

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

BZA Appeal No. 21100

Appellants: Friends of the Field, Gladys Austin, Kenneth Austin, Claudia Russell, Sylvie Tanoh, Thierry Tanoh, Nancy Voisin, and David Patton

**Respondent: District of Columbia Department of Buildings
Party in Interest: The Maret School**

OPPOSITION TO MOTION TO DISMISS

Appellants Friends of the Field, Gladys Austin, Kenneth Austin, Claudia Russell, Sylvie Tanoh, Thierry Tanoh, Nancy Voisin, and David Patton, by their undersigned counsel, hereby oppose the Motion to Dismiss filed by the District of Columbia Department of Buildings (“Department”).

On November 27, 2023, the Department of Buildings issued Permit BCIV2300110 to the Episcopal Home for Children relating to The Maret School’s “PROPOSED ATHLETIC FIELDS, NEW MULTIPURPOSE ATHLETIC FIELD ON A PREVIOUSLY UNDEVELOPED AREA.” The project’s address was 5901 Utah Avenue NW. [Exhibit 1].

Appellants filed their appeal on January 25, 2024. Appellants expressly reserved their right to amend the appeal once the associated structural permit is issued for the construction of the retaining wall. The appeal was timely. Title 11 DCMR Subtitle Y, §302.2.

On February 13, 2024, the Board of Zoning Adjustment (“BZA”) issued a Notice of Virtual Public Hearing, setting the hearing for July 17, 2024.

The Department of Buildings filed its Motion to Dismiss on July 10, 2024.

I. The Motion to Dismiss Should Be Dismissed for Laches

The BZA's Regulations provide that "Unless otherwise provided by these rules or ordered by the presiding officer all parties opposing a motion shall have seven (7) days from the service of the motion to file and serve a response." Title 11 DCMR Subtitle Y, §407.4. The Department emailed their Motion in the afternoon of July 10, 2024. The clock for filing an Opposition started on July 11. Therefore, July 17 – the day of the hearing – is the 7th day. Appellants have until midnight on July 17 – after the hearing – to respond to the Motion. The Department has filed this motion too late. The BZA cannot – per its own rules – decide the motion because that would deprive Appellants of the full time in which to respond. Nor can the BZA force Appellants to file their Opposition in less time than permitted by the Regulations.

In *American University Park Citizens Asso. v. Burka*, 400 A.2d 737, 740 (D.C. 1979), the court explained that

Laches is the principle that "equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." *Russell v. Todd*, 309 U.S. 280, 287 ... (1940). It was developed to promote diligence and accordingly to prevent the enforcement of stale claims.

Laches should also apply where, as here, the Respondent's failure to exercise diligence in filing a motion to dismiss prejudiced the Appellants.

The Department has offered no reason why it could not have filed its Motion at any time between January 30 and July 1. BZA should not condone the Department's lack of diligence.

II. The Board of Zoning Adjustment Has Jurisdiction to Review Appeals from Permits Issued by the Department of Buildings

A. The Department is Responsible for Permits it Issues

The BZA clearly has jurisdiction to consider appeals from various District agencies, including the Department of Buildings. Title 11 DCMR Subtitle Y, §100. See, e.g., *Appeal No. 17285 of Patrick J. Carome* (2005), *aff'd sub nom. Economides v. BZA*, 954 A.2d 427 (D.C. 2008).

No, says the Department. Although the Department issued the permit and Department Director Brian Hanlon signed the permit, the Department “never reviewed” the Permit application “prior to its issuance” and does not review BCIV applications. According to the Department, “there is nothing for the BZA to decide because the scope of the BCIV Permit did not implicate the zoning regulations nor did the BCIV Order undergo any review by OZA.” [Motion at 1-2].

The BZA cannot countenance such behavior. Each District agency must be responsible for the decisions it signs indicating approval. This is especially true where, as here, community members have the right to appeal. From whose decision do they appeal? Even in its Motion, the Department does not identify the “real” decision-maker.

