condominium Association

BZA Appeal 19174

DCRA'S MOTION TO ACCEPT DCRA'S MARCH 11 FILING AS TIMELY FILED

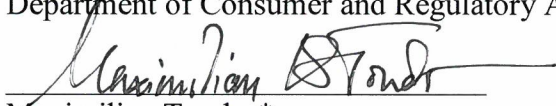
DCRA sincerely apologizes for the filing of its proposed Findings of Fact and Conclusions of Law one day after the deadline established by the Board at its February 9, 2016 hearing. The delay was due to the illness of DCRA's undersigned counsel.

Therefore, DCRA respectfully requests that the Board grant this motion to accept DCRA's March 11, 2016 filing of its proposed Findings of Fact and Conclusions of Law as timely filed.

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

Date:

3/4/16


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

Appeal No. 19174 of Unit Owner’s Association of The Erie Condominium pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue a building permit (B1410680) on June 17, 2015 to allow the construction of a 40 unit apartment building at 2337-2345 Champlain Street, N.W. (Square 887, Lot 2563).

HEARING DATE: February 9, 2016
DECISION DATE: March 15, 2016

DECISION AND ORDER

INTRODUCTION

The appeal was filed by the Board of Zoning Adjustment (“**Board**” or “**BZA**”) on October 23, 2015, by the Unit Owner’s Association of the Erie Condominium (“**Appellant**”). Appellant challenges the determination by the Zoning Administrator (“**ZA**”) that the proposed the penthouse roof height authorized by building permit B1410680 (the “**Permit**”) complies with the requirements of Sections 3125.7, 3125.8 and 3205 of the Zoning Regulations. Appellant asserts that the penthouse roof height authorized by the Permit differed from that shown in the plans approved by the Board in Application Number 18339 of FCP Champlain, LLC, and that this discrepancy violated Sections 3125.7 and 3125.8, which require the owner of 2337-2345 Champlain Street, N.W. (the “**Property**”) who obtained the Permit (the “**Permit Holder**”) to build “only in accordance with the plans approved by the Board”, and Section 3205, which requires compliance with all conditions in a Board Order.

Based on the evidence of record, including extensive prehearing submissions and testimony received at the public hearing, and for the reasons set forth below, the Board denies the appeal as untimely filed, and as without merit.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing.

By a memorandum dated November 9, 2015, the Office of Zoning provided notice of the appeal to Advisory Neighborhood Commission (“**ANC**”) 1C, in which district the Property is located; ANC 1C07, the Single Member Commission in whose district the Property is located; the Councilmember for Ward One; the Office of Planning; and the ZA, whose approval of the issuance of the Permit is challenged in this appeal. The Office of Zoning scheduled a hearing on February 9, 2016. Pursuant to 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed

notice of this hearing to ANC1C; Appellant, Permit Holder, and the ZA. Notice was also published in the D.C. Register on November 20, 2015 (62 DCR 15114).

Parties.

Appellant and the ZA, represented by the Department of Consumer and Regulatory Affairs (“DCRA”), were automatically parties to this proceeding. The Permit Holder filed a Motion to Intervene, but automatically is a party under Section 3199.1(a)(3) of the Zoning Regulations. There were no other requests for party status.

The Board received prehearing materials from the Appellant on October 23, 2015 (BZA Exhibits 1-3), on January 22, 2016 (BZA Exhibit 18), on February 1, 2016 (BZA Exhibit 19), and on February 8, 2016 (BZA Exhibits 24 and 27). The Permit Holder submitted prehearing materials for the Board's consideration on January 26, 2016 (BZA Exhibits 16-16K) and on February 8, 2016 (BZA Exhibit 25), and DCRA submitted its prehearing statement on February 5, 2016 (BZA Exhibit 23).

Motion to Dismiss.

On January 26, 2016, Permit Holder moved to dismiss the appeal as untimely filed, which DCRA joined in its filing of February 5, 2016. BZA Exhibits 16-16K and 23. The Board heard arguments and received testimony on the Motion to Dismiss at the beginning of the hearing on February 9, 2016, and deferred ruling on that Motion.

