

**BEFORE THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT**

Appeal of Dupont Circle Citizens Association

Appeal No. 19374

**OWNER'S MOTION TO DISMISS APPEAL**

**I.  
INTRODUCTION**

The owner of the property which is the subject of this appeal, 1514 Q LLC, (hereinafter, the "Owner"), hereby joins in the Motion to Dismiss of DCRA, and respectfully requests that the Board dismiss this appeal as untimely filed. This Board has consistently affirmed that "the Board lacks jurisdiction to hear any appeal that is not filed in a timely manner." See, e.g., BZA Appeal No. 18300 of Ausubel, at p. 5 (April 11, 2012), citing Economides v. DC Board of Zoning Adjustment, 954 A. 2d 427, 434-35 (DC 2008); Waste Mgmt. of Md., Inc. v. DC Board of Zoning Adjustment, 775 A. 2d 1117, 1121-22 (DC 2001); Mendelson v. DC Board of Zoning Adjustment, 645 A. 2d 1090, 1093 (DC 1994)(the timely filing of an appeal with the Board is mandatory and jurisdictional; if an appeal is not timely filed, the Board is without power to consider it); BZA Appeal No. 18070 of ANC 6B, at p. 4 (December 17, 2010). The 60-day time period for filing an appeal is strictly construed. See e.g., BZA Appeal No. 17430 of Rodut Associates of DC, LP (September 29, 2006) (appeal untimely filed three days after expiration of 60-day appeal period).

The Board is bound to consider this threshold jurisdictional question first, prior to consideration of the appeal itself. BZA Appeal No. 18300 of Ausubel, *supra* at p. 4, citing BZA Appeal No. 17411 of Basken and Meyer, at p. 4 (March 23, 2006), *affirmed*, Basken v. DC Board of Zoning Adjustment, 946 A. 2d 356 (DC 2008). Owners therefore respectfully request

the Board's determination on this Motion to Dismiss prior to a consideration of the merits of the appeal.

## **II. SUMMARY OF ARGUMENT**

This appeal was filed by the Dupont Circle Citizens Association (hereinafter the “Appellant”) on September 16, 2016 (BZA Exhibits 1 and 2), and supplemented with additional claims on November 23, 2016 (BZA Exhibits 24, 24A and 24B). The appeal challenges the issuance of the July 18, 2016 building permit for the project at 1514 Q Street, N.W., and raises a number of issues. However, the Zoning Administrator ruled upon these exact same issues at least six months earlier, in his Determination Letter of March 21, 2016 (BZA Exhibit 27A), and supplemented in his follow-up email exchange on March 22, 2016 (BZA Exhibit 27B) (hereinafter, the “Zoning Administrator’s Rulings”). On March 21 and 22, 2016, the Zoning Administrator’s Rulings were served upon Brian Gelfand and Don Hawkins, who presented themselves as the Appellant’s representatives at the January 18, 2017 public hearing on this appeal. Because this appeal was filed more than 60 days after the Appellants had “notice or knowledge of the decision complained of” in the Zoning Administrator’s Rulings, this appeal must be dismissed.

The Zoning Regulations and the decisions of this Board and the DC Court of Appeals establish a very clear deadline for filing an appeal. An appeal must be filed within 60 days from the date the appellant "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." 11-Y DCMR, Section 302.27 (emphasis added). In addition,

“A zoning appeal may only be taken from the first writing that reflects the administrative decision complained of to which the appellant had notice. No

subsequent document, including a building permit..., may be appealed unless the document modifies or reverses the original decision, or reflects a new decision.”  
11-Y DCMR, Sec. 302.5.

Actual or constructive notice or knowledge that a decision has been made is what starts the 60-day clock. There is no requirement that the person also has notice or knowledge of the rationale for the decision. BZA Appeal No. 17513 of ANC 2E at p. 8 (January 4, 2008). When an appellant asserts a certain date as the basis of its zoning appeal, the Board must determine if there is an earlier date that should apply. BZA Appeal No. 17468 of ANC 6A, at p. 4 (February 16, 2007). Once the person has actual or constructive notice or knowledge that a decision has been made, that person has an obligation to undertake due diligence to determine the nature of the decision, in order to be able to file a timely appeal. Id.