But the BZA Regulation gives the BZA authority to consider appeals from any agency. If not the Department, who? Appellants could have filed a timely appeal from a DDOT or a DOEE decision if only the decision-maker had been identified. The Department cannot hide the ball and then say “not me.”

Regulations require the posting of construction Permits. Posted Permits presumably reassure the public that a responsible District agency has approved the construction project. The

Department claims that it is not a responsible agency. If the BZA accepts the Department's explanation, it must find that the Department is not "responsible" in any sense of the word. And the public must be told they cannot rely upon a Permit issued by the Department. Of what value to the community is a permit issued by the Department?

B. The Permit Involved Zoning Regulations

Equally without merit is the Department's contention that the Permit "does not touch on administration or enforcement of the Zoning Regulations." [Motion at 2]. The Permit expressly provides that it will expire in 180 days unless there is a "structure built under the Residential Code." [Exhibit 1]. The "structure," of course, is the "multi-purpose athletic field" Maret proposes to build at 5901 Utah Avenue. "Structure" is defined in the Zoning Regulations. Even someone unaware of the litigation involving the Maret Project should have understood that "the Residential Code" is part of the Zoning Regulations.

The Permit labeled BCIV2300110 is part of 13 permit series involving, *inter alia*, sheeting and shoring, excavation, and the installation of retaining walls. [Exhibit 2, hereto]. Appellants will testify that some of these permits were not publically posted as required and some were not posted on Maret's website. More importantly, the Court of Appeals has expressly adopted the BZA's position that multiple permits for the same construction project must be viewed as a collective permit. *Sisson v. BZA*, 805 A.2d 964 (D.C. 2002).

Several facts should have been clear to the Department which issued the Permits. First, each of the 13 permits was part of one major construction project at 5901 Utah Avenue. Second, the retaining wall permit was expressly required to comply with the BZA's decision in *Application No. 20643 of The Maret School*. Third, the retaining wall permit expressly refers to Permit BCIV2300110. Fourth, a retaining wall is expressly listed as an example of a structure in the Zoning Regulations. See DCMR 11B §100.2.

C. The Appeal Properly Includes the Retaining Wall Permit

In their January 2024 filing, Appellants expressly reserved the right to include in their appeal as yet unissued permits involving the construction project at 5901 Utah Avenue. Subsequently, the Department issued Permit RW2400069 concerning the installation of retaining walls to create the multi-purpose athletic field which was the basis for Permit BCIV 2300110. In fact, Permit RW2400069 expressly cited and relied upon Permit BCIV 2300110.

The Department's contentions that Appellants cannot criticize the retaining wall as part of their appeal from Permit BCIV 2300110 and that an appeal from Permit RW2400069 would be untimely are doomed by the BZA decision affirmed by the Court of Appeals in *Sisson v. BZA*, 805 A.2d 964 (D.C. 2002). The *Sisson* facts closely parallel the facts here. Mildred Crary appealed from several construction permits issued to Charles Sisson. After Ms. Crary filed her appeal, Mr. Sisson obtained additional permits for the same project. Mr. Sisson argued, unsuccessfully, that Ms. Crary could not challenge the fifth permit which issued after she filed her appeal. The BZA held that the timely appeal permitted challenges to a subsequent permit.

The Court of Appeals agreed, quoting heavily from the BZA decision:

[Mr. Sisson] submitted five separate applications for building permits that all related to work performed on a single property. Because of the cumulative, piecemeal nature of the applications, the full extent of [Mr. Sisson's] construction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole. . . . Therefore, the Board concludes that [Ms. Crary] was not chargeable with notice of the entire scope of work performed at [Mr. Sisson's] property until all of the permits were issued.

Id at 967-968, 970.

Appellants would not have located all of the permits on the District of Columbia website. Several permits, including the retaining wall permit, were issued to the Episcopal Home for Children, an entity that has not existed, except on paper, for decades. The retaining wall permit

erroneously states that it will be built on Square 2319, Lot 831. [Exhibit 2]. There would have been no reason to conduct a computer search for permits issued for Lot 831 when the Maret Project would be on Lot 832.