Hearing and Closing of the Record.

The Board convened a public hearing on February 9, 2016, during which time Appellant, DCRA and Permit Holder presented their respective cases through legal counsel. The Board received testimony on behalf of Appellant from the president of the Unit Owner’s Association of the Erie Condominium, Richard Wiedis. The Board received testimony on behalf of Permit Holder from Brian Papke, the Design Manager for the Permit Holder. The ZA presented testimony through the ZA, Matthew LeGrant.

The Board deferred its decision on the merits of the case and closed the record, except to receive proposed findings of fact and conclusions of law from all parties by March 10, 2016. The Board scheduled the case for decision on March 15, 2016, at which time it considered the merits of the case and voted - - to deny the appeal.

FINDINGS OF FACT

The Property

1. The Property is a lot located at 2337-2345 Champlain Street, N.W.
2. The Property is currently owned by 2337 Champlain Street, LLC.

3. The Property is located in the R-5-B Zone District and the Reed-Cooke Overlay District.
4. A prior owner of the Property applied on November 18, 2011 to the Board for (i) special exception relief to increase the maximum permitted height from 40 feet to 48 feet, 9 inches; and (ii) variance relief to increase the permitted floor area ratio (“FAR”) by 0.25 FAR (or 3,643 square feet of gross floor area) in BZA Application Number 18830 (“**BZA 18830**”). Exhibit A, at 1, to Appellant’s Pre-Hearing Statement, BZA 19174 Exhibit 18, at 27.
5. Appellant was granted status as parties in opposition to BZA 18830, and used the same legal counsel. Exhibit A, at 2, to Appellant’s Pre-Hearing Statement, BZA 19174 Exhibit 18, at 27.
6. The Board in an Order dated July 26, 2012 in Application No. 18830 of FCP Champlain, LLC (the “**BZA 18830 Order**”) granted the relief requested subject to:
 - a. “the approved plans” (“**BZA 18830 Approved Plans**”), with a subsequent statement that the owner of the Property shall “carry out the construction ... only in accordance with the plans approved by the Board,” and
 - b. two conditions: (i) the access to the roof decks be limited to the occupants of the seven top floor residential units as shown on the plans in the BZA 18830 record as Exhibit 44; and (ii) the roof deck space be set back at least 20 feet from the north property line and bounded by a metal railing.Exhibit A, at 16, to Appellant’s Pre-Hearing Statement, BZA 19174 Exhibit 18, at 27.
7. Appellant appealed BZA 18830 Order to the District of Columbia Court of Appeals, but agreed to dismiss that appeal as part of a settlement agreement with the previous owner of the Property. Appellant’s Pre-Hearing Statement, BZA 19174 Exhibit 18, at 4; Permit Holder’s Pre-Hearing Statement, BZA 19174 Exhibit 25, at 7-8 and 30-43 (Exhibit A).
8. As part of that settlement of the appeal of BZA 18830 Order, the prior owner of the Property agreed to change the BZA 18830 Approved Plans to lower the height of the building and of the building parapet and accepted the authority of the ZA to authorize changes from the BZA 18830 Approved Plans without requiring Board approval of these modifications. Appellant’s Pre-Hearing Statement, BZA 19174 Exhibit 18, at 4; Permit Holder’s Pre-Hearing Statement, BZA 19174 Exhibit 25, at 7-8 and 30-43 (Exhibit A).
9. Appellant did not believe that the changes made pursuant to this settlement agreement required approval by the Board as a modification of the BZA 18830 Approved Plans. Instead, Appellant required the Permit Holder to obtain from the ZA a zoning determination letter, which was issued on April 9, 2013. Appellant’s Pre-Hearing Statement, BZA 19174 Exhibit 18, at 10.
10. Appellant had continued interaction with the Permit Holder regarding the proposed development of the three years between BZA 18830 and the issuance of the Permit. DCRA Joinder of Permit Holder’s Motion to Dismiss Appeal as Untimely Filed, BZA 19174 Exhibit 23, at 4.

