



ADVISORY NEIGHBORHOOD COMMISSION 1A

CASE #

17671

ANC 1A01 - Jacqueline Arguelles
ANC 1A02 - Calvin Woodland
ANC 1A03 - Alex Hogan
ANC 1A04 - Betty Pair
ANC 1A05 - Anne Theisen

ANC 1A06 - Samuel Johnson
ANC 1A07 - Larry Ray
ANC 1A08 - Janisha Richardson
ANC 1A09 - Donny Gonzalez
ANC 1A10 - Lenwood Johnson
ANC 1A11 - Dotti Love Wade

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BOARD OF ZONING ADJUSTMENT
District of Columbia

OPPOSITION FROM ANC 1A
TO THE DISTRICT'S
MOTION TO DISMISS

CASE NO. 17671
EXHIBIT NO. 21

ANC 1A is opposed to the District's Motion to Dismiss filed with the District of Columbia Board of Zoning Adjustment ("BZA" or "Board") on October 29, 2007. The basis for the motion bespeaks a lack of understanding of the timeliness rules governing the BZA, as outlined in Title 11, DCMR, Section 3112.2.

STATEMENT OF FACTS

On December 15, 2006, the Department of Consumer and Regulatory Affairs ("DCRA") issued Building Permit No. 90426 (the "Permit").

On January 19, 2007, DCRA Advisory Neighborhood Commission Liaison Eric Rogers served ANC Commissioner Lenwood Johnson with notice of the Building Permits issued from December 15 or December 31, 2006. Notice was required to be sent to ANC 1A Commission Vice Chair Anne Theisen, who is the Single Member District ("SMD") Commissioner for the SMD within which the property is located, or to ANC1A Commission Chair, Dotti Love Wade, who would be responsible to forward it to the appropriate Commissioner, but it was not.

The existing use and the proposed use indicated on the permit application, as well as the DCRA permit summary, were both listed as "Residential - one/two family."

In early April 2007, construction work began on the building at 1432 Monroe Street, N.W. On April 3, 2007, nearby residents observed construction at the site that did not appear to meet the requirements of the R-5-B zoning of the property (specifically, the foundation was being laid along the alley, suggesting that the building might be intended to occupy the entire lot).

On April 4, 2007, residents called the Zoning Administrator with their concerns; when he did not respond within the required 24 hours, they contacted DCRA again on April 5, 2007 and made an appointment for April 9, 2007 with Mabel [last name unknown] to view the drawings for the project. On April 9th, residents arrived for the scheduled appointment; however, Mabel did not recall making the appointment and did

not have the drawings ready. Mabel looked for the drawings but was only produced an incomplete set, which was insufficient to resolve the residents' concerns. Repeated contact with the Office of the Zoning Administrator yielded no results until the Mayor's Office and Councilmember Cheh were contacted. On April 24, 2007, DCRA reportedly found a full set of drawings for the project, but refused to release them. DCRA finally provided a full set of drawings on May 4, 2007; however, this set did not include the required survey plat. Even without the survey plat, the drawings indicated zoning problems with regard to allowable height, lot occupancy, floor area ratio, parking, and a planned closed court. On May 9, 2007, DCRA provided the residents with a copy of the survey plat.

The building under renovation at 1432 Monroe Street, N.W. was not "under roof" (as defined by Section 3112.2 (b)) on May 11, 2007.

On May 9, 2007, ANC 1A voted to appeal the Zoning Administrator's decision to approve Building Permit No. 90426 as being in compliance with the Zoning Regulations. The ANC took this action based on the information that was obtained from DCRA on May 4 and May 9, 2007.

On May 11, 2007, ANC 1A filed the instant appeal, seven days after having knowledge of the decision complained of, that is, the issuance of Building Permit No. 90426 based on incorrect plans, a fact to which DCRA has effectively stipulated.

#### ARGUMENT

The Appellee has argued to the BZA that it lacks the jurisdiction to hear Appeal No. 17671 on its merits, because the ANC 1A did not file its appeal within 60 days of the issuance of Permit No. 90426. It draws this conclusion based on a misreading of Title 11, DCMR, Section 3112.2 (a), which states: "An appeal shall be filed within sixty (60) days from the date 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."

