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GOVERNMENT OF THE DISTRICT OF COLUMBIA

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Georgetown Residence Alliance from the Administrative Decision of the Department of Consumer and Regulatory Affairs for failure to enforce subsection 2002.3 and from the issuance of Building Permit Nos. B468701 for a roof hatch and mechanical access door at 1531 31st Street, N.W., in the R-3 District	)	**BZA Appeal No. 17329** **Hearing: July 12, 2005**

PROPERTY OWNER'S MOTION TO DISMISS

I.
INTRODUCTION

Reid A. Dunn, through undersigned counsel, hereby moves to dismiss Board of Zoning Adjustment ("BZA" or "Board") Appeal No. 17329 filed by the Georgetown Residence Alliance ("Alliance" or "Appellant") as untimely. Mr. Dunn is the owner of the property ("Owner") for which this appeal is filed and is an automatic party to this proceeding pursuant to 11 DCMR § 3199.1 (2003). The Alliance failed to file its appeal within sixty days after issuance of Building Permit No. 458701 or within sixty days after the alleged refusal of the Department of Consumer and Regulatory Affairs ("DCRA") to enforce subsection 2002.3 of the Zoning Regulations. The building permit was issued on December 28, 2004 and DCRA's alleged refusal to enforce subsection 2002.3 occurred on December 29, 2004. However, the Alliance did not file its appeal until March 25, 2005, or approximately 24 days after the requisite 60 days expired under section 3112.2(a) of the Zoning Regulations. Thus, the Alliance is time-barred from asserting its claim and the appeal should be dismissed.

BZA
Case No. 17329
Exhibit No. 23

Board of Zoning Adjustment
District of Columbia
CASE NO. 17329
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II.
ALLIANCE HAD AMPLE NOTICE TO FILE A TIMELY APPEAL

The Alliance failed to file a timely appeal despite its full knowledge of the construction occurring at 1531 31st Street, N.W. ("Subject Property"), the issuance of Building Permit No. 468701 and DCRA's determination that the construction did not violate subsection 2002.3. The Alliance alleges that the Owner intends to use the roof of his building for human occupation and constructed access to the roof for such purposes. According to the Alliance, such access to the roof would constitute an unlawful expansion of an existing non-conforming multi-family use in violations of subsection 2002.3 of the Zoning Regulations. Subsection 2002.3 provides that a "nonconforming use shall not be extended portions of the structure not devoted to the nonconforming use at the time of enactment or amendment of this title, or to another structure." 11 DCMR § 2002.3 (2003). The Subject Property is located in the R-3 District, which only permits single-family dwellings and flats. The Subject Property was converted to a multi-family residential building prior to the enactment of the Zoning Regulations and thus constitutes a lawfully existing non-conforming use.

According to its own statement of facts submitted with its appeal, the Alliance has been monitoring proposed changes at the Subject Property since at least September, 2004, when several proposed alterations were reviewed by the Old Georgetown Board ("OGB") of the U.S. Commission of Fine Arts. Thereafter, when construction began at the site, the Alliance initiated a series of communications with the D.C. Historic Preservation Office ("HPO") and the Zoning Administrator of DCRA complaining that construction at the Subject Property was proceeding illegally. DCRA inspected the site and DCRA determined that construction was occurring without the necessary building permits. A stop work order was on November 16, 2004. On December 27, 2004, the Owner filed for a building permit to construct a roof hatch and a

mechanical access door at the rear of the roof-top turret. DCRA issued Building Permit No. B468701 the following day. On December 29, 2004, the Zoning Administrator for DCRA informed the Alliance that a previously issued stop work order had been lifted and a building permit issued.

> DCRA and the zoning division have indeed focused on the problem at the subject address [1531 31st Street, N.W.]. In distinction to the Historic Preservation Stop Work Order which permitted interior work to continue, this office issued a Stop Work Order 12/27 stopping all work pending abatement of the roof work that was done outside the scope of the instant building permit. Whereas Historic's 11/6 Stop Work [Order] did not elicit compliance because the owner was allowed to continue to work on the interior, ours has brought remedy in 24 hours.
>
> The subject property owner brought in revised plans showing only a proposed roof hatch, no roof deck, and has obtained a revised building permit reflective of the scope of the work allowed. Further, the owner has been put on notice that as an existing non-conforming structure, a roof deck addition is impossible without a public hearing before the Board of Zoning Adjustment...."

