GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17329 of Georgetown Residence Alliance, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) for failure to enforce the Zoning Regulations and from the issuance of Building Permit No. B-468701 for a roof hatch and mechanical access door at 1531 31st Street, N.W. in the R-3 zone (Square 1269, Lot 294).

HEARING DATE: July 12, 2005
DECISION DATE: July 12, 2005

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on March 25, 2005, challenging DCRA's issuance of a building permit allowing the construction of a roof hatch and mechanical access door at the premises, and also challenging DCRA's alleged failure to enforce the Zoning Regulations. Prior to the public hearing, the property owner moved to dismiss the appeal, claiming that it had been untimely filed. After hearing argument and reviewing the written submissions of the parties, the Board dismissed the appeal, finding that the appeal was untimely filed as to the building permit, and that the Board lacked subject matter jurisdiction to review other alleged errors.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for July 12, 2005. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellant, the property owner, and DCRA.

Parties

The Appellant in this case is the Georgetown Residence Alliance (the Appellant or the Alliance), a not-for-profit civic association represented by Don Crockett. The owner of the subject property is Reid Dunn, who was represented by Holland & Knight LLP, Mary

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Carolyn Brown, Esq. As the property owner, Mr. Dunn is automatically a party under 11 DCMR § 3199. Appellee DCRA was represented by Lisa Bell, Esq.

FINDINGS OF FACT

Background

1. The subject property is located at 1531 31st Street, NW in the R-3 zone. Originally a single-family home, the building was converted into a four-unit apartment house prior to the enactment of the Zoning Regulations. Although the R-3 district permits only single-family dwellings and flats, the apartment house use is a lawfully existing non-conforming use.

2. Beginning on or about September, 2004, the current property owner proposed changes at the property for the purpose of converting the apartment house to a condominium. Several proposed changes were reviewed by the Old Georgetown Board of the US Commission on Fine Arts and monitored by the Alliance, including changes to the rooftop. The building permit issued by DCRA on or about May 17, 2004 provided only for renovation work to the building's interior, not the rooftop or any other portions of the exterior. The permit was not entered in the administrative record and there was disagreement about the exact date it was issued. However, both parties referred to the permit during the hearing and concurred that it was issued prior to November, 2004 when construction began.

3. Shortly after construction began, the Alliance initiated a series of communications with the DC Historic Preservation Office (HPO), the Historic Preservation Review Board (HBRB)[1], and the Zoning Administrator of DCRA, complaining that construction was proceeding illegally. The Alliance complained that the owner had unlawfully removed part of a large ornamental turret that occupied part of the roof space, and was about to construct an unauthorized roof deck.

4. HPO and DCRA both inspected the site, and determined that construction – including the partial removal of the turret -- had occurred without the necessary building permits. The HPO inspected the site and issued a stop work order on or about November 16, 2004, and DCRA inspected the site and issued a stop work order on or about December 27, 2004. According to an e-mail from the Zoning Administrator to Mr. Crockett, DCRA's stop work order was issued because the rooftop work went beyond the interior

[1] The District of Columbia Historic Preservation Review Board advises the State Historic Preservation Officer. The Historic Preservation Office is part of the Office of Planning and serves as staff to the State Historic Preservation Officer and the Historic Preservation Review Board.

renovations allowed by the building permit. The e-mail also stated that Board approval would be required before the owner could expand the non-conforming use and construct a roof deck (Exhibit 2, Appellant's Statement in Support of their Appeal, Appendix I at 18).

5. The owner promptly applied to DCRA for a permit to allow him to construct rooftop access. The revised plans submitted with the application showed a proposed roof hatch but no roof deck (Exhibit 2, Appendix I at 18). DCRA lifted the December 27 stop work order and issued Building Permit No. 468701 (the access permit) on December 28, 2004. The access permit is the subject of this appeal. It allowed the owner to construct a roof hatch and a mechanical access door at the rear of the rooftop turret (Attachment to Exhibit 11). It did not authorize a roof deck.

