

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

Appeal of Dupont Circle Citizens Association

Appeal No. 19374

**OWNER'S REPLY TO APPELLANT'S OPPOSITION TO
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 responds to the Appellant's opposition to the two motions to dismiss filed by DCRA and the Owner. In summary, the Appellant's opposition to the Motion to Dismiss attempts to divert the Board's attention away from the central facts of this case, and the relevant language of ZR16 that governs the procedures and requirements for an appeal. These new regulations set a higher procedural threshold for appellants than the prior regulations in ZR58. The Appellants do not meet those threshold requirements, and this appeal should be dismissed.

**II.
THE APPEAL SHOULD BE DISMISSED AS UNTIMELY**

A. The Zoning Administrator's March 21, 2016 Determination Letter, Which Was Served On The Appellant's Representatives, and His Follow-up March 22, 2016 Email Exchange With the Appellant's Representatives, Were Appealable Administrative Decisions.

1. The Zoning Administrator ruled upon the exact same issues challenged in this appeal at least six months before this appeal was filed. The building permit application and plans were pending in DCRA's permit system when he issued his March 2016 rulings.

a. In his comprehensive five-page March 21, 2016 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 in definitive language 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’”.

b. On March 22, 2016, the Zoning Administrator sent a follow-up email to DCCA representatives Brian Gelfand (a DCCA member, who owns and resides in the top-level unit in the building next door to 1514 Q Street, NW), and Don Hawkins and Alan Gambrell, as well as to ANC Commissioner Abigail Nichols and Jenny Gelfand, “regarding the treatment of ‘habitable rooms’ and ‘cellars’ as per my interpretation”. The Zoning Administrator concluded in definitive language 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”.

B. The Appellant Had Notice or Knowledge of the Zoning Administrator's Decision, Or Reasonably Should Have Had Notice Or Knowledge, Well In Excess Of 60 Days Prior To the Appeal Date.

On March 21 and 22, 2016, the Zoning Administrator's decisions were served upon the Appellant's representatives Brian Gelfand and Don Hawkins and Alan Gambrell. Because this appeal was filed more than 60 days after the Appellants 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", this appeal must be dismissed. 11-Y DCMR, Section 302.2.

C. The Zoning Administrator's March 21 and 22, 2016 Decisions Were The "First Writing" Of The Decisions To Which The Appellant Had Actual Or Constructive Notice.

The Zoning Regulations were revised in ZR16 to mandate that

"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. (emphasis added).

The Zoning Administrator's March 21, 2016 determination was published on his website on March 22, 2016. A building permit was issued for the project on July 18, 2016, based on the same plans as those reviewed in the March 21 and 22 determinations. The permit plans "do not substantially deviate from the plans attached" to the March 21, 2016 determination letter; in fact, they are the same plans. Nor did the building permit issuance "modify or reverse" the Zoning Administrator March decisions, or "reflect a new decision".

D. The Building Was Under Roof By July 31, 2016

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).

III.

THERE IS NO BASIS FOR EXTENDING THE 60-DAY TIME PERIOD FOR FILING THIS APPEAL

Per 11-Y DCMR, Section 302.6, an extension of the 60-day appeal period may only be granted if

(a) there are exceptional circumstances outside of the appellant's control and that could not have reasonably been anticipated that substantially impaired the Appellants' ability to file a zoning appeal to the Board; and

(b) the extension of time will not prejudice the parties to the zoning appeal.

Even assuming that this inquiry is justified, the Appellants cannot satisfy either one of these elements.

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

The Appellants knew, or should have known, of the Zoning Administrator's March 21 and 22, 2016 determinations 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 determinations, which addressed the very same issues that are the subject of this appeal.

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 at Exhibit 49C of the record.

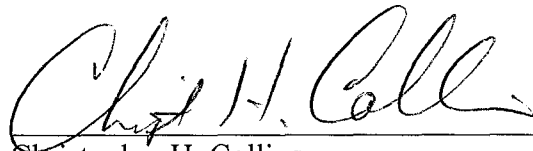
IV.
CONCLUSION

For the foregoing reasons, this appeal should be dismissed.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By:


Christopher H. Collins

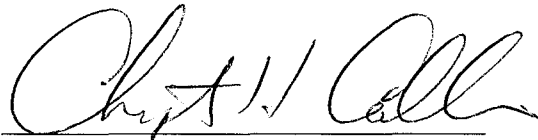
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Owner's Reply to Appellant's Opposition to Motion to DiAppeal was filed electronically with the Office of Zoning and was sent by first-class mail and electronic mail, this 16th day of February, 2017, to the following:

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A handwritten signature in black ink, appearing to read "Chris H. Collins", written over a horizontal line.

Christopher H. Collins
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