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DISTRICT OF COLUMBIA
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LAW DIVISION

District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

GARLAND F. PINKSTON
CLERK OF COURT

Telephone: 879-2700
Area Code 202

October 31, 2006

06-AA- 1298 Diana de Brito, et al vs. D.C. Board of Zoning Adjustment

District of Columbia Zoning Adjustment
Jerrily Kress, Director
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Suite 210S
Washington, D.C. 20001

Dear Sir/Madam:

Pursuant to the rules of this Court I am transmitting, herewith, a copy of the petition for review filed October 31, 2006, in the above-entitled case.

Yours very truly,

Garland F. Pinkston
Clerk of Court

By: _____
Information Center Supervisor

cc: Todd Kim, Esq./Edward Schwab, Esq.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17391
EXHIBIT NO. 35

Board of Zoning Adjustment
District of Columbia
CASE NO. 17391
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RECEIVED
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COURT OF APPEALS

District of Columbia Court of Appeals

Petition for Review

OCT 2006
DISTRICT OF COLUMBIA
COURT OF APPEALS

Appeal Number_____

Diana de Brito and Jonathan Gottlieb, Petitioners

v.

Government of the District of Columbia, Board of Zoning Adjustment

Agency Number 06-AA-1298

We, Diana de Brito and Jonathan Gottlieb, seek review by the District of Columbia Court of Appeals of the decision and order of the Board of Zoning Adjustment entered on the second day of October, 2006.

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Attachment: Decision and Order of the Board of Zoning Adjustment, Appeal Number 17391

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17391 of Diana de Brito and Jonathan Gottlieb pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit Nos. B-472018, B-450009, B-451175, B-452735, and B-452577 for property located at 2620 Foxhall Road, NW (Lot 1031, Square 1397).

HEARING DATES: November 29, 2005 and January 10, 2006
DECISION DATE: January 10, 2006

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on June 24, 2005, challenging DCRA's decisions to approve five building permits that were issued over a period spanning between May, 2003 and April, 2005. The property owner to whom the permits were issued moved to dismiss the appeal and the Board scheduled a hearing on the motion. At the hearing, the Board heard from the property owner, from DCRA (who had joined in the motion to dismiss), and from the Appellant and the affected ANC. The Board found that the appeal of the first four permits had been untimely filed and that the appeal of the fifth permit (the fence permit) did not state a claim for a zoning review error. As a result, the Board granted the property owner's motion to dismiss. A full discussion of the facts and law that support this conclusion follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on November 29, 2005. In accordance with 11 DCMR §§3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 3D (the ANC in which the subject property is located), the property owner, and DCRA.

Parties

The Appellant in this case is Diana de Brito and her husband, Jonathan Gottlieb (Appellant). Ms. de Brito and Mr. Gottlieb reside at 4610 Dexter Street, NW, which abuts the subject property to the north (See, tab B appended to Exhibit 20). Ms. de Brito authorized her husband to act on her behalf during the appeal (Exhibit 2).

Eugene and Carol Ludwig, the owners of the subject property, were represented by the law firm of Holland & Knight. As the property owner, the Ludwigs are automatically a party under 11 DCMR § 3199.1 and will hereafter be referred to as the owner.

ANC 3D, as the affected ANC, was automatically a party in this appeal. In a resolution dated December 5, 2005 (Exhibit 25), the ANC voted to support a continuance of the Board hearing. In a later resolution dated January 9, 2006, the ANC voted to support the appeal. The resolution was issued after a regularly scheduled monthly meeting with a quorum present (Exhibit 30). Among other things, the ANC cited the "piecemeal manner" in which the permits were obtained and the project had been developed, and a "massing of structures" that is inconsistent with the character of the Wesley Heights Overlay. Alma Gates, the ANC representative who testified at the hearing, stated that even though the subject property is outside of the Overlay, it impacts on nearby properties that are within its boundaries.

DCRA appeared during the proceedings and was represented by Lisa Bell, Esq.

Motion to Dismiss and Continuance

The owner filed a motion to dismiss prior to the hearing scheduled on November 29, 2005 (Exhibit 20). On that date appellant requested a continuance so that he and the ANC could respond to the owner's motion. Appellant also asked that the hearing be continued until such time as the Board issued its decision in Appeal No. 17285 (the "Economides case"), a case appellant claimed was "similar" to the present appeal. The owner and DCRA each argued against a lengthy continuance. They asserted that the Economides case had no bearing on this matter because it applied only to properties within the Wesley Heights Overlay, and the subject property was located outside of the Overlay. The Board declined to hold this matter in abeyance pending a final decision in the Economides case[1]. However, it did continue the hearing to January 10, 2006, directing filings from Appellant and the ANC by December 20, 2005, and any replies by January 3, 2006. It also granted appellant's request to amend his appeal.