Appellant's Statement in Support of Appeal, March 25, 2005, App. at 18 (email correspondence from Toye Bello to Don Crockett, December 29, 2004, 11:20 a.m.).

Despite this written notice from DCRA, the Alliance elected *not* to file its appeal within 60 days thereafter even though it had full knowledge that a permit constitutes a triggering event for filing an appeal. In email correspondence with HPO on November 29, 2004, the Alliance stated that it would file an appeal immediately with the BZA if a permit had been filed for the rooftop work: "If this builder did, in fact, get the necessary approvals for the roof structure please let me know immediately so I can file my appeal with the BZA." Appellant's Statement in Support, App. at 4 (email correspondence from Don Crockett to Timothy Dennee, HPO, November 29, 2004, 2:54 p.m.).

Instead, the Alliance immediately sought redress from the HPO and the Chairman of the Historic Preservation Review Board ("HPRB") for design issues. It failed to file the necessary appeal for the zoning issue until after the time period had lapsed.

III.
ZONING REGULATIONS DICTATE DISMISSAL OF APPEAL

Under section 3112.2 of the Zoning Regulations, an appeal must be filed within sixty days from either the date the appellant had notice or knowledge of the decision complained of, or the date the appellant reasonably should have known of such complaint. Zoning Commission Order No. 02-01, February 7, 2003, at 3-4. *See also Waste Management of Maryland, Inc. v. D.C. Board of Zoning Adjustment,* 775 A.2d 1117,1122 (D.C. 2001) ("in the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal – circumstances outside of the party's control – we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness"). Here, the Appellant was required to raise any appeal pertaining the roof access and alleged illegal expansion of a non-conforming use no later than sixty days from December 28, 2004, the date the permit was issued, which was February 28, 2005. The Appellant failed to meet this regulatory deadline. Appellant was fully aware of the timeliness requirements for an appeal, as evidenced by its email communication with the HPO, yet it chose not to file a timely appeal. Any actions the Appellant took in other venues did not relieve it of its duty to comply with the deadlines imposed by the Zoning Regulations.

While the BZA may extend the sixty-day deadline, it may do so only if the appellant demonstrates that:

(1) there are ***exceptional circumstances outside 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 timely appeal; and

(2) the extension of time will not prejudice the parties to the appeal...".

11 DCMR § 3112.2(d); Zoning Commission Order No. 02-01, February 7, 2003, at 4 (emphasis added).

Here, there are no such exceptional circumstances. The Appellant was in constant contact with DCRA and HPO and was fully aware of the building permit and the construction that had taken place. In fact, the Appellant informed DCRA on February 21,2005, that it still believed that the construction at the Subject Property was illegal. Had the Appellant simply filed its appeal with the BZA on that same date, it would have been timely. Having failed to do so, the Appellant has foreclosed its right to pursue its complaint at this late date.

Although no such claim has yet been made, the Appellant cannot argue that the triggering date for the appeal period should begin on February 21, 2005, presumably a date on which DCRA failed to enforce subsection 2002.3. The Zoning Regulations clearly state that the earliest date starts the clock for lodging an appeal:

> An appeal shall be filed with sixty (60) days from the date of the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, ***whichever is earlier.***

11 DCMR § 3112.2(a), Zoning Commission Order No. 02-01, February 7, 2003, at 4 (emphasis added).

Here, the earlier triggering date is December 28, 2005, the day on which the building permit for the roof hatch and mechanical access door in the turret was issued. Thus, the Appellant should have filed its appeal no later than February 28, 2005, and having failed to do so, the appeal should be dismissed.

VI.
CONCLUSION

WHEREFORE, based on the foregoing, the Board should dismiss the appeal on the grounds of untimeliness.

Respectfully submitted,

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July 11, 2005

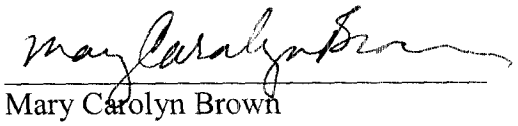
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss was served this 11th day of July, 2005, via email or first-class mail, postage prepaid, upon the following:

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