The Board may extend the 60-day deadline only if the appellant demonstrates that (1) exceptional circumstances outside the appellant's control, which could not have been reasonably anticipated, substantively impaired the appellant's ability to file the appeal; and (2) the extension of time will not prejudice the parties to the appeal. 11-Y DCMR, Section 302.6. When, as here, the decision complained of

"involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, the following paragraphs shall establish the latest date on which a zoning appeal may be filed: (a) No zoning appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof..." 11-Y DCMR, Section 302.3. (emphasis added).

Because this appeal was not filed until after the 60-day appeal period had expired, and more than 10 days after the structure was under roof, and because the Appellants can demonstrate no exceptional circumstances outside of their control that impaired their ability to act timely, and because an extension of the 60-day appeal period will prejudice the Owners, this appeal must be dismissed.

### **III.** **THE FACTS**

1. In the fall of 2015, the Owner proposed to convert the existing dwelling at 1514 Q Street, NW, which was then located in the DC/R-5-B zone, into a four-unit apartment building. An application was made to the HPRB for exterior alterations, including a rear addition within the applicable height, density and setback requirements of the Zoning Regulations. Those exterior alterations were supported by ANC 2B (BZA Exhibit 27C), and were approved by the HPRB, and by DCRA, and the addition was subsequently constructed.

2. In the fall of 2015, the Owner discussed the proposal with the Zoning Administrator, including the proposed addition of a dwelling unit in the cellar level. The Zoning Administrator determined at that time that the lowest level was in fact a cellar, as it met the requisite measurements for a cellar, and therefore did not count in the FAR calculation.

3. Citing neighbor concern that the cellar measurement was not accurate, ANC 2B adopted a resolution dated November 23, 2015 requesting the Zoning Administrator to come to the site to make a measurement to verify whether the lowest level is in fact a cellar. (BZA Exhibit 27C).

4. A meeting was held at the site on February 12, 2016, at which DCRA Building Inspector Ruben Legaspi, ANC Commissioner Abigail Nichols, the Owner, and the Owner's architect, among others, were present. Measurements were taken with a mock-up of the ceiling height of the lowest level, and authenticated photos of the measurement were taken in the presence of all attendees, and were presented to the Zoning Administrator.

5. Appellant's representative Brian Gelfand met at the site on March 8, 2016 with Tarek Bolden and Rohan Reid of DCRA, and others. The agenda for that meeting, prepared by ANC Commissioner Nichols, stated the purposes of the meeting:

--"so that the Zoning Administrator can fulfill the request from ANC 2B that a representative of the Zoning Administrator verify measurements and the developer's plans onsite in the presence of representatives of the public and the ANC"; and also,

-- "there is the question of whether the below grade space can be a habitable cellar which doesn't count toward FAR".

(See email attached to this Motion as Exhibit A).

6. In a follow-up email of March 9, 2016 from Appellant's representative Brian Gelfand to Messrs. Bolden and Reid of DCRA, and to the Zoning Administrator, Mr. Gelfand argued the Appellant's point that "the definition of 'Habitable Room' specifically excludes cellars", and that the cellar area should not have been excluded from FAR. (BZA Exhibit 27B).

7. The Zoning Administrator issued his Determination Letter on March 21, 2016, in response to the observations and measurements taken at the February 12, 2016 site visit. (BZA Exhibit 27A). In his comprehensive five-page Determination Letter, the Zoning Administrator analyzed all aspects of the project, including the proposed uses, the cellar measurement issue, and the FAR issue, plus the height, the lot occupancy, the rear yard, the side yard and the parking for the project. He determined that based upon the measurements taken at the site, and other evidence, the lowest level is a cellar for zoning purposes, that cellars are excluded from the calculation of FAR, and that the plans show that the permitted 1.8 FAR will not be exceeded. He concluded that:

"there is sufficient evidence to determine the Cellar Area satisfies the definition of a 'cellar' under 11 DCMR Sec. 199.1 Therefore the Project satisfies the requirements of

the R-5-B zone. Accordingly, it is my determination that the Project may be constructed as a matter of right, provided that the project plans filed with the building permit do not substantially deviate from the plans attached here as 'Exhibit A' “.

