GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 14054, of Robert E. Love, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of Douglas Lee, Acting Administrator, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs, dated August 11, 1983, not to review alleged errors in the calculation of floor area ratio for an R-5-B District at premises 1865 California Street, N.W., (Square 2554, Lot 52).

HEARING DATE: December 14, 1983
DECISION DATE: February 1, 1984

FINDINGS OF FACT:

1. The subject appeal was scheduled for the public hearing of December 14, 1984. At that public hearing, the Zoning Administrator, through the Office of the Corporation Counsel, raised the issue of whether the subject appeal was properly within the appellate jurisdiction of the Board because it was not timely filed as required by Section 201.1 of the Supplemental Rules of Practice and Procedure before the Board. The issues of estoppel and laches were also raised but were not actively pursued as subordinate to the issue of timeliness.

2. The appellant indicated at the hearing that he was not completely prepared to respond to the timeliness issue. The Board determined that the merits of the appeal should not be considered until the appellant had been afforded the opportunity to respond to the issue of timeliness raised by the Zoning Administrator. The Board, therefore, left the record open for the submission of written statements from the appellant and the Office of the Corporation Counsel on the sole issue of whether the appeal was filed in a timely manner. The written response of the appellant was received on January 24, 1984. No response was received from the Office of the Corporation Counsel.

3. The appeal, as filed and advertised, responds to a letter dated August 11, 1983, from Douglas Lee, Acting Administrator, Building and Land Regulations Administration, Department of Consumer and Regulatory Affairs.

4. Building Permits No. B-286833 and B-286834, dated September 16, 1981, were issued by the District of Columbia permitting the extension of an existing party wall and the construction of an additional floor at premises 1865 California Street, N.W.

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5. Robert E. Love, the appellant herein, is the owner and occupant of 1863 California Street, N.W., the property immediately adjacent to the property at issue.

6. The appellant initially questioned the method of calculating the floor area ratio of the subject structure in early 1982, as evidenced by letters and meetings between the appellant and officials of the District Government. In addition to questions regarding the computation of the floor area ratio, the appellant informed city officials that the subject development was, in his opinion, in violation of numerous Building Code requirements.

7. The appellant sought to review the plans approved pursuant to the cited building permits approximately two weeks after their issuance, in order to ascertain whether there were any problems with the proposed construction. The appellant was unable to review the plans until approximately February of 1982. The delay in the availability of the plans was due to the transfer of records necessitated by the relocation of the department responsible for them. The appellant testified further that the plans were not available at the construction site as required by the Building Code.

8. After review of the plans, the appellant informed Lacey Streeter, then Acting Administrator for the Office of Building and Zoning Regulation, Department of Licenses, Investigations and Inspections, of the alleged violations resulting from the issuance of those permits.

9. Officials of the D.C. Government met with the builder in March of 1982, and Building Permit No. B290526, dated May 14, 1982, was ultimately issued. This permit approved revisions to the plans originally approved by the permits issued in September, 1981. The revisions included changing a front door to a window, a window to a door on the east side, and a revision of grade conditions.

10. The appellant met with representatives of the D.C. Government in November of 1982. By letter dated November 22, 1982, Mr. Streeter advised Mr. Love that the drawings "are now in compliance with the Zoning Regulations." The letter further confirmed the meeting Mr. Love had on November 15, 1982, with Joseph Bottner, Deputy Chief of the Zoning Division.

11. The appellant was not satisfied with the explanation received at that time regarding the method used for calculation of the floor area ratio resulting in the issuance of permits approving construction at 1865 California Street, N.W.

12. By letter dated December 6, 1982, Mr. Streeter informed the appellant of his right to appeal the method of calculation used in determining the floor area ratio to the Board of Zoning Adjustment.

13. The appellant chose not to file an appeal before the Board of Zoning Adjustment at that time. The appellant attempted to resolve the problem through letters to and meetings with staff and members of the City Council, other D.C. Departments and the Mayor.

14. In March of 1983, the functions exercised by the Department of Licenses, Investigations and Inspections were reorganized into a new Department of Consumer and Regulatory Affairs. Building and zoning matters were placed in the Building and Land Regulation Administration.

15. The appellant, by letter dated July 13, 1983, informed Mr. Lee that his attempts to resolve the situation through other District officials had been unsuccessful. The appellant requested Mr. Lee to take action to bring the construction at 1865 California Street, N.W., into compliance with the zoning and building codes.

