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- 1297 Rodut Associates of DC , LP vs. D.C. Board of Zoning Adjustment

District of Columbia Zoning Adjustment
Jerrily Kress, Director
441 4th Street, N.W.
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 30, 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. 17430
EXHIBIT NO. 33

Board of Zoning Adjustment
District of Columbia
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COURT OF APPEALS

RODUT ASSOCIATES OF DC, LP
400 7th Street, N.W.
Washington, D.C. 20004

v.

DISTRICT OF COLUMBIA BOARD
OF ZONING ADJUSTMENT

Case No. 06-AA-1297

PETITION FOR REVIEW FROM AN ORDER OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Petitioner, Rodut Associates of DC, LP, the owner of 1108 K Street, N.W., hereby petitions for review of the Order of the District of Columbia Board of Zoning Adjustment, dated September 29, 2006, dismissing Appeal Number 17430. In this Appeal, Petitioner challenged the issuance of Certificate of Occupancy No. 100692 for the property located at 1150 K Street, N.W.

In support hereof, Petitioner states as follows:

1. The Board applied the wrong legal standard in dismissing the appeal;

2. The Board's order is not supported by findings of fact based on substantial evidence of record;

3. The Board's rulings on the procedural motions were erroneous;

4. The Board's conclusions of law were erroneous; and

5. The Board's procedural actions with respect to the appeal were legally deficient and deprived the Petitioner of due process of law.

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GREENSTEIN DELORME & LUCHS, P.C.
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SUITE 900
WASHINGTON, D.C. 20036-5605
AREA CODE 202-452-1400

Therefore, Petitioner respectfully requests that the Court of Appeals reverse the subje order of the Board of Zoning Adjustment.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

Dated: October 30, 2006

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Roger D. Luchs, #347609
Stephanie A. Baldwin, #463370
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Counsel for Petitioner Rodut Associates of DC LP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition from an Order was served by first-class mail, postage prepaid, this 30th day of October, 2006, upon

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John Patrick Brown, Jr.

300685v1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17430 of Rodut Associates of DC, LP pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Certificate of Occupancy No. 100692 for property located at 1150 K Street, NW, for allowing more than one principal structure on a lot, in violation of § 3202.3 of the Zoning Regulations.

HEARING DATE: March 21, 2006
DECISION DATE: March 21, 2006

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on September 9, 2005, challenging DCRA's decision to approve a certificate of occupancy (C of O) on July 5, 2005, for a "Condominium [of] 121 Units and [a] Parking Garage" at 1150 K Street, NW (the subject property). The property owner to whom the C of O was issued moved to dismiss the appeal, and the Board conducted a public hearing. At the hearing the Board heard from the property owner, DCRA (who also moved to dismiss), the appellant and the affected ANC. The Board ruled that it lacked jurisdiction over the appeal because the appeal was untimely filed and because the Appellant was not an aggrieved party under the Zoning Act or the Zoning Regulations. 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 March 21, 2006. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the appellant, ANC 2F (the ANC in which the subject property is located), the property owner, and DCRA.

Parties

The appellant in this case is Rodut Associates of DC, LP (Rodut or the appellant). Appellant is the owner of 1108 K Street, NW ("1108 K"), a three-story commercial building. Appellant authorized the law firm of Greenstein DeLorme & Luchs, PC, John

Patrick Brown, Jr., Esq. and Stephanie A. Baldwin, Esq., to represent him in the appeal (Exhibit 4).

The subject property is improved with a condominium apartment house that was developed by 1150 Investors, Inc. (the owner[1]), and is located at 1150 K Street, NW ("1150 K"). The owner is represented by the law firm of Holland & Knight, Norman Glasgow, Esq., and Dennis Hughes, Esq. As the owner of the subject property, 1150 Investors, Inc. is automatically a party under 11 DCMR § 3199.1 and will hereafter be referred to as the owner.

ANC 2F, as the affected ANC, was automatically a party in this appeal. In a resolution dated March 6, 2005, the ANC voted to support dismissal of the appeal if the building at 1150 K Street was constructed on a single record lot (Exhibit 22).

DCRA appeared during the proceedings and was represented by Dennis Taylor, Esq.

FINDINGS OF FACT

The Property

1. The subject property is a newly constructed condominium building, consisting of 121 apartment units and a parking garage.

2. The condominium building is located at 1150 K Street, NW, at Square 317, Lot 27. Adjacent to it is the 1108 K property, which is improved with a three-story commercial building (the commercial building) at Square 317, Lot 25.

Background

3. The condominium building is located on land that was once part of Lot 25, the same record lot on which the commercial building is located. However, as a result of two subdivision recordations (detailed below), the condominium building is now located on land that is part of record Lot 27.