6. On December 29, 2004, The Zoning Administrator notified the Appellant by e-mail that DCRA's stop work order had been lifted and the access permit had been issued.

7. The Appellant continued to communicate with the HPO, HPRB, and DCRA after the access permit was issued, and requested that the rooftop turret be restored to its original condition. Appellant's own submissions show written communications dated January 24, 25, and 26 of 2005 (Exhibit 2, Appendix I at 10, 21, 24, and 26). During the hearing of this matter, Appellant also referred to his "constant communication" with District agencies (See, for instance, T., p. 111). Although Appellant stated in these written communications that the turret had been "demolished", HPO and DCRA disagreed, stating that a portion of the turret was altered to allow for mechanical access to the roof (Exhibit 2, Appendix I at31).

The Appeal

8. The appeal was filed on March 25, 2005 alleging that DCRA "refuse[d] to enforce the Zoning Regulations and Zoning Laws against the unlawful and un-permitted extension and expansion of the non-conforming apartment house use" at the premises (Exhibit 1).

9. In an undated statement submitted April 8, 2005, the Appellant alleged that on or about December 28, 2004, DCRA improperly issued Building Permit No. B468701 (the access permit) allowing the owner to construct a roof hatch and mechanical access door at the premises (Exhibit 11).

10. During the public hearing, the Appellant alleged that the appeal stemmed from: (a) the owner's unlawful rooftop demolition and construction work without a permit (T. p. 104, 120), (b) the HPRB's failure to order that the roof be restored to its original

condition, and (c) the issuance of the access permit that allegedly improperly authorized the rooftop expansion of a non-conforming use.

The Motion to Dismiss

11. Prior to the public hearing, the owner filed a motion to dismiss the appeal, contending that the appeal of the access permit was untimely. The owner also claims that DCRA's issuance of the access permit is the only administrative decision which can be appealed to this Board.

12. As stated above, Appellant's view of the appeal is broader. He contends that the appeal was timely filed because it was filed when "it was clear no one would do anything" (T. p. 166). Appellant cites the 3 letters he sent to the HPRB chair asking him "to look into the situation and take action" (T. p. 110), with copies to "everyone involved", including the Zoning Administrator and Timothy Dennee of the HPO (T. 112). Appellant also claims that his appeal was timely because it was filed "about a month after, or less than a month after" Mr. Dennee failed to respond to his last letter (T. p. 166), and because Mr. Dennee's office and the HPRB office is each a "subsidiary" office of DCRA (T. p. 112).

13. Given the Appellant's close scrutiny of the project, the Board is persuaded that the Appellant knew about the access permit on or about the date it was issued, on December 28, 2004, but at least by December 29, 2004 after the e-mail communication from the Zoning Administrator.

14. Appellant filed this appeal on March 25, 2005, approximately 87 days after the access permit was issued. Although Appellant may have been frustrated in his dealings with DCRA, there is no evidence that DCRA's actions substantially impaired Appellant's ability to file an appeal.

CONCLUSIONS OF LAW

The Appellant did not clearly identify the error that was being complained of in this appeal. After extensive exploration of Appellant's concerns at the hearing, the Board determined that Appellant was appealing the access permit and the DCRA and HPRB decisions not to require the property owner to restore the rooftop turret to its original condition. For the reasons discussed below, the Board concludes that it lacks jurisdiction over the claim related to the access permit because the appeal of its issuance was not timely filed, and it lacks subject matter jurisdiction over the enforcement claim because the alleged violations did not involve zoning regulations. The reasons for these conclusions follow.

The Appeal of the Access Permit was Untimely

The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days after the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may be extended only if the appellant shows that: (1) "There are exceptional circumstances that are 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; and (2) "The extension of time will not prejudice the parties to the appeal." 11 DCMR 3112.2(d).

