BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF
THE RESIDENCES OF COLUMBIA HEIGHTS, A CONDOMINIUM

BZA CASE NO. 20183

HEARING DATE: JANUARY 29, 2020

PROPERTY OWNER'S MOTION TO DISMISS APPEAL AS UNTIMELY AND POSTPONE THE HEARING ON THE MERITS

The Department of General Services ("DGS"), on behalf of the District of Columbia, the owner of the property that is the subject of this appeal, moves to dismiss this appeal as untimely filed. The Appellant had known of the zoning decisions regarding the matter of right processing of DGS's project at 2500 14th Street NW (Lot 205 in Square 2662) (the "Property") for substantially more than 60 days and failed to timely file an appeal. DGS requests to postpone the January 29, 2020 hearing on the merits; and conduct a limited hearing to address this motion at the public hearing scheduled on January 29, 2020.

MOTION TO POSTPONE JANUARY 29, 2020 HEARING

We respectfully request that the public hearing on the merits scheduled for January 29, 2020 be postponed at least 15-30 days for three reasons. Laura Zeilinger, the Director of the Department of Human Services, will be testifying at the D.C. Council Oversight Hearing before the Committee of the Whole for her agency on January 29, 2020. *See* D.C. Council calendar snip attached at **Exhibit A**. Accordingly, she will not be able to testify that same day in this matter at the Board of Zoning Adjustment, and Ms. Zeilinger's testimony may be relevant to the merits of this case. Second, the jurisdictional question raised on timeliness should be bifurcated from the hearing on the merit. Further, DGS retained undersigned counsel for the purpose of this appeal on January 22, 2020,[1] and counsel requests that the hearing be postponed, to provide time to submit

[1] The undersigned counsel was previously retained for the limited scope of responding to the memorandum by Appellant's counsel in the letter dated May 3, 2019 in the record at BZA Ex. No. 7.

a written prehearing statement on the merits, if one is necessary post the ruling on the Motion to Dismiss. For these reasons, we request the January 29, 2020 hearing on the merits be postponed.

MOTION TO DISMISS

The facts and the law are clear that The Residences of Columbia Heights, a Condominium (the "Appellant") failed to comply with Subtitle Y § 302.2 and file this appeal within the required sixty days from when it had actual knowledge and notice. The Appellant challenges four aspects of Building Permit B1908601, issued September 30, 2019 (the "Building Permit"). However, the Appellant had prior and actual notice of previous zoning decisions regarding all issues now alleged on appeal. The facts as outlined in the Appellant's own filing and arguments contained herein prove this case should be dismissed on timeliness.

FACTUAL BACKGROUND

A complete recitation of the facts pertinent to the issue of timeliness is attached at **Exhibit B**. This project has been subject to public review dating back to December 7, 2017. One Year and one month ago, Mayor Bowser publicly announced the Property as the final site location for the Ward 1 Shelter, a 50-unit apartment house comprised of 35 apartment units to be used for short term family housing, and 15 apartment units to be used for permanent supportive senior housing (the "Project"). Beginning with the Ward 1 Community Town Hall meeting on January 18, 2018, regular public meetings with the community and Ward 1 Advisory Team have been held to discuss and review the Project, including all elements relating to the zoning decisions at issue in this appeal. Importantly, as of February 1, 2018, the "Short-term Family Housing in Ward 1: Questions and Answers" specifically identified that the Project would be constructed as a matter-of-right, and the plans and design have been available for public review on the website of the Office Deputy

Mayor for Health and Human Services, under the "Special Initiatives" tab.[2] *See* **Exhibit C**. Further, the RFP for the Project was issued on May 26, 2018 and included all elements of the Project, which are now at issue in this appeal. *See* **Exhibit E**.

