BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Dupont Circle Citizens Association Appeal No. 19374

OWNER'S DRAFT FINDINGS OF FACT AND CONCLUSIONS OF LAW

MOTION TO DISMISS

FINDINGS OF FACT

I.
INTRODUCTION

1. This appeal was filed by the Dupont Circle Citizens Association (Appellant DCCA) on September 16, 2016. The appeal alleges errors by the Zoning Administrator in the issuance of the Building Permit for 1514 Q Street, NW on July 18, 2016. Appellant DCCA's Prehearing Statement filed on that date (Ex. 2 of the record) alleges that the Zoning Administrator "did not properly apply the definition and use of a cellar as it relates to habitability and calculation for FAR density compliance". In that Statement, Appellant DCCA specified two errors:

(a) Section 199.1 of the Zoning Regulations "defines a cellar as non-habitable space". The Zoning Administrator incorrectly classified the lower level dwelling unit as a cellar, because it contains habitable space.

(b) The Zoning Administrator's approval "violates Section 402.4 regarding maximum allowable FAR in a R-5-B zone".

This will be referred to as "Claim 1".

2. On November 23, 2016, Appellant DCCA amended their appeal and filed a "Revised DCCA Prehearing Statement" (Ex. 24, 24A and 24B), in which they alleged that "the permit and plans fail to achieve cellar measurement". In that revised document, Appellant

DCCA challenged the ceiling height measurements of the cellar that were included in the Zoning Administrator's March 21, 2016 administrative decision. This will be referred to as "Claim 2". To support Claim 2, Appellant DCCA attached the Zoning Administrator's March 21, 2016 administrative decision, and portions of the exhibits to that administrative decision.

3. The Owner of the property at 1514 Q Street, NW, which is the subject of this appeal, filed a prehearing statement in opposition to Claims 1 and 2 in the appeal (Ex. 27 and 27A through 27T) on December 7, 2016. The Department of Consumer and Regulatory Affairs (DCRA), on behalf of the Zoning Administrator, filed a prehearing statement in opposition to Claims 1 and 2 in the appeal (Ex. 30 through 33) on December 9, 2016.

4. The public hearing in this application was originally scheduled for December 14, 2016, and was postponed to January 18, 2017, at Appellant DCCA's request, and was then continued by the Board to February 22, 2017. At the January 18, 2016 public hearing, Appellant DCCA was given until February 8, 2016 to file further revisions to its Prehearing Statement (Ex. 52, 52A and 52B). DCRA and the Owner were given until January 25, 2017 to file motions to dismiss the appeal (Ex. 49, 49A through 49C, and 50).

II.
MOTION TO DISMISS APPEAL FOR LACK OF TIMELINESS

5. 11 DCMR Sub. Y, Sec. 302.2 states that an appeal "shall be filed within 60 days of 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".

6. 11 DCMR, Sub. Y, Sec. 302.6 states that this 60 day period may only be extended if the appellant demonstrates that there are exceptional circumstances outside of the Appellant's

control, and that could not reasonably be anticipated, that "substantially impaired the Appellant's ability to file the appeal", and "the extension of time will not prejudice the parties to the appeal".

7. 11 DCMR, Sub. Y, Sec. 302.5 codifies prior decisions of this Board, and states 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".

8. 11 DCMR Sub. Y, Sec. 302.3 states that "if the decision complained of involves the erection, construction, reconstruction, conversion or alteration of a structure or part thereof...(a) no zoning appeal shall be filed later than ten (10) days after the structure or part thereof in question is under roof".

9. The Board finds that the Zoning Administrator's March 21, 2016 administrative decision, which was issued while the building permit application was pending, addresses all of the issues raised by Appellant DCCA in their Claim 1 filed on September 16, 2016 and on their Claim 2, which was addressed in their November 23, 2016 and February 8, 2017 prehearing submissions in this appeal. The Zoning Administrator's March 21, 2016 administrative decision was comprehensive, and addressed the permitted uses; the measurement of the ceiling height relative to the adjacent finished grade, and the reasons why the lowest level of the building is properly classified as a cellar; the exclusion of cellar area from the FAR calculation; the permitted building height; the permitted lot occupancy; the minimum required rear yard and side yard dimensions; and the parking requirement. The March 21, 2016 administrative decision included the building permit plans; photo documentation of the cellar ceiling height measurement taken during a site visit with a DC inspector; plans showing the cellar area

measurements; and letters from the architect and the structural engineer for the project, explaining the details and the necessity of the new floor joists between the cellar and first floor levels.