8. The Zoning Administrator's March 21, 2016 Determination Letter was published on the Zoning Administrator's website on March 22, 2016. (BZA Exhibit 27A). Exhibit A of the Determination Letter is the proposed building plans referenced in the above-quoted language, which clearly show that the cellar level was previously occupied with a bedroom and bath, and that it was proposed to be occupied as a two-bedroom apartment.

9. The Zoning Administrator sent his March 21, 2016 Determination Letter by email on that same date to Appellant's representatives Brian Gelfand and Don Hawkins, as well as to other members of the community including ANC Commissioner Abigail Nichols, Jenny Gelfand, and ANC 1C05 Commissioner Alan Gambrell.

10. On March 22, 2016, the Zoning Administrator sent a follow-up email to Appellant's representatives Brian Gelfand and Don Hawkins, as well as Commissioner Nichols, Jenny Gelfand, and Alan Gambrell, responding to Mr. Gelfand's March 9 email to the Zoning Administrator and Messrs. Bolden and Reid “regarding the treatment of ‘habitable rooms’ and ‘cellars’ as per my interpretation”. The Zoning Administrator pointed out in his March 22 email that his

“approval of numerous other projects with below grade dwelling units is consistent with the District's Zoning Regulations. Although cellars and attics are excluded from the definition of ‘habitable room’, the regulations do not prohibit those spaces from being used for sleeping, cooking and living. This has been DCRA's long-standing interpretation of the regulations....

I hope this information is helpful in the explanation of my office's approval of the project”.

11. A building permit was issued for the project on July 18, 2016. The permit plans “do not substantially deviate from the plans attached” to the March 21, 2016 Determination Letter.

12. The project was under roof by July 31, 2016.

13. This appeal was filed on September 16, 2016, which was 47 days after the project was under roof, and 178 days after the issuance of the Zoning Administrator’s Rulings and service of those rulings on Appellant’s representatives Brian Gelfand and Don Hawkins.

14. The September 16 appeal claims that the Zoning Administrator incorrectly classified the lower level dwelling unit as a cellar, because it contains habitable space; and because the lower level is incorrectly classified as a cellar, the project exceeds the permitted FAR. These same issues were addressed in the Zoning Administrator’s Rulings of March 21 and 22, 2016.

15. On November 23, 2016, the Appellant’s amended their appeal, to include a specific challenge to the height measurement of the cellar that was included in the March 21, 2016 Determination Letter, claiming that it is not a cellar but rather a basement, and included in FAR. This appeal amendment was filed 246 days after the issuance of the Zoning Administrator’s Rulings and service on Appellant’s representatives Brian Gelfand and Don Hawkins, and included the same issues that were addressed in the Zoning Administrator’s Rulings.

16. This appeal challenges the very same issues that were addressed in the Zoning Administrator’s Rulings on March 21 and 22, 2016.

**IV.**  
**11-Y DCMR, SECTION 302.2 ESTABLISHES THE**  
**DEADLINE FOR FILING AN APPEAL**

11-Y DCMR, Section 302.2 establishes a filing deadline of 60 days from the time that an Appellant has actual 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 Zoning Commission originally adopted this provision in Order No. 02-01, dated February 7, 2003, "in order to reduce uncertainty and litigation over the timeliness of Board of Zoning Adjustment appeals." See Zoning Commission Order No. 02-01, at p. 1. The adoption of former Section 3112.2 in Order No. 02-01 "codifies the principles established in Waste Management (supra), and prior court decisions by requiring all appeals to the Board pursuant to the Zoning Act to be filed within sixty (60) days of the date the appellant had actual or constructive knowledge of the administrative decision complained of." *Id.* at p. 2.<sup>1</sup> (emphasis added). The Zoning Commission also included a new paragraph (b) in Order No. 02-01 that:

"no appeal may be filed later than ten (10) days after construction is 'under roof' ... Since the sixty (60) day appeal period is based upon actual or constructive notice or knowledge of the decision complained of rather than the actual date of the decision complained of, the Commission's intent in paragraph (b) was to establish a firm deadline beyond which no appeal could be filed. Accordingly, the Commission ... added a new paragraph (c) to clarify that all appellants have at least sixty (60) days from the date of the decision complained of in which to file an appeal... The cap in paragraph (b) on the appeal period, however, does not relieve an appellant of the responsibility of filing a timely appeal, within sixty (60) days of actual or constructive notice or knowledge of the decision complained of." Order No. 02-01 at pp. 2-3. (emphasis added).