Appellant's prehearing statements include that "Appellant brought the lack of a rear yard setback to the City's attention on February 20, 2019." *See* BZA Ex. 14; BZA Ex. 33. Then, immediately after obtaining architectural plans for the Project from DGS in March 2018, Appellant requested a zoning compliance review by Appellant's counsel. *See* BZA Ex. 33. Further, in March 2019, Appellant met with DGS and raised the issues now on appeal. *See* BZA Ex. 33. In response to Appellant's challenges, DGS requested and obtained the March 25, 2019 zoning confirmation email (the "March Zoning Confirmation Email") from the Zoning Administrator regarding the Project being a single building and its rear yard compliance. DGS sent this information to the Appellant in an email dated March 29, 2019, attached hereto at **Exhibit F**. *See* BZA Ex. 33.

Appellant further demonstrated its complete awareness of the alleged zoning issues regarding the Project, when Appellant's counsel issued its comprehensive zoning compliance memorandum on April 18, 2019 ("Appellant's April Memorandum"), outlining each issue now on appeal. *See* BZA Ex. 6. DGS's counsel responded to the issues now on appeal by letter to the Appellant dated May 3, 2019, and at that time conspicuously raised the issue of timeliness to the Appellant ("DGS's May 3 Letter"). *See* BZA Ex. 7. Appellant showed again that it had notice of the Project, when it responded to DGS's May 3 Letter with its May 8, 2019 letter to the Zoning Administrator, detailing again each issued raised in Appellant's April Memorandum regarding the alleged zoning violations of the Project, and included its response to the issue of timeliness. *See* BZA Ex. 8. Finally, Appellant clearly was fully apprised of the zoning decisions challenged, after

[2] The "Short-term Family Housing in Ward 1: Questions and Answers" document from the March 28, 2019 Ward 1 Advisory Team Meeting identifies and shows the Project's location. *See* **Exhibit D**.

Appellant met with the Zoning Administrator on May 10, 2019, wherein the Zoning Administrator affirmed the Project's zoning compliance. *See* BZA Ex. 33.

Further, the Appellant knew or should have known that zoning decisions were made supporting the Project because permit FD1900028 (the "Foundation Permit") and permit SH1900029 (the "Sheeting and Shoring Permit") were both issued on June 3, 2019. *See* **Exhibit G**. DCRA's publicly-available Permit Tracker shows zoning review of the architectural plans, including the apartment building use, attached hereto at **Exhibit H**, and all zoning specifications for the Project, on February 1, 2019. *See* **Exhibit G**. A zoning reviewer is listed and noted on the Foundation Permit plans on May 21, 2019. *See* **Exhibit H**. Additionally, DCRA's Permit Tracker shows zoning review approval of the Sheeting and Shoring Permit on February 12, 2019. *See id*. Then, as the Appellant noted, DGS broke ground for the Project on July 1, 2019. *See* BZA Ex. 33.

Despite these series of salient events, the Appellant waited until the Building Permit was issued on September 30, 2019 and then filed this appeal.

LEGAL STANDARD

In the District of Columbia, any aggrieved person "affected by an order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations, may file a timely zoning appeal with the Board." Subtitle Y § 302.1.

The Zoning Regulations and the decisions of this Board and the DC Court of Appeals establish a very clear deadline for filing a zoning appeal. It is also established that the failure to file an appeal within the applicable 60-day time period will result in the dismissal of an appeal, unless the 60-day deadline is duly extended pursuant to Subtitle Y § 302.6. BZA Case No. 19375.[3]

[3] The Board has established that untimely appeals must be dismissed, even though this deadline could be deemed a "claims processing rule." *See* BZA Case No. 19374 *citing to Gatewood v. District of Columbia Water and Sewer Authority*, 82 A.3d 41 (2013) (WASA deadline to file appeal of water bill is non-jurisdictional).

Specifically, pursuant to Subtitle Y § 302.2, an appeal is only deemed timely if it is:

> filed within sixty (60) days from 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. (Emphasis added).