10. The Zoning Administrator's March 21, 2016 administrative decision was published on the Zoning Administrator's website on March 22, 2016 (Ex. 27A). The Zoning Administrator also sent his administrative decision by email to a number of individuals in the community on March 21, 2016 (Ex. 27B), including two members of the Appellant DCCA—Brian Gelfand and ANC Commissioner Abigail Nichols. Mr. Gelfand, a DCCA member since early 2015 (Transcript at p. 165), lives next door, on the top floor (Unit #3) of the abutting building at 1516 Q Street, NW (Ex. 48), and testified as the principal witness on behalf of Appellant DCCA at the February 22, 2017 public hearing in this appeal. (See e.g., Tr. 113; 130-136; 186). Architect Don Hawkins and former ANC 1C Commissioner Alan Gambrell both also were served with the Zoning Administrator's March 21, 2016 administrative decision by email, and both also testified on behalf of Appellant DCCA at the February 22, 2017 public hearing in this appeal.

11. Commissioner Nichols and Messrs. Hawkins and Gambrell were all copied on a follow-up email on March 22, 2016 from the Zoning Administrator to Mr. Gelfand, further explaining the Zoning Administrator's March 21, 2016 administrative decision (Ex. 27B). In that memorandum, the Zoning Administrator stated the purpose of the email to "specifically address the matter you raised in your email below regarding the zoning treatment of 'habitable rooms' and 'cellars' as per my interpretation", which he then went on to address.

12. The record in this appeal also shows that there was widespread knowledge of this matter in the community prior to that time, dating back to November 2015 (Ex. 27C), including

an email from Appellant DCCA member and ANC Commissioner Abigail Nichols dated March 8, 2016 to the Owner, in which she stated that there was "widespread concern" in the neighborhood, including Appellant DCCA members and immediate neighbors Brian and Jennie Gelfand, and "many block neighbors [who] attended a meeting on the project at the ANC's Zoning, Preservation and Development Committee". An earlier email of March 4, 2016 in Ex. 27C from Architect (and Appellant DCCA witness representative) Don Hawkins to DCRA official Mr. Whitescarver clarified that this ANC meeting occurred on November 3, 2015. Mr. Hawkins also testified to this fact (Tr. 204).

13. The Board finds that by March 22, 2016, Appellant DCCA members Brian Gelfand and Abigail Nichols (also the ANC Commissioner at that time) knew of the Zoning Administrator's March 21 and 22, 2016 administrative decisions. As to them, the Board finds that the 60-day appeal period expired by May 21, 2016.

14. The Claim 1 appeal filed by DCCA on September 16, 2016 included a challenge to only some of the issues raised in the March 21 and 22, 2016 administrative decisions. The Claim 1 appeal, alleging that the zoning definition of "cellar" excludes habitable space, and alleging that the FAR of the project exceeds the permitted limit, was filed by Appellant DCCA on September 16, 2016, almost four months after the expiration of that 60-day appeal deadline. Claim 2 was filed on November 23, 2016, six months after the expiration of the 60-day appeal deadline, challenging to the measurement of the ceiling height of the cellar, relative to the adjacent finished grade, that was addressed in the March 21, 2016 administrative decision, and four months after the Building Permit was issued, and more than 60 days after this appeal was filed.

15. The Board must address the following questions:

(a) What was the "first writing" of the appealable administrative decision in this instance—the issuance of the March 21 and 22, 2016 administrative decisions by the Zoning Administrator, or the issuance of the July 18, 2016 building permit for the project at 1514 Q Street, NW?

(b) If the July 18, 2016 issuance of the building permit was the "first writing" of the appealable administrative decision, was the Appellee's filing of Claim 2 on November 24, 2016, challenging the cellar ceiling height measurement timely, and if so, is it permitted by the Board's rules?