[1] A final order was issued on or about March 24, 2006, see. Appeal No. 17285 of Patrick J. Carome.

FINDINGS OF FACT

The Property

1. The property is located at 2620 Foxhall Road, NW, Lot 1031, Square 1397, and is zoned R-1-A. It is a large property consisting of approximately 124,980 square feet, which the owner has developed as a single-family home with a pool, tennis courts and related structures (Exhibits 1, 3).

2. Although the property is located within the Wesley Heights area, it is not located within the boundaries of the Wesley Heights Overlay (WH Overlay) (Exhibit 20, Tab C, Exhibit 27).[2]

The Permits

3. DCRA issued four building permits within four months of each other in 2003 (the 2003 permits), as follows:

(a) Building Permit No. B451175, dated May 9, 2003 for site work and grading for a future single family dwelling, a retaining wall and a tennis court;

(b) Building Permit No. B452577, dated June 26, 2003, for the footing and foundation for the single-family dwelling;

(c) Building Permit No. B452735, dated July 1, 2003, which revised permit B451175 to change the structural design of the tennis court according to submitted plans; and

(d) Building Permit No. B4550009, dated September 15, 2003, for construction of a three-story wood frame house, a new driveway, retaining walls, and terraces. (See, Exhibits 3, 20, 27).

4. DCRA issued Building Permit No. B472018 (the fence permit) dated April 27, 2005, authorizing the construction of fences at the property. The fence permit allowed the following:

(a) "NEW FENCE – 7 [feet] ENTIRELY ON OWNER'S LAND"
(b) "BLACK VINYL COATED C/L 7 [FEET] FENCE"
(c) "(NATURAL) WOOD PRIVACY FENCE"
(d) "WROUGHT IRON (BLACK) FENCE"

(See, Exhibits 3, 20, and Attachment A to Exhibit 27).

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[2] The Wesley Heights (WH) Overlay is a zoning overlay that was designed by the Zoning Commission to preserve and enhance the low density character of the Wesley Heights area, see, 11 DCMR §§1541-1543. Properties within the Overlay are subject to more stringent restrictions than the development standards of the underlying R-1 zone.

Communications Between the Parties

5. Appellant contacted the owner within a few weeks after purchasing his own property in January 2003. During that discussion and subsequent discussions, appellant asked about development plans and sought assurances that he would not be adversely affected by those plans (Exhibit 26, p. 3, 4).

6. Appellant also contacted the owner and his agents to "express objections" once construction began at the subject property (Exhibit 26). The record is unclear as to the exact time period or frequency of communications between appellant and the owner. However, the Board finds that, based upon appellant's own statement, there were several communications regarding the development and appellant was "repeatedly assured" that his objections would be cured (Exhibit 26, p. 4, 5).

Construction

7. Construction of the new home was completed to the point where it was completely under roof no later than April, 2004 (Exhibit 20).

The Appeal

8. The appeal was filed on June 24, 2005, more than 17 months after the last of the 2003 permits was issued[3], and exactly 60 days after the fence permit had been issued (Exhibit 1). The appeal was filed more than one year after the dwelling structure was under roof.

9. Appellant filed a "Statement in Support of Appeal" detailing the basis of his claims (Exhibit 3). Appellant alleges that the 2003 permits violate various provisions of the Zoning Regulations, including side yard requirements (§ 405), rear yard requirements (§ 404), and restrictions of the Wesley Heights Overlay (§ 1541). Appellant also alleges that the fence permit allowed the construction of fences in violation of the seven feet height limit within the Building Code (12 DCMR 3110) (Exhibit 3).

The Restated Appeal

10. On or about January 9, 2006, Appellant submitted an "Amended and Restated Statement in Support of [its] Appeal"(Exhibit 29). In his Amended Statement and during argument before the Board, Appellant cited additional violations of the Zoning Regulations, including § 2503.3. Section 2503.3 allows construction of a fence in a required open space, but only if it is "constructed in accordance with the D.C. Building Code" (Exhibit 29, p. 18). Appellant maintains that the fence permit issued

[3] The appeal was filed more than two years after permit B-451175 was issued on May 9, 2003, and nearly two years after permits B-452577 and B-452735 were issued on June 26, 2003, and July 1, 2003, respectively.

by DCRA allowed fences which exceed the maximum height of seven feet under the Building Code.