The permits have not always been posted or visible from the public right of way. In fact the public right of way has been closed since construction began. No effort has been made to correct this public access. In addition, The Maret School was clear for the benefit of the neighbors that it would place all permits on its construction website. It did place the Civil permit and the permitted Civil drawings on the site. But, it subsequently removed them. The neighbors were required to request them from the District as they were not also on the District website in any easily accessible or timely manner.

CONCLUSION

For the reasons stated herein, the Motion to Dismiss must be denied.

Respectfully submitted,

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**Department of Buildings**

Permit Operations Division
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Washington DC 20024
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**BUILDING CIVIL PERMIT**

THIS PERMIT MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS OF WORK UNTIL WORK IS COMPLETED AND APPROVED

PERMIT NO. BCIV2300110



Issue Date: 11/27/2023

Expiration Date: 11/27/2024

Address of Project: 5901 UTAH AVE NW		Zone: R-1-B	Ward: 4	Square: 2319	Suffix:	Lot: 0829
Description Of Work: Episcopal Home for Children MARET SCHOOL PROPOSED ATHLETIC FIELDS - NEW MULTI-PURPOSE ATHLETIC FIELD ON A PREVIOUSLY UNDEVELOPED AREA.						
Permission Is Hereby Granted To: Episcopal Center For Children		Owner Address: 5901 UTAH AVE NW 5901 UTAH AVE NW WASHINGTON, DC 20015		PERMIT FEE: \$715.00		
Permit Type: Civil Plans	Agent Name: Dfm Development Services Llc		Contractor Name:			
Agent Phone #: 7032831118	Agent Address: 400 N Washington St 3rd Fl. Falls Church, VA 22046		Contractor Address:		Contractor Phone #:	
Conditions/ Restrictions: This permit expires if no approved inspections have occurred within one year after the issuance date on this permit or 180 days for structures built under the Residential Code. A permit extension must be requested before the expiration of this permit. As a condition to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District government, and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property to inspect all work authorized by this permit, and to require any change in construction which may be necessary to ensure compliance with the permit and with all the applicable regulations of the District of Columbia. Work authorized under this permit must start within one (1) year of the date appearing on this permit or the permit is automatically void. If this permit has expired and no work or partial work was completed, a If this permit was issued to a building built before 1978, it is subject to full compliance with the Lead-Hazard Prevention and Elimination Act, its associated regulations, and the EPA Lead Renovation, Repair and Painting Rule. To determine how to comply, submit a Lead-Activity Notification form at						
Brian J. Hanlon, AIA LEED AP® Director				Permit Clerk QTHOMAS		
DC INSPECTOR GENERAL HOTLINE: If you are aware of corruption, fraud, waste, abuse, or mismanagement involving any DC Government agency, official or program, contact the Office of the Inspector General (OIG) at 202-727-0267 or 1-800 521-1639 (toll free). All reports are confidential and you may remain anonymous by law. Government employees are protected from reprisals or retaliation by their employers for reporting to the OIG. The information you provide may result in an investigation leading to administrative action, civil penalties, or criminal prosecution in appropriate cases. To schedule a CONSTRUCTION INSPECTION or for INQUIRIES CALL (202) 442-9557 Call Miss Utility at 811 or 1-800-257-7777 at least 48 Hours prior to excavation to obtain a ticket. www.missutility.net/washingtondc/dsstateaw.asp						