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<sup>1</sup> In Waste Management, the DC Court of Appeals held that "in the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal--circumstances outside of the party's control--we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness." Waste Management, *supra*, at 1122. (emphasis added).



V.

**THIS APPEAL WAS UNTIMELY FILED AND MUST BE DISMISSED**

11-Y DCMR, Section 302.2 establishes a filing deadline of 60 days from the time that the Appellant has actual 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's initial inquiry must therefore be "when the Appellant knew or should have known of that issue". BZA Appeal No. 17468 of ANC 6A, dated February 16, 2007, at p. 4. This Board has held that when an Appellant asserts a certain date as the basis for its zoning appeal, "the regulations require that the Board determine if there is an earlier date when the Appellant reasonably should have known of the authorization." BZA Appeal No. 17468, supra. The Appellants in this case had actual knowledge of the Zoning Administrator's Rulings on the issues raised in their appeal well in excess of 60 days before they filed their appeal, and failed to take timely action.

This Board has previously dismissed appeals as untimely filed on many occasions. The case most directly relevant to the set of facts in this appeal is Appeal No. 18300 of Ausubel, (April 11, 2012). A copy of that decision is attached to this Motion as Exhibit B. In that case, the Appellants filed their appeal on September 9, 2011, 58 days after the issuance of a building permit on July 13, 2011 that authorized construction of a building addition. However, the Board found that prior to the issuance of the building permit, the Appellants met with and corresponded with the Zoning Administrator on several occasions to press their concerns and their position that the project does not comply with the Zoning Regulations, and the Zoning Administrator issued an email to Appellant's counsel on June 14, 2011 stating that the project complied with the zoning regulations and would be approved. In their analysis, the Board concluded that the earliest appealable form of the Zoning Administrator's decision was the June 14 email, and not the July 13 building permit issuance, and dismissed the appeal as untimely.

In a detailed review of the prior case law governing the timeliness of appeals, including Basken v. DC BZA, 946 A.2d 356 (DC 2008), the Board concluded in Ausubel at pages 4 through 8 that the time for appeal of an administrative decision is not tied to the issuance of a specific type of notice. The regulations then, and now, state that “Any person aggrieved...by any order, requirement, decision, determination or refusal”, made by any officer of the government in the administration of the Zoning Regulations, may file a timely appeal...”. 11-Y DCMR, Sec. 302.1. In Ausubel, the Board noted on page 8 that the Zoning Administrator’s

“conclusion that ‘the proposed addition is in compliance with the underlying R-1-A Zone and the applicable TSP provisions set forth in Sections 1513 and 1514’, ‘represented a decision on the very issue’ that the Appellants have asked this Board to review, Basken, 946 A.2d 370”.

In the instant appeal, the Zoning Administrator’s Rulings state unequivocally, after a comprehensive review of the issues raised in this appeal, that “the Project satisfies the requirements of the R-5-B Zone District” (March 21, 2016 determination Letter); and that “I hope this information is helpful in the explanation of my office’s approval of the project”. (March 22, 2016 email). Both of the Zoning Administrator’s Rulings were sent to the Appellant’s representatives. There is nothing vague or equivocal about the wording of the Zoning Administrator’s Rulings.

In Ausubel, this Board also noted on page 8 that the wording of the Zoning Administrator’s email was unambiguous, and that the subsequent issuance of the building permit did not represent a new decision, nor did it represent the Appellants’ earliest notice of the decision. The email in Ausubel constituted the “administrative decision” that started the 60-day appeal period. The same is true in all respects in the instant appeal.

In the 2016 Zoning Regulations, the Zoning Commission removed any doubt as to when an appeal must be filed, by adopting new 11-Y DCMR, Sec. 302.5:

“A zoning appeal may only be taken from the first writing that that reflects the administrative decision complained of to which the appellant had notice. No subsequent document, including a building permit...may be appealed unless the document modifies ore reverses the original decision or reflects a new decision”. (emphasis added).’

