

DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT  
441 4<sup>th</sup> Street, N.W.  
Washington, D.C. 20001

Appeal of David Belt/ANC 7F

BZA Appeal 19627

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**DCRA’S MOTION TO DISMISS FOR UNTIMELY FILING;**  
**MOTION TO DISMISS FOR LACK OF JURISDICTION OVER PUBLIC SPACE;**  
**MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM;**  
**AND MOTION TO CONTINUE THE HEARING ON THE MERITS FOR TWO WEEKS**

Appellant alleges that the Zoning Administrator (the “ZA”) erroneously approved building permit B1501924 (the “Permit”), issued on October 2, 2015 for a “4 story wood fram [sic] structure over a walkout basement – 71 residential apartments, ...” at 4000 Benning Road, N.E., known for assessment and taxation purposes as Lot 52 in Square 5081 (the “Property”), and located in the R-5-C Zone District under the 1958 Zoning Regulations under which the Permit was issued.<sup>1</sup> Appellant alleges that the ZA’s approval of the Permit was non-compliant with Zoning Regulation provisions for (i) retaining wall; (ii) the required rear yard; (iii) wall check; (iv) lot occupancy; (v) projections of the building over the front property line onto public space; and (vi) construction of an accessway for the loading dock over the side lot line onto public space.

DCRA asserts that Appellant failed to timely file this appeal which was filed almost two years after the 60-day appeal period established by Section Y-302.2 of the Zoning Regulations and three-and-a-half months after the expiration of Section Y-302.3(a)’s 10-day appeal period triggered by the construction authorized by the Permit was “under roof” – on May 15, 2017.<sup>2</sup>

DCRA also respectfully asserts that the Board of Zoning Adjustment (the “Board”) lacks jurisdiction to Appellant’s allegation (iii) because a wall check is a requirement of the Building Code (Title 12A of the DCMR) and not referenced or required by the Zoning Regulations. The

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<sup>1</sup> This appeal is procedurally governed by the current Zoning Regulations, although the appeal of the Permit is based on compliance with the 1958 Regulations.

<sup>2</sup> All references to the Zoning Regulations are to the (current) Zoning Regulations; all references to the 1958 Zoning Regulations shall be specifically identified as such.

administrative appeals entity with authority over the Building Code is the Office of Administrative Hearings (“OAH”), not the Board.

DCRA respectfully asserts that the Board also lacks jurisdiction to hear Appellant’s allegations (v) and (vi) because these concern construction in public space, which are regulated by Titles 12A (Building Code) and 24 (Public Space Regulations) of the DCMR. Permits were issued under these public space regulations to authorize the construction. DCRA asserts that jurisdiction to hear appeals of permits issued under these DCMR titles for construction in public space lies with OAH and not with the Board.

DCRA also asserts that Appellant failed to provide any statement or evidence to demonstrate or support its allegation (iv) that lot occupancy requirements were not satisfied, and so should be dismissed for failure to state a claim.

DCRA therefore respectfully requests that the Board grant its Motion to Dismiss for Untimely Filing. If the Board denies this Motion, DCRA respectfully requests the Board to grant DCRA’s Motion to Dismiss for Lack of Jurisdiction Appellant’s claims (iii) and (iv) regarding public space and also grant DCRA’s Motion to Continue the hearing to consider the merits of the Appeal for two weeks.

### **MOTION TO DISMISS FOR UNTIMELY FILING**

#### **Appellant failed to file with the 60-day period established by Section Y-302.2**

DCRA asserts that Appellant failed to file this appeal within the appeal period established by Section Y-302.2 of the Zoning Regulations - sixty (60) days from the time an appellant had, or should have had, notice or knowledge of the challenged decision. Section Y-302.5 clarifies 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** or certificate of occupancy, **may be appealed** unless the document modifies or reverses the original decision or reflects a new decision.” (bold and underscored added).

Thus the issuance of an extension to a previously issued permit, or a certificate of occupancy, does not trigger a new 60-day appeal period unless the aspect challenged by the appeal is changed – as the Court of Appeals affirmed in *Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 367-8 (D.C. 2008).

In this case, DCRA asserts that this 60-day period was triggered by the ZA’s approval of the application on July 22, 2015, but certainly by the issuance of the Permit on October 2, 2015. Therefore the 60-day appeal period would have closed no later than December 1, **2015** – almost two years before Appellant filed this appeal on September 7, 2017.