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 the Board of Zoning Adjustment appeals." *See* Z.C. Order. No. 02-01. The adoption of this Text Amendment "codifies the principles established in *Waste Management*, 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."

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. *See* BZA Appeal No. 17513. 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. *See* BZA Appeal No. 17468. Once the person has actual or constructive notice that a decision has been made, that person has an obligation to undertake due diligence to determine the content, implications, and nature of the decision, and as appropriate, file a timely appeal. *Id.* An appellant can be "chargeable with notice" based on the appellant's knowledge of plans and correspondence with the zoning administrator. *See Georgetown Residents Alliance v. D.C. Bd. of Zoning Adjustment*, 816 A.2d 41, 50 (D.C. 2003); *see also Woodley Park Community Assoc. v. D.C. Bd. of Zoning Adjustment*, 490 A.2d 628, 637 (D.C. 1985) (finding that appellant had notice and knew of the on appeal before permit issuance).

A zoning appeal "may only be taken from the first writing that reflects the administrative decision complained of, to which the appellant had actual or constructive 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" *See* Subtitle Y § 302.5.

The Board is only permitted to extend the 60-day deadline when the appellant demonstrates that (1) 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 the zoning appeal; and (2) the extension of time will not prejudice the parties to the appeal. *See* Subtitle Y § 302.6. Neither of those exceptions apply in this instance, as discussed below.

SUMMARY OF THE ARGUMENT

Substantially after DGS publicly stated that the Project would be a matter of right apartment building, more than six months after corresponding with DGS and the Zoning Administrator to confirm that the use was by-right, and after the Foundation Permit was issued with zoning detail shown, Appellant is only now filing a zoning appeal of this Project. Indeed, since January 2018, DGS has made clear to the Appellants, ANC 1B, and the community that the Project would be processed and constructed by-right, with no special exception relief needed. DGS very publicly and specifically corresponded with the Appellant to provide it with reasonable and proper actual and constructive notice of the zoning decisions. Appellant documents its dissention with DGS and the Zoning Administrator's decisions repeatedly from March through May 2019. The Appellant's request for the Zoning Administrator to change his decision failed. The zoning decisions have not changed and since May 2019. Further, since May, multiple permits have been issued with zoning approvals of the same plans at issue in this appeal, and construction of the Project began with a well-publicized groundbreaking event held on July 1, 2019.

Given these facts, there can be no question that Appellant had actual, and if not constructive, knowledge of the zoning decision to process the Project as a by-right building. No level of naivety can be feigned to assert that Appellant "reasonably" did not have knowledge of

this decision – the standard established by the Zoning Regulations. Indeed, the Zoning Regulations do not allow an Appellant to gather all its information, have excessive notice, and then wait to file an appeal. Rather, the opposite is true: the Appellant only has 60 days to appeal after they gain actual or constructive notice. Here, even generously counting from Mid-May 2019, that 60-day period expired on July 12, 2019. Additionally, even counting from the Foundation Permit issuance date of June 3, 2019, the appeal deadline was August 2, 2019. But, Appellant let all of those dates pass. Instead, they waited another three months to file this appeal. That is simply too long and far beyond the regulatory requirement. It cannot stand, and we respectfully assert that this appeal must be dismissed.

It is clear the Appellant has been paying close attention to the Project since its outset, and had notice and knowledge of the underlying plans, design, decisions, and schedule. The Building Permit was not the first writing informing the Appellant, stakeholders, and community that the Project would not need BZA special exception review, was a single building, provided the proper rear yard setback, and complied with parking and loading requirements. Finally, the Appellant has not requested, nor should the Board grant an extension beyond the 60-day deadline. There is simply no rationale or basis to support such a request. Accordingly, this appeal is not timely filed, and the Board should grant this motion to dismiss.

ARGUMENT

I. The Appellant Had Actual Notice and/or Constructive Knowledge of the Zoning Decisions to process the Project as a matter of right in Mid-May 2019.