16. By letter dated August 11, 1983, Mr. Lee responded to the July 13, 1983, letter from the appellant by confirming the zoning calculations made regarding the construction at 1865 California Street. The letter further advised appellant that revision of the calculations would be inappropriate because construction was eighty percent complete, eight months had expired since the appellant had been advised of the method of computation, and the December 6, 1982, letter from Mr. Streeter advised the appellant of his right to appeal to the Board of Zoning Adjustment.

17. The appellate jurisdiction of this Board is conferred by the Zoning Act, Section 5-424, D.C. Code (1981 Ed.) as set forth by the Zoning Commission in the Zoning Regulations. Section 201.1 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment further requires that an appeal be filed in a "timely manner."

18. Even though the Rules do not specify a specific number of days within which a decision must be appealed, inherent in the "timely" requirement is a jurisdictional criteria that an appeal may not be brought after an unreasonable period of time has elapsed. Even without such an express requirement, appeals must be brought within a reasonable period of time in order to invoke the appellate jurisdiction of the Board. The Board may not waive a jurisdictional impediment and, consequently, may not waive the requirement that an appeal be "timely" filed.

19. The subject appeal was filed on August 16, 1983, approximately eight months after the appellant was informed in writing of his right to appeal to the Board. The appeal is, therefore, not considered as timely by this Board, pursuant to Section 201.1 of the Rules of Practice and Procedures.

20. The Board finds that the August 11, 1983, letter from Mr. Lee is not a ruling of its own but is merely a reaffirmation of the decisions made by employees of the Office of Building and Zoning Regulation. The August 11, 1983, letter further clearly refers to the December 6, 1982, letter to the appellant which informed the appellant of his right to challenge the decisions regarding the calculation of the floor area ratio to the Board of Zoning Adjustment.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and the evidence of record, the Board concludes that it is faced with the jurisdictional question of whether the appeal was filed in a timely manner. The Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment do not set a specific time limit following a decision within which an appeal may be filed. Because appeals may be filed by persons who are aggreived by a decision who are not applicants for permits or who are not directly notified of the decisions, it is possible that an appellant may not know of a decision until some other action has occurred, such as the beginning of construction or the opening of a use.

Although this Board has set no specific limit for the filing of appeals, it has uniformly held where the issue has been raised that appeals filed seven to nine months after the Zoning Administrator's action are untimely. See Orders of the Board in Appeal of California Steak House, BZA Appeal No. 13967, November 22, 1983 (ten and one-half months); Appeal of Sheridan Kalorama Neighborhood Council, BZA Appeal No. 11872, February 14, 1975 (eight month delay); Appeal of Arthur H. Fawcett, Jr., BZA Appeal No. 11158, July 22, 1976 (seven month delay); and Appeal of Christian Embassy, Inc., BZA Appeal No. 12142, June 18, 1976 (nine month delay). Under the current Rules, therefore, persons faced with the potential of filing appeals should act promptly to preserve their rights. If subsequent actions can resolve the matter before the Board acts on the appeal, the appellant always has the right to withdraw the appeal.

In the subject appeal, the appellant was informed of his right to challenge the decisions regarding the calculation of floor area ratio through an appeal before the Board of Zoning Adjustment in the December 6, 1982, letter from Lacy C. Streeter, Acting Administrator, Office of Building and Zoning Regulation. The Board concludes that the letter

from Douglas Lee, dated August 12, 1983, which is the subject of this appeal, is merely a reaffirmation of the facts stated in the December 6, 1982, letter from Mr. Streeter. The Board further concludes that the appellant was clearly advised of his right to appeal in December of 1982. The subject appeal was not filed until August 6, 1983, approximately twenty-three months after the issuance of building permits in September 1981. The appellant's attempt to resolve the issues through other means was by his own choice. His failure to resolve the matter that way does not change in any way the fact that he was advised of his right to appeal in December of 1982, nor lessen the impact that the passage of time has had upon the construction taking place.

The Zoning Act and Zoning Regulations clearly state where an appeal regarding administration or enforcement of the Zoning Regulations is to be taken. The appellant's choice of pursuing other possible remedies now forecloses his right to appeal to this Board.

The Board therefore concludes that the subject appeal was not filed in a timely manner and is hereby DISMISSED for lack of jurisdiction.

VOTE: 3-1 (Douglas J. Patton and Carrie L. Thornhill to DISMISS, Lindsley Williams to DISMISS by PROXY; William F. McIntosh OPPOSED to the motion; Charles R. Norris not voting, not having heard the case).

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

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: MAY 29 1984

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

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