The Board has upheld that the issuance of a building permit as a public document that is required to be posted at the construction site constitutes notice that triggers the 60-day appeal period. ANCs, like Appellant in this case, receive lists of DCRA issued permits on biweekly basis (D.C. Official Code § 1-309.10(c)(3)) that would provide additional notice. DCRA notes that Appellant had plenty of knowledge of the project because it was repeatedly discussed at the Zoning Commission hearings on Case Number 13-07 that had been initiated by Appellant.<sup>3</sup> Indeed the project that is the subject of this appeal led to the revision of the proposed rezoning of the Property from the original proposed R-1-B zone district to the enacted R-5-C zone district.<sup>4</sup> Therefore Appellant had ample notice that a building permit for the Property would be filed, but failed to exercise its rights to appeal the Permit until almost two years after its issuance.

Appellant failed to provide a statement of its justification for compliance with the timely filing requirements, as required by Section Y-302.12(e). Although the ANC Appellant, which did not file the appeal, but joined it 12 days later (Exhibit 13), requested an extension of this 60-day period, it did not even attempt to demonstrate – as required by Section Y-302.6 - that

- “(a) There are exceptional circumstances that are outside of the appellant’s control and that could not have been reasonably anticipated that substantially impaired the appellant’s ability to file a zoning appeal to the Board; **and**
- (b) The extension of time will not prejudice the parties to the zoning appeal.”  
(bold and underscored added).

Again, the ANC had notice of the issuance of the Permit in October 2015 – almost two years prior to the filing of the appeal, and Mr. Belt had notice of the impending application for the Permit as of the September 26, 2013 hearing before the Zoning Commission in Case Number 13-07. Yet both Mr. Belt, and the ANC, chose to not appeal within the 60-day appeal period of the issuance of the Permit, but instead two years later seek to revoke the Permit now that construction has been almost completed. Neither Mr. Belt nor the ANC have provided any demonstrable evidence that they lacked the ability to file an appeal due to unforeseeable

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<sup>3</sup> Z.C. Order No. 13-07, at 1 – filed as Exhibit 4, at 9; and the transcript for hearings in ZC Case No. 13-07 as submitted as Exhibit 3, at 7-8.

<sup>4</sup> Z.C. Order No. 13-07 – filed as Exhibit 4, at 10-12.

“exceptional circumstances” that they could not control, as they are required to demonstrate to qualify for the extension under Section Y-302.6.

Furthermore, Section Y-302.6 authorizes the Board to grant an extension if and only if the Board finds that there is no prejudice to the parties to the appeal. In this case, there is clear prejudice to both DCRA, which has to conduct research in its permit files to determine the circumstances of a permit issued two years ago, and certainly to the Permit Holder, which has relied on the Permit to finance and construct the project almost to completion prior to the filing of this appeal.

**Appellant failed to file the appeal  
within the 10-day period after the project was “under roof”**

Moreover, Section Y-302.3 establishes an absolute closure to the appeal period ten (10) days after construction authorized by a permit is “under roof”, which

“means the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place”

In this case, the Permit Holder’s Construction Schedule states that the main roof was installed on May 15, 2017, and so the appeal period would have definitively closed on May 25, 2017. DCRA notes that this “under roof” provision is definitive and does not provide for a “should have known” exception to the 10-day period as Section Y-302.2 does for its 60-day period. This definitive 10-day period is presumably based on the fact that a potential appellant clearly has knowledge of the issued permit by the time the project is “under roof” and so must immediately exercise its appeal rights or lose them. In this case, Appellant already had knowledge of the proposed project two years prior to the issuance of the Permit and so once any construction was started should have been on notice of the issuance of the Permit. Yet Appellant chose to not appeal until the building authorized by the Permit was largely complete.

Therefore, DCRA respectfully requests that the Board grant this Motion to Dismiss for Untimely Filing and so dismiss the appeal.

**MOTION TO DISMISS FOR LACK OF JURISDICTION**

DCRA respectfully asserts that the Board lacks jurisdiction to review Appellant’s allegation (iii) regarding the wall check because wall checks are required and regulated by the Building Code, which is not within the jurisdiction of the Board, but instead of OAH.