4. Both properties are zoned DD/C-3-C and located in Housing Priority Area B. As such, each property must provide at least 3.5 FAR of residential uses on site, but may account for such uses off-site through a combined lot development. The condominium had enough residential uses on-site to satisfy its residential requirement as well as the requirement of the commercial development. Rather than engaging in a combined lot

[1] 1150 Investors, Inc. was the record owner of the property at the time the C of O was issued on July 5, 2005, and is the current owner of a number of condominium units within the building.

development, the appellant maintains that the two properties were to be combined into a single building through the construction of an above grade connection[2].

5. DCRA issued Building Permit No. B452618 (the building permit) to the owner's predecessor-in-interest, JJR Residential, LLC (JJR) for the construction of a 14-story apartment house that was to be located on a portion of Lot 25 in Square 317 (Exhibit 23, Tab B, Exhibit 20, Tab C). The plans submitted for permit approval depict a proposed above-grade connection between the condominium and the commercial building (Exhibit 23, p. 2).

6. The owner constructed an above-grade connection on the interior of the east elevation of the condominium, but the connection was never built with the commercial building (Exhibit 23, p. 2). The two buildings are side by side, but without internal communication (Tr. p. 161). As a result, each portion of the structure is a separate building and the commercial development must find another residential property within Housing Priority Area B to meet its residential requirement. The consequence of these events is the subject of a lawsuit brought by the owner in Superior Court.

C of O

7. Because the occupancy of the condominium units was phased, separate C of Os were issued for groups of units within the building.

8. The application submitted in connection with C of O No. 100692 for 121 units (the challenged C of O) was dated June 30, 2005, and identified the subject property as "1150 K Street, NW", at "Lot 25, Square 317" (Exhibit 20, Tab F). The C of O itself was issued on July 5, 2005 (Exhibit 20, Tab A). It did not identify the lot or square for the premises, only the premise's address at "1150 K St., NW".

9. A separate undated application was submitted in connection with a C of O for an additional 8 units at the building (C of O No. 102814). This application identified the subject property as "1150 K Street, NW", at "Lot 27, Square 317" (Exhibit 25, Attachment B).

The Appeal

10. The appeal was filed on September 9, 2005, 66 days after the C of O was issued on July 5, 2005 (Exhibit 1).

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[2] The definition of "building" provides that the existence of communication below the main floor does not make two portions of a structure into a building. 11 DCMR § 199.1. Conversely, the existence of communication at or above the main floor does allow the portions to be deemed a single building.

11. Appellant filed a "Statement in Support of Appeal" detailing the basis of his claim (Exhibit 5). In it he alleges that the absence of an above-grade connection between the two buildings resulted in each structure being deemed a single building. As a result, he claims, the C of O allegedly issued for a single lot violates 11 DCMR 3202.3's requirement that only one principal structure be located on a single record lot (Exhibit 5)[3].

12. Appellant filed a "Pre-Hearing Statement" arguing that, despite the subdivisions which created Lot 27 at the 1150 property, the C of O was issued for Lot 25, and not for Lot 27. This reasoning is based, in part, upon the application reference to Lot 25.

13. DCRA confirmed the owner's position that the two buildings were on separate lots at the time the owner applied for the C of O (June, 2005) and at the time the C of O was issued (July 5, 2005) (Exhibit 21). The subdivision history is as follows:

(a) Record Lot 25 was recorded in Book 194, Page 104 of the Office of the Surveyor on February 28, 2001 (See, Subdivision Square 317, Exhibit 21, Tab 1).

(b) For purposes of assessment and taxation only, Record Lot 25 was apportioned into Tax Lots 834, 835, and 836 on May 6, 2003. While the creation of the tax lots did not affect the record lot designation, Tax Lots 834 and 836 are now occupied by the 1150 property, and Tax Lot 835 is now occupied by the 1108 property. (See Assessment and Taxation Plat 3810-H, Exhibit 21, Tab 2).

(c) Record Lot 25 was subdivided on January 24, 2005. With the recordation of that subdivision, the portions of record Lot 25 comprising Tax Lots 834 and 836 were separated from the remainder of record Lot 25, and designated as record Lot 26 (See, Subdivision Square 317, Exhibit 21, Tab 3).

(d) On May 6, 2005, record Lot 26 was combined with other property within Square 317 to form record Lot 27 (See, Subdivision Square 317, Exhibit 21, Tab 5).

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3 Subsection 3202.3 provides in part that "a building permit shall not be issued for the proposed erection, construction, or conversion of any principal structure... , unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record ... However 11 DCMR § 2517 "permit[s] two (2) or more principal buildings or structures to be erected as a matter of right on a single subdivided lot that is not located in, or within twenty-five feet (25 ft.) of, a Residence District." Since the Board found that each building sits on a single record lot, it did not address the relevancy of these provisions.