The Board is compelled to read the ordinance in full rather than misinterpret the intent of the Zoning Commission in drafting it as the Appellee has done. Section 3112.2 (b) goes on to say: "If the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, the following subparagraphs *shall* establish the latest date on which an appeal may be filed (*emphasis added*): (1) No appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof. For purposes of this subparagraph, the phrase "under roof" means the stage of completion of a structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place; and (2) The provisions of paragraph (b) of this subsection shall not relieve an appellant of the jurisdictional requirement in paragraph (a) of this subsection of filing a timely appeal."

Section 3112.2 (b) is not optional in interpreting the timeliness question – it is essential.

The importance of Section 3112.2 (b) arises from the presumption that is afforded to DCRA that it issues permits legally. It is only when a person becomes aware of other facts (usually triggered by seeing something amiss) that the presumption is called into question. As is the case here, the “decision complained of” is not the issuance of the permit itself, but the issuance of the permit based on incorrect plans. The ANC had no knowledge that the issuance of Building Permit No. 90426 was based on incorrect plans until those plans were provided to them on May 4, 2007. The appeal was filed seven days later.

If there remains any doubt on the part of the Board that the Appellant’s appeal was filed timely, we urge the Board to review Zoning Commission Order No. 02-01, which we have attached. Among other relevant points, we highlight the following from the discussion of the hearing on the regulations that were to become Section 3112.2: A member of the public “...expressed concern that the denial of access to permit files and plans might affect a person’s ability to file a timely appeal. The Commission agrees that denial of access to public information might result in delay; however, the rule addresses such delays *by providing that the appeal period begins to run from the time a person had actual or constructive knowledge of the administrative decision complained of and by providing that the Board may extend the appeal period in exceptional circumstances (emphasis added).*”

The reasoning behind the structure of Section 3112.2 is straightforward – it is simply not enough for the public to be aware that a permit has been issued as the sole determinant of when the 60-day clock for an appeal starts ticking. At that point, there is no trigger to suggest that an error has been made. When construction is involved (as addressed in Section 3112.2(b)), the trigger is to view the construction as it progresses. The Zoning Commission set an outside limit, however, that by the time a building is under roof, one should be able to discern a lack of compliance with the Zoning Regulations.

DCRA clearly takes its duty to inform the public when permits are issued seriously, by developing a system that notifies ANCs of basic permit information shortly after issuance. That system alone is a vast improvement over the information void that formerly existed. However, the information provided in the bi-weekly permit report is insufficient, on its face, to meet the standard of the ANC having “knowledge of the decision complained of.” In order to claim that, DCRA would have to have made all the supporting documentation to the permit available at the time of the bi-weekly report, which they did not.

To interpret the Section 3112.2 as requiring an appeal to be filed within 60 days of the issuance of a permit without regard for an individual’s opportunity to appeal after construction is underway (more than 60 days after the permit date) sets up several unintended situations. First, any developer could ensure that no appeal of a construction

project would ever be sustained against a project where DCRA had erred by simply delaying construction until 60 days after the permit date. In that case, ANC's in particular (for whom there is no cost to file an appeal) could protect their appeal rights by appealing every building permit to buy themselves time to research the plans and drawings. Second, to interpret Section 3112.2(a) by ignoring subsection (b) is inconsistent with the interpretation of legal drafting that all sections are intended to have meaning. The Appellee is advocating that the BZA effectively rewrite the Zoning Regulations to exclude Section 3112.2(b), which the BZA does not have the authority to do.

ANC 1A's appeal in Case No. 17671 is timely based on the fact that the appeal was filed seven days after the ANC had knowledge that the permit was issued in error, which was the date on which the complete set of permit plans were released to them. Any other reading of Section 3112.2 is simply wrong and ignores the intent of the Zoning Commission in clarifying the timeliness rules in Z.C. Case No. 02-01.



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Anne Theisen, Commissioner ANC1A05  
Chair, 1A Planning and Zoning Cmt

January 9, 2008



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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ANC1A response to the District of Columbia's Motion to Dismiss was served by e-mail this 9<sup>th</sup> day of January, 2008, to the following:

Robert Cooper, Esquire  
Cooper and Crickman  
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Matthew LeGrant  
Zoning Administrator  
Department of Consumer and Regulatory Affairs  
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Dennis M. Taylor  
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Department of Consumer and Regulatory Affairs  
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Anne Theisen, ANC1A05 Commissioner  
Vice Chair, ANC1A  
Chair, ANC1A Planning and Zoning Committee