The Appellant does not dispute that it obtained the initial Zoning Administrator's email as early as March 28, 2019, and that it sent a detailed memorandum addressing all of the matter of right issues to the Zoning Administrator on April 19, 2019. The Zoning Regulations are abundantly clear regarding the date by which an appeal must be filed. Specifically, a zoning appeal

"shall be filed within sixty (60) days" from the earlier 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." *See* Subtitle Y § 302.2.

The Court has held that the "administrative decision complained of" need not take a specific form. *Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 366 (D.C. 2008) (Finding that "regulations do not tie the time for appealing to the BZA to the issuance of a specified type of notice."). To that end, it is well established that zoning decisions *before* the issuance of a building permit are appealable. Indeed, an appellant can be "chargeable with notice" based on the appellant's knowledge of plans and correspondence with the zoning administrator. *See Georgetown Residents Alliance v. D.C. Bd. of Zoning Adjustment*, 816 A.2d 41, 50 (D.C. 2003); *see also Woodley Park Community Assoc. v. D.C. Bd. of Zoning Adjustment*, 490 A.2d 628, 637 (D.C. 1985) (finding that appellant had notice and knew of the on appeal before permit issuance).

In *Woodley Park*, the Court of Appeals found that the appellant knew of the issues being appealed before permit issuance. *See Woodley Park*, 490 A.2d at 637. The Court noted that the appellant had reviewed plans for the proposed project during task force meetings on that development, and "as to the issues of height, setback, and use, the plans presented at these meetings were substantially similar to those objected to" in the appellant's zoning appeal. *See id.* The Court identified letters written by the task force to the property owner and the zoning administrator, objecting to the project and its zoning compliance. *See id.* The *Woodley Park* Court concluded that the appellant "had full actual notice of the aspects of the building project relating to height, setback and use," and, as to those issues, the appeal was appropriately dismissed as untimely. *See id.*

The facts here are analogous to the cases in *Georgetown Residents Alliance* and *Woodley Park*. In both cases, the Court of Appeals affirmed that "pre-permit" notice of a zoning decision

means the appellant is "chargeable with notice," that a zoning decision was made. Here, just as in *Woodley Park,* the Appellant clearly was "chargeable with notice" of the zoning decisions to process the case as a matter of right in May 2019, nearly six months before the Appellant filed this appeal. Given the significant correspondence between DGS, Appellant's counsel, and the Zoning Administrator from March until May 2019 and DGS/ DHS's public notifications, the Appellant cannot refute it was "chargeable with notice." DGS's May 3, 2019 letter to Appellant specifically stated, "The community was on notice that DGS intended to construct the Project as a by-right apartment house use, and the Zoning Administrator agreed that the Project qualified as an 'apartment house.'" *See* BZA Ex. 7 pg. 5. Any allegation that Appellant did not have actual or constructive knowledge of the key zoning decisions for the Project, flatly ignore the facts.

Also, this Board has previously dismissed appeals as untimely on many occasions. *See e.g.* BZA Appeal Nos. 19374, BZA Case No. 18300, BZA Case No. 18469, BZA Case No. 19049. BZA Appeal No. 19374 and BZA Case No. 18300 are particularly relevant, because in those cases, the Board dismissed appeals as untimely, when they were filed within 60 days of the issuance of a building permit, but long after the initial zoning decisions had been provided. Indeed, in BZA Appeal No. 18300, the Board completed a thorough review of prior case law, and concluded that the time for appeal is not tied to the issuance of a specific *type* of notice, and that a decision by the Zoning Administrator that a project could be compliant with matter of right zoning, "represented a decision on the very issue that the Appellants have asked this Board to review" *citing Basken*, 946 A.2d 370.