11. Appellant submitted photographs of the subject property that were taken in January, 2006 (Exhibit 32). The photographs depict construction at the subject property, including various fences and "platform structures". (See, Tabs G – Q, appended to Exhibit 32). Appellant maintains that the fences are more than seven feet tall and, in some instances, consist of a fence placed "on top of" a platform structure Exhibit 32, Tr. at 102).

12. Appellant maintains that he could not know the scope of work at the property at the time the permits were issued because he was "misled" by the owner and the construction was ongoing as of the date of the public hearing.

CONCLUSIONS OF LAW

Motion to Dismiss

The owner filed a motion to dismiss the appeal on grounds that: (1) the appeal was untimely filed as to the 2003 permits; (2) the Board lacks subject matter jurisdiction as to the appeal of the fence permit because it is a challenge under the Building Code, not the Zoning Regulations; and (3) the appeal of the fence permit is without a factual basis in the Zoning Regulations because there is no provision of the WH Overlay regulations that applies to the property.

DCRA joined in the owner's motion and argues, in addition, that: (1) whether the fence permit violates height limits under the Building Code is not an issue of zoning review; and (2) with respect to the fence permit, appellant has failed to identify or state an error in the zoning review process, and relies solely on the actual fence height after construction (see, Exhibit 27).

The Administrative Decision Complained Of

Pursuant to the Zoning Act, the Board has jurisdiction to hear appeals alleging "error in any order, requirement, decision, determination, or refusal made by ... any [District] administrative officer or body in the carrying out or enforcement of" the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1) (2001). Therefore, the threshold question is to identify the administrative decision (or decisions) being complained of. There is no dispute that the appeal stems from the issuance of the four permits issued in 2003 (the 2003 permits) and the fence permit that was issued in 2005. Accordingly, the appeal relates to the issuance of the five building permits.

Timeliness

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).

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Subsection 3112.2(a) provides that an appeal must be filed within sixty (60) days from the date the person filing the appeal had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier. Section 3112.2 (b) also applies with respect to approval of the house construction. That provision states that no appeal shall be filed later than 10 days after the structure or part thereof in question is under roof. [4] However, § 3112.2(c) provides that notwithstanding § 3112.2(a) and (b), an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal. Finally, § 3112.2(d) provides that the Board may extend the 60-day time limit only if the appellant demonstrates 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.

The Appeal of Each of the 2003 Permits was Untimely

With respect to each of the 2003 permits, this appeal was filed well after the 60-day time period had expired. It was filed more than 17 months after the permit issued in September, 2003, nearly two years after the permits issued in June, 2003 and July, 2003, and more than two years after the permit issued in May, 2003. It was also filed more than one year after the dwelling was under roof (see, Finding of Fact 8).

As will be explained below, the Board does not find there were exceptional circumstances beyond appellant's control which impaired his ability to file a timely appeal. Moreover, any extension of time would certainly prejudice the owner. Therefore, even if the Board were persuaded that an extension was justified, the appellant cannot make the required showing under § 3112 (d).

By his own admission, Appellant objected to the development at the site for nearly two years before filing this appeal. There is no doubt appellant engaged in discussion with the owner and his agents during this time. The owner may not have

[4] The subsection goes on to define "under roof" as "the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place".

been entirely candid during these discussions, and appellant may very well have wished to avoid the difficulty and expense of prosecuting an appeal. However, even if the Board were to find that appellant was misled by the owner at some point, the scope of work at the property should have been obvious once the house was under roof during the spring of 2004. 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, see, *Waste Management v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117 (D.C. 2001)[5]; *Woodley Park Community Ass'n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985). The Board need "not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision." *Waste Management, supra.*

Appellant argues that the five permits were obtained in piecemeal fashion, hindering his ability to access the scope of development until the fifth permit – the fence permit -- was issued. Appellant claims that, in this respect, the facts are similar to those in the *Sisson* case, a timely appeal that was filed long after the issuance of the initial permit, *Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964 (D.C. 2002). The Board does not find the facts in this case to be similar to *Sisson.*

In *Sisson*, the Board found that the time for filing an appeal could not be measured from the issuance of the initial permit because observers were not fairly on notice at that time regarding the scope of the entire project. Specifically, the Board found that the appellant could not access potential zoning issues such as lot occupancy until the last of five permits had been issued. In this case, the claims of violation relate to the siting of improvements and the bulk and height of those improvements, all of which were apparent to the appellant early on (Findings of Fact 5-7).