In addition, the appeal must be dismissed because it was filed more than 10 days after the building addition was under roof. The addition to the building, which was shown on the plans reviewed by the Zoning Administrator in the Zoning Administrator’s Rulings, added FAR to the building, but within the maximum permitted FAR. The Appellants are claiming that, based on their theory that the cellar level should be counted in FAR,

“the GFA exceeds the allowable FAR and this condominium development should not be permitted as it is in violation of the zoning code. Accordingly, the BZA should order the permit invalid”. BZA Exhibit 2, at page 2.

**VI.**  
**THERE IS NO BASIS FOR AN EXTENSION OF THE 60-DAY TIME**  
**PERIOD FOR FILING THIS APPEAL**

Because the appeal is untimely per 11-Y DCMR Section 302.2 the inquiry shifts to a consideration under 11-Y DCMR, Section 302.6 of whether the Appellants can demonstrate that (1) there are exceptional circumstances outside the Appellants' control, which could not have reasonably been anticipated, that substantially impaired the Appellants' ability to file this appeal to the Board, and (2) the extension of time will not prejudice the Owner. Even assuming that this inquiry is justified, the Appellants would be required to satisfy both tests, but cannot satisfy either one.

**A. There Are No Exceptional Circumstances Outside of Appellants' Control that Substantially Impaired Their Ability To File A Timely Appeal.**

The Appellants knew, or should have known, of the Zoning Administrator's Rulings in time to file a timely appeal. The Appellant's representatives participated in meetings with the Zoning Administrator's staff, and received copies of the March 21 and 22, 2016 Zoning Administrator Rulings, which addressed the issues that are the subject of this appeal.

Both the DC Court of Appeals and this Board have held that "the Board need 'not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision.' " BZA Appeal No. 17411 of Basken and Mayer, (March 23, 2006) at p. 6; BZA Appeal No. 17391 of de Brito and Gottlieb, (October 2, 2006) at p. 7, citing Waste Management, supra. The "fact that the Appellant 'chose to concentrate on avenues that reasonably may have appeared more promising than an appeal does not excuse its delay in noting an appeal.'" BZA Appeal No. 17915 of Jonathon Bolduc, (December 17, 2009), , at p. 3 citing Waste Management, supra. The Board has no jurisdiction to hear an untimely appeal. Waste Management, supra.

**B. An Extension Of Time Will Prejudice The Owner**

An extension of time will have a substantial impact on the Owner. The Owner received a lawful Building Permit dated July 18, 2016 to construct the improvements that are being challenged in the appeal. The building was under roof by July 31, 2016. By September 16, 2016 (the appeal date), the Owner expended \$780,000 in hard and soft costs for the design, permitting, materials and construction. See Affidavit, attached to this Motion as Exhibit C.

**VII.**  
**EXHIBITS**

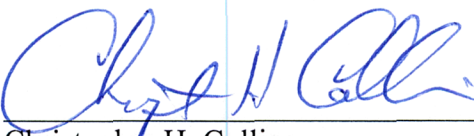
- A. Agenda for March 8, 2016 on-site meeting.
- B. BZA Appeal No. 18300 of Ausubel (April 11, 2012).
- C. Affidavit of John Casey, 1514 Q Street LLC.

**VIII.**  
**CONCLUSION.**

Based upon the clear language of the Zoning Regulations and upon prior rulings by this Board and by the DC Court of Appeals, there can be no doubt that this appeal has been untimely filed by the Appellants. All of the issues in this appeal were presented by the Appellant's representatives to the Zoning Administrator in early 2016, and he ruled on those issues in the Zoning Administrator's Rulings of March 21 and 22, 2016. Further, there is no basis for granting an extension of the 60-day appeal period. Accordingly, the Board is without jurisdiction to hear this appeal, and the appeal must be dismissed.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By:   
Christopher H. Collins

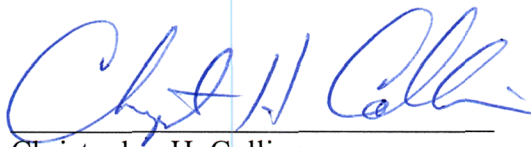
### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Owner's Motion to Dismiss Appeal was filed electronically with the Office of Zoning and was sent by first-class mail and electronic mail, this 25<sup>th</sup> day of January, 2017, to the following:

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