Similarly, this Board should find the subject appeal as untimely. Appellant had both actual and constructive knowledge of the zoning decision, and confirmation in May 2019 or earlier, that the plans were deemed compliant with all zoning regulations. If they wanted to appeal, they should not have waited until October 24, 2019, with the full actual and constructive knowledge of the

previous zoning decisions. This flaunting of the Zoning Regulations' clear statutory requirements cannot stand, and this appeal should be dismissed.

II. At the very latest, the Appellant Had Actual Notice and/or Constructive Knowledge of the Zoning Decisions to process the Project as a matter of right as of June 3, 2019

The Foundation Permit was issued on June 3, 2019. The stamped Foundation Permit plan set includes notes from a zoning reviewer dated May 21, 2019, and the publicly-available Permit Tracking Information states "Zoning Review Approved" on February 1, 2019. The Foundation Permit plans clearly identify the Project as a "Proposed Apartment Building" and explain how the Project satisfies the zone's matter of right development standards. As such, the Foundation Permit would constitute the "first writing," because the Foundation Permit is specific to the Property; the language on the plans showing the Project as a "Proposed Apartment Building" establishes that DCRA review and approval of the Foundation Permit was unambiguous; and there is no language on the plans or the approval that would suggest the decision is subject to change. *See* BZA Case No. 19374 and BZA Case No. 18300. *See also*, BZA Case No. 19374, where the Board found that the "'administrative decision complained of' need not take a specific form."

Further, this finding is consistent with the Board's decision in BZA Case No. 18469, where the Board dismissed an appeal as untimely, when it was filed more than 60 days after the Zoning Approval of a Retaining Wall permit ("RW Permit") was posted on the publicly-available Permit Tracking system. Here, even though DGS could reasonably assert that the appeal clock started on February 1, 2019, (when the Foundation Permit zoning approval was posted on the publicly-available Permit Tracking system), there is no ambiguity that the very last day to file an appeal was August 2, 2019 – 60 days after DCRA issued the Foundation Permit on June 3, 2019.

It would be unrealistic for Appellant to claim that they did not have actual or constructive knowledge of the zoning decision, following the June 3, 2019 Foundation Permit issuance. The

Foundation Permit would have been posted on the Property. Also, and importantly, construction began on the Project on July 1, 2019. Indeed, Appellant's own power point slides include a press release about the Mayor's public ground breaking ceremony on that date. *See* BZA Ex. No. 36. Since then, the Project has been an active construction site. The Board clearly established in BZA Case No. 17648, that commencement of construction puts neighbors on notice, and at the very least they need to make a reasonable effort to undertake due diligence to determine the underlying zoning decisions that support the construction. *See* BZA Case No. 17648 (stating "The undisputed evidence…shows that there were a series of activities that should have put the ANC and its constituencies on notice…when construction began… the regulations contemplate an obligation within a reasonable period of time to undertake due diligence to determine" the zoning decision to support the construction).

Accordingly, this clear Board precedent established that in a highly-publicized case, such as this Project, that, at the very least, when construction began, the Appellant had an obligation to review the readily-available on-line permitting history. This review would have shown the June 3, 2019 issuance of the Foundation Permit and the Permit Tracker reference to zoning review on February 1, 2019. Given the significant scrutiny of this case and the fact that Appellant and their counsel met with the Zoning Administrator shortly before the Foundation Permit was issued, it is beyond the pale to claim that Appellant did not know or should not have known about the Foundation Permit approval, which includes all zoning references and plans.

As such, the latest date the appeal could have been filed was August 2, 2019 – 60 days after the Foundation Permit was issued. Appellant did not even comply with this deadline, but waited months to file. The Appeal must be dismissed.