(c) If the March 21 and 22, 2016 administrative decisions of the Zoning Administrator were the "first writing" of the administrative decisions, can Appellant DCCA member Gelfand's 6-month delay in notifying Appellant DCCA President Diener of those decisions thereby begin a new 60-day appeal period for Ms. Diener to file an appeal in the name of DCCA from the July 18, 2016 date of the building permit issuance, as claimed by Ms. Diener and Mr. Gelfand?

(d) If the March 21 and 22, 2016 administrative decisions of the Zoning Administrator are the "first writing" of the administrative decisions, has there been any demonstration of exceptional circumstances outside of the Appellant's control that could not have reasonably been anticipated, that substantially impaired the Appellant's ability to file a timely appeal of that March 21 administrative decision, and would an extension of time prejudice the Owner?

(e) Regardless of the answers to the above, was the appeal filed within 10 days after the building addition was under roof?

16. The Board finds that the Appellant's Claim 2 on November 24, 2016, challenging the cellar ceiling height measurement, was untimely and was not permitted by the Board's rules, regardless of whether the first writing of the appealable administrative decision is deemed to be the March 21 and 22, 2016 administrative decisions of the Zoning Administrator, or the July 18, 2016 issuance of the building permit. Sub. Y, Sec. 302.13 states that an appeal may not be amended to add issues not identified in the statement of the issues on appeal submitted in response to Subtitle Y § 302.12(g) unless the appellee impeded the appellant's ability to identify the new issues identified. The appeal was filed on September 16, 2016 only on Claim 1, and Claim 2 was not included in that filing. There was no allegation or proffer by the Appellant that the Appellee DCRA impeded the Appellant's ability to include Claim 2 in their September 16, 2016 filing. Moreover, Claim 2 was filed six months after issuance of the March 21 and 22, 2016 administrative decisions, more than four months after issuance of the Building Permit on July 18, 2016, and more than 60 days after this appeal was filed. Claim 2 was untimely filed under any scenario.

17. The Board finds that the March 21 and 22, 2016 administrative decisions of the Zoning Administrator are the "first writing" of the administrative decision. Those two documents explained in detail the Zoning Administrator's decisions, and the reasons for those decisions. The Zoning Administrator's administrative decisions reflect that he was fully briefed on the Owner's proposal, and the plans submitted therewith are consistent with the permit plans. In his March 21, 2016 letter, the Zoning Administrator concluded as to the "cellar" issue 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'". The record reflects that the plans attached to the letter as "Exhibit A" were consistent with the plans that were submitted with the then-pending building permit application. This letter was emailed to DCCA members Gelfand and Nichols on that same day (Ex. 27B). In his March 22, 2016 email to Appellant DCCA member Gelfand, with a copy to Appellant DCCA member Abigail Nichols, among others, the Zoning Administrator concluded by stating that "I hope this information is helpful in the explanation of my office's approval of the project". (Ex. 27B) The Board finds that the Zoning Administrator's words were clear and unambiguous.

18. 11 DCMR, Sub. Y, Sec. 302.5 states 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". In this instance, the July 18, 2016 building permit issuance can only be deemed as the "first notice" if the building permit modified or reversed the original decision, or reflects a new decision. The Appellant offered no evidence indicating that the July 18 building permit issuance modified or reversed the original decision, or reflected a new decision. The evidence of record indicates that the plans approved in the building permit are consistent with the plans that were attached to the March 21, 2016 administrative decision. Accordingly, the building permit did not modify or reverse the March 21 and 22, 2016 administrative decisions, or reflect a new decision. The Board finds that the March 21 and 22, 2016 administrative decisions are the "first writing" of the administrative decision complained of, and establish the time for commencement of the 60-day appeal period. The Board also notes that the Appellant's testimony and cross-examination at the

February 22, 2017 public hearing principally focused on the March 21, and 22, 2016 administrative decisions, and the plans attached thereto, rather than on the July 18, 2016 building permit that was claimed by Appellants as the subject of their appeal.