Motion to Dismiss and Motions for Summary Judgment

14. The owner filed a motion to dismiss the appeal on March 16, 2005, on several grounds as set forth below (Exhibit 23). The owner also submitted supplemental information on March 20, 2005. This submittal contained three "updated" C of Os for the condominium building. Each of the C of Os referenced Lot 27, Square 25 (Exhibit 25).

15. DCRA filed a motion for summary judgment on March 13, 2006, arguing that official records of the District prove that the two buildings are located on separate record lots (Exhibit 21).

16. Appellant filed its own "cross-motion for summary judgment" arguing that the C of O is "invalid on its face" and "not in compliance with the Zoning Regulations" (Exhibit 26).

CONCLUSIONS OF LAW

The Administrative Decision Complained of is the Issuance of the C of O

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 being complained of. The appeal in this case relates to DCRA's issuance of the C of O. It does not relate to the building permit, the contractual agreement for a single lot development, or the subdivision of Lot 25.

Motion to Dismiss

The owner filed a motion to dismiss the appeal on the following grounds (1) that the appeal was not timely filed; (2) that appellant is not an aggrieved person under the Zoning Act and Zoning Regulations; (3) that appellant failed to establish a violation of the Zoning Act or Zoning Regulations; and (4) that the appeal was barred under the equitable doctrine of estoppel. For the reasons set forth below, the Board finds that it lacks jurisdiction over this matter because the appeal was untimely filed and because appellant is not an aggrieved person under the Zoning Act and Zoning Regulations. Because the Board finds that it lacks jurisdiction to hear the appeal on these grounds, it need not, and does not, reach the other two grounds for dismissal.

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. In this case, that 60-day period must be measured from the issuance of the C of O. Under § 3112.2(d) of the Regulations, 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 60th day fell on Saturday, September 3, 2005, followed by Sunday, September 4, 2005 and Monday, September 5, 2005, the Labor Day holiday. Because the 60th day fell on a Saturday, followed by a Sunday and a holiday, the 60-day time period must be computed to end on Tuesday, September 6, 2005. *See*, 11 DCMR 3110.2. Therefore the latest appellant could have filed a timely appeal was September 6, 2005. The appeal filed on September 9, 2005, was three days late.

Appellant failed to identify any exceptional circumstances which impaired his ability to file a timely appeal. By his own admission, appellant received a copy of the C of O in late August, 2005, during the Superior Court litigation, and waited almost two weeks from that time to file his appeal.

As explained in the Findings of Fact, appellant's chief concern was the disputed single-lot development. Appellant attempted to address this concern through litigation in the Superior Court. 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. *See, Waste Management v. District of Columbia 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 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*. Accordingly, the Board lacks jurisdiction to hear the appeal because it was untimely filed.

Standing

In order to pursue an appeal before the BZA, an appellant must allege that an error by an administrative officer or body in carrying out or enforcing the Zoning Regulations has caused him particular damage. *See* D.C. Official Code § 6-641.07(g) (1) (2001), *supra*, and 11 DCMR 3112.2. Title 11 DCMR 3112.2 provides that "[a]ny person aggrieved by an order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, may file a timely appeal with the Board." (Emphasis added.)

While appellant alleges that he was aggrieved by actions of the owner relating to appellant's and owner's properties, appellant failed to allege a direct connection between any error on the part of DCRA in issuing the certificate of occupancy and any particular damage to appellant as a result. Rather, appellant's aggrievement appears to be not from any error on the part of DCRA, but from a contractual dispute between the parties. That dispute is one for another forum to decide, and is, in fact, pending before the Superior Court of the District of Columbia. (See Finding of Fact 6.) Accordingly, because appellant is not an aggrieved person under the Zoning Act or the Zoning Regulations, appellant lacks standing to bring this appeal and this Board is without jurisdiction to hear it.

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. Great weight means acknowledgement of the issues and concerns and an explanation of why the Board did or did not find their views persuasive. ANC 3D voted unanimously to advise the Board to dismiss the appeal if the apartment building at 1150 K Street was constructed on a single record lot and expressed concern that the quiet and peaceful enjoyment of the condominium dwellers would be disturbed. The Board notes the ANC's concerns, and has decided to dismiss the appeal, albeit on other grounds.

DCRA's Motion for Summary Judgment and Appellant's Cross-Motion for Summary Judgment

Because the Board dismisses the appeal for lack of jurisdiction, it does not address the merits of the case as set forth in DCRA's and appellant's motions for summary judgment.

For reasons set forth above, it is hereby **ORDERED** that the motion to dismiss the appeal is **GRANTED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Anthony J. Hood in support of 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

FINAL DATE OF ORDER: SEP 29 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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 17430

As Director of the Office of Zoning, I hereby certify and attest that on **SEPTEMBER 29, 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