11. On June 17, 2015, the Permit and the plans approved thereby (the “**Permit Approved Plans**”) were issued by DCRA, having been approved by the ZA.
12. Appellant did not inquire with DCRA if the Permit Approved Plans were available for public consultation during the sixty (60) day appeal period following the issuance of the Permit, but instead waited until after having filed this appeal.
13. On August 16, 2015, the sixty (60) day appeal period specified in Section 3112.2(a) closed without the filing of an appeal.
14. On October 23, 2015 – 128 days after the issuance of the Permit - Appellant filed this appeal of the ZA’s approval of the issuance of the Permit, asserting that the change in the penthouse roof height from the BZA 18830 Approved Plans violated Sections 3125.7 and 3125.8 as well as 3205.

Evidence supplied at Hearing

15. At the hearing, Richard Wiedis, president of Appellant, testified on behalf of Appellant.
16. Brian Papke, Design Manager for the Permit Holder, testified on behalf of the Permit Holder. Mr. Papke testified as to the email communications and meetings between the Permit Holder and Appellant between November 2013 when the Permit Holder acquired the Property and the June issuance of the Permit.
17. The ZA testified in support of his approval of the June 17, 2015 issuance of the Permit. The ZA, with regards to the timeliness issue and the public’s access to plans approved by permits issued by DCRA, testified that in his almost nine years as ZA that he had only encountered approximately three or four occasions when he had to correct a citizen who had been told by someone at DCRA that they could not obtain plans approved by a permit. As to the merits of the appeal, the ZA testified that during his almost nine year tenure as ZA it has been his established practice to apply the requirement of Sections 3125.8 only to the specific areas of relief granted by the Board, and that it is his general understanding that this was the practice of his predecessors as ZAs.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized to hear and decide appeals of alleged violations of the Zoning Regulations by Section 3100.2 of the Zoning Regulations and Section 8 of the Zoning Act of 1938 (D.C. Official Code § 6-641.07(g)(1)).

Appellant has appealed the ZA’s approval the issuance of the Permit, based on the alleged error of determining that the changed height of the penthouse roof in the Permit Approved Plans from the BZA 18830 Approved Plans did not violate the requirements of Sections 3125.7, 3125.8 and 3205 that construction on the Property be “in accordance” with the BZA 18830 Approved Plans

and conditions of the BZA 18830 Order. Based on the findings of fact above and as detailed below, the Board concludes that Appeal was untimely filed and would dismiss on that basis alone. As to the merits of the appeal, the Board concludes that the ZA did not err in approving the Permit as in compliance with Sections 3125.7, 3125.8 and 3205 of the Zoning Regulations.

Timeliness of Appeal

Section 3112.2(a) of the Zoning Regulations requires an appeal to be filed within sixty (60) days of the earliest date on which the person filing the appeal first had, or reasonably should have had, notice or knowledge of the challenged decision. Here, the ZA's decision was made with the issuance of the Permit on June 17, 2015.

Appellant had notice of the pending Permit based on its repeated interactions with the Permit Holder, as well as notice of the Permit when it was posted next door to Appellant. Yet Appellant chose not to contact DCRA to confirm that the Permit Approved Plans corresponded to Appellant's understanding of the Permit Holder's representations of what would be constructed. Appellant's assertion that it did not succeed in obtaining access to the Permit Approved Plans at DCRA after Appellant had filed this appeal does not excuse Appellant's failure to inquire with DCRA as soon as the Permit was issued and posted on the Property next door to Appellant.

Appellant would have the Board expand the appeal period under the Zoning Regulations to long after the sixty (60) day period established by Section 3112.2(a) and without any requirement that a potential appellant at least try to consult the plans approved with a permit within the sixty (60) day appeal period provided by the Zoning Regulations to determine what the permit authorizes may be built at a site. Appellant's citation of *BZA Appeal No. 17109, Appeal of Kalorama Citizens Association* does not support this assertion, but instead emphasizes the inquiry duty of a potential appellant to request the plans approved with a permit from DCRA upon appellant having notice that a permit has been issued. Appellant did not undertake such an investigation, and its failure to do so renders this appeal untimely.