As stated in the Findings of Fact, the access permit was issued on December 28, 2004, and Appellant knew about this approval when the permit was issued ,or shortly thereafter on December 29, 2004, when it was notified by the Zoning Administrator. Thus, under section 3112.2(a) of the Regulations, the appeal should have been filed within 60 days after that date, or on or about February 27, 2005. Instead, the appeal was filed on March 25, 2005, approximately 86 days after the Appellant was charged with notice of the decision complained of. During this 86 day period, Appellant pursued other avenues to resolve its dispute and engaged in extensive communications with the Zoning Administrator and HPO staff. However, a party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal. *Waste Management of Maryland, Inc. v. DC Board of Zoning Adjustment*, 775 A.2d 1117 (D.C. 2001); *Woodley Park Community Ass'n v District of Columbia Board of Zoning Adjustment,* 490 A.2d 628 (D.C. 1985).

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). This appeal, filed March 25, 2005, was untimely filed as to the access permit and the Board, therefore, lacks jurisdiction to hear it.

The Board Lacks Subject Matter Jurisdiction Over The Other Alleged Errors

As to the other issue raised by the appeal, the claimed refusal of DCRA and HPRB to enforce the Zoning Regulations, the Board lacks subject matter jurisdiction because no violations of the Zoning Regulations are alleged.

The Appellant is essentially claiming that DCRA should have required the turret to be restored because the rooftop work was performed without a building permit, as is required by section 10 of the Zoning Act of 1938, codified at D.C. Official Code § 6-

641.08 (2001). Similarly the Appellant contends that HPRB or the HPO should have ordered restoration, presumably based upon section 5 of the Historic Landmark and Historic District Protection Act of 1978 ("Historic Preservation Act"), codified at D.C. Official Code § 6-1104, which requires review by the Mayor before all or part of a historic landmark or contributing building is demolished.

Neither of these requirements may be found in the Zoning Regulations. Yet, the Board's jurisdiction is limited to hearing and deciding appeals "where it is alleged by the appellant that there is error in any order, requirement, decision[2], determination, or refusal made by any ... administrative officer or body in the carrying out or enforcement ***of any regulation adopted pursuant to" the Zoning Act.*** D.C. Official Code § 6-641.07 (f) (2001). With respect to the lack of a building permit, this Board has twice held in the context of Civil Infraction Act appeals that its jurisdiction does not extend to violations of the Zoning Act that are not also included in the Zoning Regulations, such as the requirement for a building permit. *Appeal of Peter Choharis*, BZA No. 03-0001, 51 DCR 8210 (2004); *Appeal of William Robinson*, BZA No. 04-0001 52 DCR 3677 (2005). The requirement for the Mayor to review applications to demolish historic or contributing buildings is not even in the Zoning Act, but in an entirely different law.

The Board has no jurisdiction to hear complaints over the alleged inaction of District officials in enforcing the Zoning Act, the Historic Preservation Act, or any other statutory or regulatory provisions other than those contained the Zoning Regulations. Since Appellant does not claim that any zoning regulation was violated, the alleged lack of enforcement cannot be addressed by this Board.

Therefore, for the reasons stated above, it is hereby **ORDERED**:

1. The motion to dismiss the appeal of the building permit as untimely is **GRANTED**.

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II and Anthony J. Hood, in favor of the motion; Curtis L. Etherly, Jr. being necessarily absent)

Vote taken on July 12, 2005

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[2] To the extent that the Appellant was also appealing the construction and demolition activities of the property owner, as opposed to the decisions made by District officials with respect to those activities, the Board also has no jurisdiction. The Zoning Act limits the Board's appellate jurisdiction to actions taken by District officials in carrying out and enforcing the Zoning Regulations, not to actions taken by private citizens.

2. The motion to dismiss the appeal on the ground that it lacks subject matter jurisdiction is **GRANTED** with respect to the alleged failure to enforce by DCRA and the HPRB/HPO

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II and Anthony J. Hood in favor of the motion; Curtis L. Etherly, Jr. being necessarily absent)

Vote taken on July 12, 2005

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 12 2006

PURSUANT TO 11 DCMR § 3125.6, THIS 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.