19. The Board also finds that an administrative decision issued prior to the issuance of the building permit, in the form of a letter or an email, can be the "first writing" of the administrative decision, especially as in this case when the issuance of the building permit did not modify or reverse that decision, or reflect a new decision. The case most directly relevant to the set of facts in this appeal is Appeal No. 18300 of Ausubel, (April 11, 2012). 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, this Board found that prior to the issuance of the building permit, the Appellants in that case 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 that case, this 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. This 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, this 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 this appeal, the two Zoning Administrator administrative decisions of March 21 and 22, 2016 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" (Ex. 27A, March 21, 2016 letter); and that "I hope this information is helpful in the explanation of my office's approval of the project". (Ex. 27B, March 22, 2016 email). Both of the Zoning Administrator's administrative decisions were sent to Appellant DCCA's representatives. There is nothing ambiguous, vague or equivocal about the wording of those decisions. 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 for the March 21 and 22, 2016 administrative decisions in this appeal. In contrast, the Board notes that a Zoning Administrator's letter "that emphatically state[s] that [his] letter had no binding effect upon him or his Office", with plans that do not provide a sufficient level of detail, is not an appealable determination. Appeal No. 18522 of Washington Harbour Condominium Unit Owners' Association (December 13, 2013).

20. DCCA's lead witness in this appeal was Mr. Gelfand, who testified that he was a DCCA member at the time that he received the March 21 and 22, 2016 administrative decisions of the Zoning Administrator (Tr. 165). He testified that he did not tell DCCA President Diener of this issue until six months later, in the first week of September after which time DCCA started this appeal process. (Tr. 160) Appellant DCCA President Diener testified at the public hearing

that DCCA holds monthly meetings on the first Monday of the month, from October to June, and that during those meetings, members may bring forward issues that they want to share with the group (Tr. 170). Mr. Gelfand brought this issue to Ms. Diener's attention in September, 2016, presumably not at one of Appellant DCCA's October – to – June monthly meetings. DCCA President Diener also testified that she and Mr. Gelfand "live a few blocks from each other, we see each other all the time, in the coffee shop, walking our dogs" (Tr. 171). Even assuming that the only time that DCCA Member Gelfand could have communicated this information to DCCA President Diener was during a DCCA meeting, the Board finds that there were at least two monthly DCCA meetings after the Zoning Administrator's administrative decisions were issued, in April and May of 2016, in which Appellant DCCA member Gelfand could have raised this issue with Appellant DCCA President Diener, which would have allowed sufficient time for DCCA to file the appeal by May 20, 2016.

21. The Board finds that it would be an unreasonable interpretation of the regulations in this instance to allow DCCA Member Gelfand, the Appellant's lead witness, who received actual notice of the administrative decision in March of 2016, to allow the appeal period of that decision to expire, and then to try to revive the appeal period by telling DCCA Member Diener of that administrative decision after the expiration, who then filed the appeal on behalf of DCCA. Moreover, it would be unreasonable in this case, as well as prejudicial to the Owner, for this Board to allow an organization member with actual or constructive knowledge of the administrative decision to sit on that information, and then "hand off" that knowledge to another organization member, after the 60-day appeal period has expired, in order to attempt to "re-start" the 60-day appeal period. In this appeal, the record shows that Appellant DCCA members Gelfand and Nichols led the effort to get the Zoning Administrator to disapprove the Owner's

project in late 2015 and early 2016, and Appellee DCCA member Gelfand was the principal witness for Appellant DCCA at the public hearing in this appeal one year later. The Board finds that based upon the record in this case, Appellant DCCA President Diener "reasonably should have had notice or knowledge of the decision complained of" within 60 days of the March 21 and 22, 2016 administrative decisions.

22. The Board finds that Appellant DCCA claimed no exceptional circumstances outside the Appellant's control, which could not have reasonably been anticipated, that substantially impaired the Appellant's ability to file a timely appeal to the Board. This Board has previously 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 Meyer, (March 23, 2006) at p. 6; BZA Appeal No. 17391 of de Brito and Gottlieb, (October 2, 2006) at p. 7. There was no demonstration or proffer in the record of any exceptional circumstances outside of the Appellants DCCA's control that could not have reasonably been anticipated, that substantially impaired DCCA's ability to file a timely appeal of the Zoning Administrator's March 21 and 22, 2016 administrative decisions.

23. The Board finds that a grant of an extension of time to file this appeal will have a substantial adverse impact on the Owner. The record shows that the Owner received a lawful Building Permit dated July 18, 2016 to construct the improvements that are being challenged in the appeal. A sworn affidavit filed by the Owner (Ex. 49C) shows that by September 16, 2016 (the Claim 1 appeal date), the Owner had expended $780,000 in hard and soft costs for the design, permitting, materials and construction for the project.