Therefore, the appeal period began to run on June 17, 2015 and terminated on August 16, 2015. As Appellant filed this appeal on October 23, 2015, more than two months after the closure of the 60 day appeal period and more than 120 days after having actual notice of the issuance of the Permit, with the duty to inquire as to the specifics of the plans approved by the Permit, this appeal is untimely and will be dismissed.

ALTERNATIVE – if the Board denies the Motion to Dismiss Appeal as Untimely Filed

The specific circumstances of this case are unusual, and while the Board recognizes the importance to all parties – the ZA, permit holders, neighbors and ANCs – of a clearly defined and limited appeal period, as provided by the sixty (60) day appeal period in Section 3112.2(a), in this case the Board finds that Appellant relied upon the ZA's determination letters as published on the DCRA website to believe that the penthouse roof approved by the Permit would be consistent with that shown by the publicly-available determination letters issued by the ZA. The Board notes that this decision does not absolve potential appellants of the duty to make a sincere attempt to consult the plans approved with a permit at DCRA in the sixty (60) day appeal

period established by Section 3112.2(a). The ruling in this case is instead limited to the specific circumstances where Appellant relied on prior public representations by DCRA in the form of the ZA's Determination Letters as published on the DCRA website. Therefore the Board denies the Motion to Dismiss Appeal as Untimely Filed.

Merits of Appeal

Appellant, who has the burden of proof under Section 3119.2 of the Zoning Regulations, alleges that the ZA erred in approving a penthouse roof height in the Permit Approved Plans that differed from that shown in the BZA 18830 Approved Plans, and that this change violated the requirements of Sections 3125.7, 3125.8 and 3205 of the Zoning Regulations that all construction occur "in accordance with the plans approved by the Board" and subject to the conditions of the BZA 18830 Order. Having considered the evidence presented on the record and in testimony, the Board has reached the following conclusions.

Appellant did not meet its burden to prove that either of the two conditions included in the BZA 18830 Order were violated, as no evidence was presented that the roof deck was not restricted to users of the top story units or that the roof deck was separated by less than twenty feet from the north property line as delineated by a metal railing. Therefore this allegation of Appellant is without merit.

As to Appellant's allegations that the ZA's approval of the Permit violated Sections 3125.7 and 3125.8, the Board heard testimony from the ZA that it has been his practice throughout his almost nine years as ZA, and his general understanding that his practice was consistent with the practice of prior ZAs, to limit the requirement to construct "in accordance with the plans approved by the Board" to those aspects of the plans directly related to the specific areas of relief granted by the Board. The ZA justified this interpretation as a practical response to the fact that plans submitted to the Board are conceptual plans early in the design stage and require substantial changes to become final building plans. The ZA denied having the authority to exempt insignificant changes from having to return to the Board for a modification, as Section 3125.8 does not distinguish on the basis of the degree of changes from the plans approved by the Board. Therefore any change from the plans approved by the Board, no matter how small – whether a change in exterior cladding material, window placement or design, or in the overall height or bulk of a project – would require a modification approved by the Board. In contrast, the ZA's interpretation of Sections 3125.7 and 3125.8 as limited to the specific relief granted by the Board provided a bright line rule that did not give the ZA additional authority. The ZA asserted that this interpretation reasonably connected the Board's action in granting relief to the requirement that construction conform with that relief, but only that relief – not every detail shown on the plans approved by the Board unless directly linked to the specific relief granted by the Board.

The ZA approved the Permit's changed penthouse roof height because the Board's grant of relief in BZA 18830 did not include the penthouse roof height – the relief was limited to the building's height and FAR. The penthouse roof as approved by the Permit complies with the height restrictions for roof structures of the Zoning Regulations. The ZA therefore asserted that the

penthouse roof height was not subject to the restrictions of Sections 3125.7 and 3125.8 because the penthouse roof height was not part of the specific relief granted by the Board in BZA 18830.