The Fence Permit

The appeal of the fence permit was timely filed. As stated in the Findings of Fact, the appeal was filed on the 60th day after the fence permit was issued (Finding of Fact 8). Thus, the issuance of the fence permit is properly before this Board.

[5] Appellant claims the *Waste Management* case is distinguishable from this matter because it involved the issuance of a certificate of occupancy rather than a building permit, and a challenge by a corporation rather than an individual homeowner. The Board disagrees with this reasoning.

Subject Matter Jurisdiction

The Board finds that its has subject matter jurisdiction to decide the appeal of the fence permit. The Zoning Act of 1938 provides that "[a]ppeals to the Board of Adjustment may be taken by any person aggrieved ... by any decision ...granting or refusing a building permit ... based in whole or in part upon any zoning regulation," D.C. Official Code § 6-6-641.07 (f). As will be explained later, the relevant zoning regulation for the purposes of this appeal is 11 DCMR § 2503.3, which is an exception to the requirement of § 2503.1 "that every part of a yard required under this title shall be open and unobstructed to the sky from the ground up." Subsection 2503.3 permits the construction of a fence in a required yard, if "constructed in accordance with the D.C. Building Code". The parties all agree that the Building Code imposes a maximum fence height of 7 feet, which Appellant contends was allowed to be exceeded by DCRA.

That the Appellant was aggrieved by the grant of the fence permit is not contested. Because section 10 of the Zoning Act (D.C. Official Code § 6-641.09) prohibits the issuance of a building permit "unless the plans of and for the proposed ... construction... fully conform to the provisions of" the Zoning Regulations, and because the fence at issue was in a required yard, DCRA was obligated to determine whether the owner's plans fully conformed to § 2503.3, including the incorporated height limitation. The issuance of the permit signified DCRA determination that it did. Since the Appellant alleged he was aggrieved by the grant of a building permit, the issuance of which was based in part on the Zoning Regulations, the Board had subject matter jurisdiction to hear his appeal.

Failure to State a Claim of Zoning Error

However, the Board agrees with DCRA that appellant has not sufficiently identified a claim of zoning error. As the property is not within the WH Overlay, appellant cannot rely on violations relating to the Overlay restrictions. The only possible claim of zoning error was that DCRA issued the fence permit in violation of § 2503.3.

Yet, Appellant does not claim that DCRA improperly issued the permit. He points to no faulty plans or improper calculations, nor does he allege that the permit authorized a fence greater than 7 feet in height. In fact, the fence permit expressly limits the fence height to seven feet (Attachment A to Exhibit 27). Instead, the Appellant focuses on the actual height of the fence, as built, and argues that it exceeds 7 feet (See, Findings of Fact 9-11). However, this fact, even if established, would not constitute an error in DCRA's zoning review process. Because this is an appeal arising from the grant of a building permit, and no error with respect to that decision

is alleged, the motion to dismiss the appeal as it relates to the fence permit must be granted.

ANC

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21), as amended; D.C. Official Code § 1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. ANC 3D voted to support the appeal, supporting the appellant's position regarding timeliness and inconsistencies with the WH Overlay. As stated in this Decision and Order, the appeal relating to the 2003 permits was untimely filed and the property is not located in the WH Overlay.

For reasons discussed above, the Board must grant the motion to dismiss the appeal as it relates to the 2003 permits. It is hereby **ORDERED** that the motion to dismiss the appeal is **GRANTED** based upon Appellant's having untimely filed it.

Vote taken on January 10, 2006

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and John G. Parsons in support of the motion)

For reasons discussed above, the Board must grant the motion to dismiss the appeal as it relates to the fence permit. It is hereby **ORDERED** that the motion to dismiss is **GRANTED** based upon Appellant's failure to sufficiently identify a zoning review error.

VOTE: 3-2-0 (Geoffrey H. Griffis, Curtis L Etherly, Jr. and John A. Mann II in support of the motion; Ruthanne G. Miller and John G. Parsons in opposition to the motion)

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

OCT 02 2006

FINAL DATE OF ORDER: _____

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

★ ★ ★

BZA APPEAL NO. 17391

As Director of the Office of Zoning, I hereby certify and attest that on OCT 02 2006, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR

Certificate of Service

I, Jonathan Gottlieb, hereby certify that I mailed, postage prepaid, a copy of this Petition for Review upon each of the following persons this thirty-first day of October, 2006:

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• **Comments:**

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