DCRA also respectfully asserts that the Board lacks jurisdiction to review Appellant’s allegations (v) and (vi) regarding construction in, and use of, public space outside of private property that is subject to the Zoning Regulations. DCRA asserts that construction in public space is allowed and regulated under Title 24 of the DCMR, administered by the District Department of Transportation (“DDOT”), and by Chapter 32 of the Building Code (Title 12A of the DCMR), administered by DCRA. The Zoning Administrator does not review any aspect of a DCRA or DDOT permit for construction in public space, and appeals of DCRA’s interpretation of the Building Code, and of DDOT’s interpretation of the public space regulations fall under the jurisdiction of OAH, not the Board.

**MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

DCRA asserts that Appellant has failed to explicate, let alone substantiate, its allegation (iv) that “lot occupancy” is an element of the appeal of the Permit, which is not included in its “Detailed Statement” (Exhibit 7) but instead listed in its service (Exhibit 9). Section Y-302.14 bars the submission of any document or witness that is not included in the filing required by Section Y-302 so DCRA asserts that Appellant cannot cure this failure by submitting additional evidence. Therefore, given the complete lack of any explanation or substantiation of this allegation, DCRA respectfully requests that the Board grant its Motion to Dismiss Appellant’s allegation (iv) regarding lot occupancy.

**MOTION TO CONTINUE HEARING ON THE MERITS TO DECEMBER 20, 2017**

DCRA respectfully requests that if the Board denies its Motion to Dismiss for Untimely Filing, that the Board grant a two-week continuance any of Appellant’s allegations that are remaining after the Board rules on DCRA’s other Motions to Dismiss for Lack of Jurisdiction and for Failure to State a Claim, so that DCRA and the Permit Holder can respond to the merits of the remaining allegations.

**CONCLUSION**

DCRA therefore respectfully requests the Board grant DCRA’s Motion to Dismiss for Untimely Filing and dismiss the appeal. Alternatively DCRA respectfully respects that the Board grant DCRA’s Motions to Dismiss for Lack of Jurisdiction and for Failure to State a Claim and DCRA’s Motion to Continue the hearing to consider the merits for two weeks.

Respectfully submitted,  
CHARLES THOMAS  
General Counsel  
Department of Consumer and Regulatory Affairs

Date: 12/6/17

/s/ Maximilian L.S. Tondro  
Maximilian L. S. Tondro (D.C. Bar # 1031033)  
Assistant General Counsel, Office of General Counsel  
Department of Consumer and Regulatory Affairs  
1100 4<sup>th</sup> Street, S.W., 5<sup>th</sup> Floor  
Washington, D.C. 20024  
(202) 442-8403 (office) / (202) 442-9477 (fax)  
[maximilian.tondro@dc.gov](mailto:maximilian.tondro@dc.gov)  
*Attorney for Department of Consumer and Regulatory Affairs*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of December, 2017, a copy of the foregoing DCRA's Motions to Dismiss for Untimely Filing; to Dismiss for Lack of Jurisdiction; to Dismiss for Failure to State a Claim; and to Continue the Hearing on the Merits for Two Weeks was served via electronic mail to:

David P. Belt  
3940 Benning Road, N.E.  
Washington, D.C. 20019  
[tazz20019@gmail.com](mailto:tazz20019@gmail.com)  
*Appellant*

Kyrus L. Freeman  
Holland & Knight  
800 17<sup>th</sup> Street, N.W., Suite 1100  
Washington, D.C. 20006  
[kyrus.freeman@hklaw.com](mailto:kyrus.freeman@hklaw.com)  
*Counsel for Permit Holder*

Sheila Carson Carr, Chair  
Advisory Neighborhood Commission 7F  
515 46<sup>th</sup> Street, S.E..  
Washington, D.C. 20019  
[7F03@anc.dc.gov](mailto:7F03@anc.dc.gov)

Tyrell M. Holcomb, Single Member Advisory  
Neighborhood Commissioner, ANC 7F01  
4020 Minnesota Avenue, N.E.  
Washington, D.C. 20019  
[7F01@anc.dc.gov](mailto:7F01@anc.dc.gov)

/s/ Maximilian L.S. Tondro

Maximilian L.S. Tondro