Appellant instead asks this Board to hold that Section 3125.7's phrase "in accordance with the plans approved by the Board" is not limited to the specific relief granted by the Board but instead applies to other details shown in the plan. Appellant provided testimony that Appellant had been consistently concerned with the overall height of the structure, and asserted that the penthouse roof height should be limited by the association with the relief granted for building height. Yet the Board notes that Appellant entered into an agreement with the Permit Holder to change details of the BZA 18830 Approved Plans – including to the building height, which was a specific area of relief granted by the Board. Appellant did not require that these changes receive Board approval as modifications to the BZA 18830 Approved Plans, but instead willingly accepted a determination letter from the ZA that these changes were consistent with the BZA 18830 Approved Plans.

Appellant did not provide the Board with an alternative bright line rule by which the ZA should determine what changes to Board-approved plans would not require a modification approved by the Board. Seemingly any change to the plans approved by the Board would require a modification approved by the Board, unless the changes involved a "reduction" in the relief granted or in the overall "impact" of the project as stated in the ZA's April 9, 2013 Determination Letter. Appellant's Pre-Hearing Statement, BZA 19174 Exhibit 18, at 10. Yet "reduction" is a subjective interpretation and the ZA, property owners, and community members require clarity and a bright-line rule on this issue. The changes that Appellant found less impactful might have increased the impact on other neighbors of the project. Section 3125.7 and 3125.8 do not grant the ZA discretionary authority to exempt certain changes to the approved plans and not others – unless, as the ZA's practice has been, these sections are interpreted to apply only to the specific areas of relief granted, in which case a reduction in the specific relief is reasonably permitted without recourse to the Board for a modification. In this case, the reduced building height approved by the ZA's April 9, 2013 Determination Letter did not require Board approval as the Permit Holder was opting to use only a portion of the relief granted by the Board, while the other changes did not require Board approval as outside of the specific areas of relief granted by the Board in BZA 18830.

"[U]nless clearly erroneous or inconsistent with the [Zoning] regulations," the ZA's interpretation and administration of the Zoning Regulations is granted great deference. *See Sisson v. D.C. Bd. of Zoning Adjustment*, 805 A.2d 964, 968 (D.C. 2002). The Board here agrees that the ZA's interpretation was reasonable and consistent with the language of Sections 3125.7 and 3125.8. Therefore, the Board finds that the ZA's approval of the Permit did comply with the Zoning Regulations and that Appellant's alleged violations of Sections 3125.7 and 3125.8 are without merit.

DECISION

For all these reasons, the Board concludes that this appeal was untimely filed as Appellant had or should have had notice or knowledge of the issuance of the Permit based on the extended

interactions with the Permit Holder and predecessor, the preparatory construction ongoing at the Property and the Permit posted on the Property. Appellant therefore should have requested to review the Permit's approved plans with DCRA within the 60 day appeal time period provided by Section 3112.2(a).

Apart from the issue of timeliness, the Board concludes on the merits that based on the reasons stated above the ZA did not err in his determination that the changed height of the penthouse roof authorized by the Permit from the penthouse roof height shown in the BZA 18830 Approved Plans did not violate the requirements of Sections 3125.7, 3125.8 and 3205, as those requirements were limited to the specific areas of relief granted by BZA 18830 Order – building height, FAR, and roof deck location and use.

Based on the foregoing, the Board finds the appeal untimely filed and without merit. It is therefore **ORDERED** that the appeal is **DENIED**.

Vote taken on March 15, 2016.

VOTE: _____ (Marnique Y. Heath, Frederick L. Hill, Jeffrey L. Hinkle, and Robert Miller to deny the appeal; not participating and not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

CERTIFICATE OF SERVICE

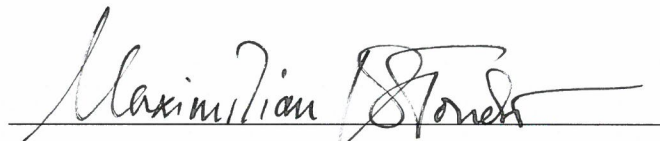
I hereby certify that on this 11th day of March 2016, a copy of the foregoing Motion to Accept DCRA's March 11 Filing as Timely Filed and Proposed Findings of Fact and Conclusions of Law was served via electronic mail to:

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