III. <u>The Building Permit cannot be Appealed because it does not Modify or Reverse the zoning decision.</u>

The Board has repeatedly found that subsequent documents cannot be appealed, when the document does not modify or reverse the original zoning decision. In BZA Appeal No. 18300, the Board held that the building permit at issue was not the first appealable zoning decision, rather, the *pre-permit* decision of the Zoning Administrator, memorialized in an email to the owners, and followed by substantial communications between the owners and appellants, was the first appealable decision. More recently, in BZA Case 19049, the Board concluded that a memorandum from the Zoning Administrator issued *after* the building permit was not appealable, because it "contained no new information," and was "merely a clarification of the same zoning issues . . . that had been raised in the past." *See* BZA Case No. 19049. Also, in BZA Case 18980, the Board found that subsequent building permits cannot be appealed, if the permits "merely reiterated the zoning decisions embodied in the issuance of the [original permit], and did not reflect new zoning decisions." BZA Case No. 18980. In BZA Case No. 18568, the Board also determined that a subsequent certificate of occupancy and two emails from the Office of the Zoning Administrator could not be appealed, because neither "represented a new decision on this issue" of a tavern use. *See* BZA Case No. 18568.

Here, just as the cases above, the issuance of the Building Permit does not constitute a new decision as to the Project. Importantly, the Appellant attached the Building Permit plans and zoning summary to its April 18, 2019 correspondence with the Zoning Administrator. Such action establishes that the Building Permit plans are, by their nature, identical to those reviewed and agreed to by the Zoning Administrator. The Appellant has been represented by the same counsel since March 2019, and that counsel has been raising the same issues with DGS and the Zoning Administrator since then – no new decision or substantive change to the plans has occurred. Finally, the Foundation Permit included all plans, a zoning chart, and it clearly stated the "Apartment Building" use. DCRA's issuance of the Foundation Permit and the Sheeting and

Shoring Permit show the Building Permit contains no new, actionable decisions. Accordingly, the Building Permit cannot be separately appealed.

IV. Comprehensive Knowledge

The Board looks at the facts of each case to decide whether a zoning determination letter, email, decision or refusal, or permit (including Foundation Permit) may be considered a first writing. *See* BZA Case No. 20141 Dec. 18, 2019 Hearing Tr. 13-15; *see also* BZA Appeal No. 18300. To make their finding, the Board considers when the parties had actual notice of the zoning issue(s) on appeal. *Id*. There are numerous relevant cases where the Board has found that pre-permit decisions and permits, may be deemed "a first writing" appealable under the Zoning Regulations. *See* BZA Appeal No. 18300; *see also Woodley Park Community Assoc. v. D.C. Bd. of Zoning Adjustment*, 490 A.2d 628, 635 (D.C. 1985).

Such is the case here. The zoning decisions here were identified in the Foundation Permit plan set, as well as the numerous zoning decisions, discussions, and letters, including but not limited to the Zoning Administrator's March 25, 2019 email, meetings and DGS, and DHS public disclosures. Here, the multiple events that triggered actual or constructive notice are overwhelming. Further, if the Board deems the Appellant was not chargeable with the notice at the time the Zoning Administrator email was issued and sent directly to the Appellant, plainly the Appellant is chargeable with notice of the zoning decision in the May correspondence with DGS and at their May 10, 2019 meeting with the Zoning Administrator; or at the very latest, after the Foundation Permit was issued on June 3, 2019 and/or the Mayor led the public ground-breaking ceremony on July 1, 2019. All of which events are now time barred.

This case is similar to BZA Appeal No. 18300 of Lawrence and Kathleen Ausubel, where the Board held that the appellant had pre-permit knowledge of the zoning decisions on appeal, due to the appellant's numerous communications with the property owner and Zoning Administrator.

Here, the Appellant not only received a copy of the Zoning Administrator's decision, but they drafted and filed two separate memorandums with the Zoning Administrator to ask him to change his decision. They even met with the Zoning Administrator to discuss the matter, and may have repeatedly engaged with the Zoning Administrator before and after those meetings. It is absolutely clear that the Appellant thus knew of, and had notice of, the zoning decisions and then waited months before it filed this appeal.