24. Finally, the undisputed evidence of record shows that the project included a building addition, and that the building addition was under roof by July 31, 2016, and that this

appeal was filed more than 10 days after the building was under roof. The Owner's sworn affidavit (Ex. 49C) states that the project was under roof by July 31, 2016. Appellant DCCA offered no evidence to the contrary. The date by which the project was under roof is applicable and relevant in this appeal because Appellant DCCA alleges in Claim 1 on September 16, 2016 that "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". (Ex. 2). Appellant DCCA's rationale for this position is that the cellar should be counted in FAR, as they allege in Claim 1 (Ex. 2). Appellant DCCA member and lead witness Gelfand testified that removal of the top floor of the project, adjacent to his dwelling unit in his building, would address this issue (Tr. 236).

III.
CONCLUSIONS OF LAW

This Board has no jurisdiction to hear an untimely appeal. 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).

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. This 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.

Appellants identify the date of issuance of the building permit as the date of commencement of the appeal period, and allege that this was the date of the "decision" being appealed. Sub. Y, Sec. 302.1 states that a timely appeal may be filed "by any person aggrieved or...affected by an order, requirement, decision, determination or refusal made by an administrative officer...in the administration or enforcement of the Zoning Regulations...." (emphasis added). If the Zoning Commission intended that appeals could only be filed from the issuance of building permits, they could have stated that in the regulations. However, the Zoning Regulations at Sub. Y, Sec. 302.5 specifically state that a written determination or decision of an administrative officer that pre-dates the issuance of a building permit may be appealed.

The Board concludes that the Zoning Administrator issued his March 21 and 22, 2016 administrative decisions on the exact same issues challenged in this appeal at least six months before this appeal was filed, and sent them to at least two DCCA members at that time. The building permit application and plans were pending in DCRA's permit system when he issued his administrative decisions. His administrative decisions were based upon the permit application plans, and specifically addressed the issues regarding those plans that were raised in this appeal. The Board concludes that the Zoning Administrator's March 21 and 22, 2016 administrative decision are the first writing that reflect the administrative decision that is the subject of this appeal. The Board further concludes that the issuance of the building permit on July 18, 2016 did not modify or reverse the issues decided by the Zoning Administrator in March of 2016, nor did it represent a new decision.

DCCA member Gelfand was notified on March 21 and 22, 2016 of the administrative decisions. The appeal period expired as to him in May of 2016, but he did not pass this information along to DCCA member Diener until September 2016, and this appeal was filed

several weeks later, but only as to Claim 1 in Appellant's Exhibits 1 and 2. The Appellant's Claim 2 (regarding the cellar ceiling height measurements) was not appealed until November 23, 2016. The Board concludes that Claim 2 is time-barred under any circumstances.

Based upon the findings of fact, the Board concludes that DCCA reasonably should have known of the issues in this appeal within 60 days of the Zoning Administrator's March 21 and 22, 2016 administrative decisions. The Board further concludes that based upon the facts and circumstances of this appeal, it was not reasonable under the circumstances to allow one DCCA member to wait to pass along information to another DCCA member until four months after the appeal period had expired, in order to allow the other DCCA member to then attempt to file a timely appeal. In addition, the Board concludes that the Appellant did not request an extension of time to file the appeal, and that if they did, the extension would have been denied due to the adverse impact upon the Owner if the Board were to allow that to occur.

Moreover, based on the evidence of record, the building addition which is the subject of this appeal was under roof by July 31, 2016, and this appeal was filed more than 10 days after that date. The Board concludes that, because the project was under roof by the time that the appeal was filed, the appeal is barred by Sub. Y, Sec. 302.3.

For all of the foregoing reasons, this appeal is DISMISSED as untimely filed.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Owner's Findings of Fact and Conclusions of Law – Motion to Dismiss was filed electronically with the Office of Zoning and was sent by first-class mail and electronic mail, this 22nd day of March, 2017, to the following:

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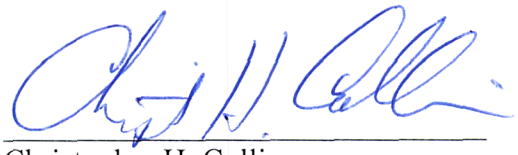

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