Appellant Exhibit 1

Appellant Exhibit 2

Maret Permit Matrix

7-15-2024

Permit	Permit Number	Dates	Made out to:	Address	Square & lot	Correct Sq & Lot	Posted?	Comments
Granted to the entity to remove and preserve trees	Urban Forestry TA88465	Expired	Maret School	5901 Utah Avenue			Yes	In conjunction with BCIV2200160
For Limited Disturbance for the heritage tree location	(BCIV2200160)	Expired	Episcopal Home for Children	5901 Utah Avenue	Square 2319 and Lot 0831: lot 831 is the ECC lot	Lot 0832	Yes	
Public Space Improvements	DDOT PA416763	Posting is incomplete-see comments	Maret School	5810-5898 Block of Nebraska Ave. NW.			Yes, but Incomplete	Additional required pages and Appendix B are missing and therefore no date is provided.
Installation of manhole and new storm line connection	DDOT PA11065847	Expired	Episcopal Home for Children	5800-5809 Nebraska Ave.			Yes	
Traffic Control for Curb cut	DDOT PA 11045864	Expired	Episcopal Home for Children	5810-5898 Block of Nebraska Ave. NW.			Yes	
Stabilized construction entrance for tree relocation and other activities at 5901 Utah Ave.	DDOT PA10988027	Expired	Episcopal Home for Children	5810-5898 Nebraska Ave. and 5900-5911 Utah Ave.			Yes	
Stabilized construction entrance for tree relocation and other activities at 5901 Utah Ave.	DDOT PA10988027 R-2	Expired	Episcopal Home for Children	5810-5898 Nebraska Ave. and 5900-5911 Utah Ave.			Yes	

Permit	Permit Number	Dates	Made out to:	Address	Square & lot	Correct Sq & Lot	Posted?	Comments
Maret School proposed athletic fields - new multipurpose & athletic field on previously undeveloped area.	BCIV2300110	11/27/2023	Episcopal Center for Children	5901 Utah Avenue	Square 2319 and Lot 0829; Lot 0829 was subdivided in October, 2021 and does not exist.	Lot 0832	Was not posted and visible to the public during portions of the construction. Originally was on the Maret/ECC website where all permits were to be placed as well as permitted drawings. No permitted drawings and or permits are on the Maret/ECC website currently.	DOB Neighborhood Notification letter informing that excavation requiring a permit will be occurring on the site was received almost 4 months after excavation began and more than 6 months after permit was received. Form letter is incomplete. Declarations of Covenants between OAG and ECC for the stormwater management was based on exhibits from this permit which are to the nonexistent lot,
Description is for installation of retaining walls Civil Permit #BCIV2300110	RW2400069	4/24/2024	Episcopal Home for Children	5901 Utah Ave. drawings say for Maret Athletic Fields at 5901 Utah Ave.	Square 2319 Lot 0831, lot 831 is the ECC lot	Lot 0832	Yes but not fully legible	Missing the Engineer / Architect which is YUN Associates of 1050 Connecticut Ave. NW. Their license number is 908347 per his stamp. Instead the address and license of MCN Build is used which is not the engineer of record. Documentation is incomplete and only for some walls, where is the remainder of the walls holding back earth?
Excavation for manhole Installation, Excavation: Storm Lateral Conn over 4" (Trench)	DDOT PA441738	Expired 6-9-2024		5810-5898 Nebraska Ave. and 5900-5911 Utah Ave.			Yes	
Statement of Special Inspections	SH2400019	3/3/2024		5901 Utah Avenue			Yes	

Permit	Permit Number	Dates	Made out to:	Address	Square & lot	Correct Sq & Lot	Posted?	Comments
Temporary Sheeting and Shoring for athletic fields project. Work to be completed prior to any utility installation.	SH2400019	4/10/2024	Episcopal Home for Children	5901 Utah Avenue, drawings say for Maret Athletic Fields at 5901 Utah Ave.	Square 2319 Lot 0831, lot 831 is the ECC lot	Lot 0832	Was not visible during active work.	Requested from city as multiple requests to owner rep and contractor failed. The civil drawings were reissued under this permit number. That reissue included the 6-6-23 DDOT/DOEE resubmittal and the of 8-11-23 DOEE resubmittal. This is confusing and requires clarification.
Awaiting the permit for the "field house" renovation.								
NOTES:	OTR address for lot 0832 is Nebraska Avenue							

CERTIFICATE OF SERVICE

I certify that on July 15, 2024 a copy of the foregoing was sent via electronic mail and/or the electronic filing system (IZIS) to:

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