V. There is no basis for extending the 60-day time period for filing this Appeal.

As the appeal is untimely for the reasons stated above, the inquiry shifts to a consideration under Subtitle Y § 302.6, of whether the Appellant can demonstrate that (1) there are exceptional circumstances outside the Appellant's control, which could not have been reasonably anticipated, and substantially impaired the Appellant's ability to file the appeal; and (2) the extension of time will not prejudice DGS. Even assuming that this inquiry is warranted, the Appellant would be required to satisfy both tests, but cannot satisfy either one.

First, the Appellant knew or should have known of the zoning decisions between March and May 2019 at the latest – this would have given them more than enough time to file a timely appeal. Indeed, as of March 2019, the Appellant had retained counsel and was advising DGS of potential litigation. Appellant received the Zoning Administrator's confirmation email directly from DGS on March 28, and Appellant's counsel completed a thorough and complete review of the plans and other documentation to prepare a six-page memorandum on April 18, 2019, which was sent to the Zoning Administrator the next day and then forwarded to DGS. After DGS's counsel responded to that memorandum in a five-page letter that attached plans, prior determinations and other materials, the Appellant's counsel took only five days to prepare and send a different, five-page letter, asking the Zoning Administrator to reverse his prior decisions.

The Appellant's counsel then met in person with the Zoning Administrator, to make the same request and see if the Zoning Administrator would change his decision. He did not.

Accordingly, there were absolutely no "exceptional circumstances" outside of the Appellant's control, which substantially impaired their ability to timely file this appeal. Rather, the circumstances were entirely within their control. Appellant asked for and timely received the Zoning Administrator's March 26, 2019 email; Appellant prepared the April 18, 2019 Memorandum and sent it to the Zoning Administrator the next day; Appellant's counsel then very quickly responded to DGS' May 3, 2019 Letter; Appellant then scheduled and ostensibly attended the in-person meeting with the Zoning Administrator; and given their adjacency to the Property, Appellant had actual knowledge that construction had begun, pursuant to the Foundation Permit. Despite notice of timeliness as an issue on May 3rd, it is not known why the Appellant did not, even if disagreeing out of an abundance of caution, file an appeal within 60 days of the May 3rd letter, the May 10th meeting, the Foundation Permit issuance, and/or construction commencing. Such action is required and is entirely reasonable, given this highly publicized case. Appellant and its counsel made said decision and now must be subject to the Zoning Regulations and all ramifications of that decision to wait. Furthermore, Appellant's decision not to file is not a reason to extend the filing deadline.

Both the 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; BZA Appeal No. 17391. 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. As is well established, the Board has no jurisdiction to hear untimely appeals.

CONCLUSION

This appeal is untimely filed, because the Appellant had actual and constructive knowledge of the zoning decisions by May 2019 or June 3, 2019, at the latest. Indeed, they met with the Zoning Administrator on May 10, 2019, to ask that the Zoning Administrator to change his decision. There can be no clearer proof of actual or constructive knowledge. But, instead of timely appealing after they were conclusively and clearly aware of the Zoning Administrator's decision and the Foundation Permit issuance, Appellant waited, and did so to their detriment. Indeed, they waited months to file this appeal. Indeed, the Zoning Regulations and the case precedent are clear that the Appellant should have filed this appeal by July 9, 2019 or August 2, 2019, at the latest – the 60-day outside dates from the May 10, 2019 meeting and/or the Foundation Permit issuance, respectively. But, the Appellant failed to file its appeal within that timeframe. Clearly, this appeal should be dismissed.

As such, the Board should conduct a separate hearing on this Motion to Dismiss for timeliness on January 29, 2020. Should the Board find that the appeal is untimely, then the Board is without jurisdiction to hear the merits of this appeal. Accordingly, DGS requests that the Board conduct a hearing on January 29, 2020 and dismiss this appeal as untimely.

Respectfully submitted,
COZEN O'CONNOR

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