Tab B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 18300 of Lawrence and Kathleen Ausubel, pursuant to 11 DCMR §§ 3100 and 3101, from the issuance of Building Permit Number B1103986[1] by the Department of Consumer and Regulatory Affairs on July 13, 2011, allowing an addition to a one-family dwelling in the TSP/R-1-A District at premises 2750 32nd Street, NW (Square 2119, Lot 25).

HEARING DATE ON MOTION TO DISMISS: November 8, 2011
DECISION DATE ON MOTION TO DISMISS: November 8, 2011

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on September 9, 2011 by Lawrence and Kathleen Ausubel, the owners of property that is immediately adjacent to the subject property. The subject property is a one family dwelling located within the Tree and Slope Protection Overlay (TSP) and R-1-A Zone District. The Ausubels' appeal challenged the decision of the Department of Consumer and Regulatory Affairs "DCRA" to allow an addition at the subject property, claiming the addition would violate the TSP Regulations. The Appellants claimed that this decision was first reflected in the building permit dated July 13, 2011 that authorized the addition and that they had sixty days after they knew or should have known of that decision to file this appeal. The owner of the subject property filed a motion to dismiss the appeal, alleging that decision was first reflected in a June 14, 2011 email from the Zoning Administrator to the Ausubels that notified them that the revised plans for the addition were approved for zoning purposes. For the reasons stated below, the Board agrees with the owner and because the appeal was filed more than 60 days after the email was sent and received, the Board dismisses the appeal as untimely.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on January 24, 2012. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellants,

[1] The caption reflects the Appellants' theory that the building permit, and not an earlier DCRA email, represented the appealable decision. As will be explained, the Board determined that only the earlier email was appealable.

Advisory Neighborhood Commission ("ANC") 3C (the ANC in which the subject property is located), the property owner, and DCRA.

Preliminary Motions

Request for Stay and Expedited Hearing

On September 9, 2011, the Ausubels (through their counsel) filed a "Request for a Stay of the Building Permit" and a "Request for an Expedited Hearing" together with the appeal documents (Letter of September 9, 2011 transmitting Exhibit 1.) The Ausubels also filed a "Memorandum in Support of Appellants' Request for a Stay". (Exhibit 32.) The property owner opposed these requests (Exhibit 28), as did DCRA (Exhibit 30).

Motion to Dismiss the Appeal

On October 28, 2011, the property owner filed a motion to dismiss the appeal, contending that the appeal was untimely filed. (Exhibit 27.) Appellants filed their opposition to the motion to dismiss (Exhibit 29), and the owner filed a reply to said opposition (Exhibit 31). DCRA took no position regarding the legal issue raised in the motion to dismiss, but provided relevant factual information to the Board. (Exhibit 30.)

The two motions came before the Board for consideration on November 8, 2011.

Parties

The Appellants in this case are Lawrence and Kathleen Ausubel. The Ausubels reside at 2744 32nd Street, N.W., adjacent to the subject property at 2750 32nd Street, N.W. They will be known hereafter as the Appellants or the Ausubels. The Appellants were represented by the law firm of Arent Fox LLP, Kinley Bray, Esq.

As the owner of the subject property, the 2750 32nd Street Trust is automatically a party under 11 DCMR § 3199.1 and will hereafter be referred to as the Owner. The Owner was represented by the law firm of Holland & Knight, Christopher Collins, Esq.

DCRA was represented by its Office of the General Counsel, Jay Surabian, Esq., Assistant Attorney General for the District of Columbia.

ANC 3C, as the affected ANC, was automatically a party in this appeal. In a Resolution dated September 19, 2011, the ANC voted to support the appeal. The Resolution was submitted to the Board on September 23, 2011, following a regularly scheduled monthly meeting with a quorum present. (Exhibit 21.) The ANC submitted a second Resolution dated October 17, 2011, which reiterated the concerns it expressed previously and acknowledged that the Owner had submitted

an amended Tree Protection Plan that incorporated recommendations made by the Urban Forestry Administration. The ANC also requested that the Board grant Appellant's request for a stay of the building permit and an expedited hearing.

FINDINGS OF FACT

The Property

1. The subject property is located at 2750 32nd Street, N.W., in Square 2119, Lot 25.

2. It is zoned R-1-A and is also subject to the requirements of the ("TSP") Overlay Zone. Among other things, the TSP Overlay was designed to regulate the protection of trees.

Events Leading Up to the Appeal

3. On or about February 17, 2011, the Owner filed a building permit application with DCRA to construct an addition to his home at the subject property. The plan included an addition to the side of the dwelling, plus extensive landscaping, including the planting of 52 trees.

4. The Ausubels became aware of the permit application shortly thereafter, and commissioned a report from an arborist (Mr. Keith Pitchford) regarding the impact of the proposed construction on trees at the property. Mr. Pitchford wrote a letter dated March 23, 2011 to the Ausubels in which he expressed his opinion about potential "irreparable harm" to particular trees. (The letter is contained in the record at Exhibit 5, and also Tab D attached to Exhibit 1.)

5. The Ausubels and the Owner engaged in discussions during March and April 2011, and the Owner agreed to submit a revised building plan to DCRA reflecting a change in the location of the proposed addition.

6. The Ausubels and their counsel met with Zoning Administrator Matthew LeGrant (the "ZA") on April 5, 2011 to discuss their concerns and to submit a copy of their arborist's report.

7. The Owners and their counsel met with the ZA on April 18, 2011 to discuss, in part, the concerns expressed by the Ausubels and their counsel. The ZA indicated that he would seek additional input from the Urban Forestry Administration (UFA) of the District Department of Transportation before making his decision, and also requested the Owner to provide supplemental documents.

8. Shortly thereafter, the Owner provided the requested documents to the ZA, including a proposed Tree Protection Plan that had been developed by the project arborist.

9. The Ausubels' counsel emailed the ZA on April 21, 2011, reiterating the concerns they expressed at their April 5 meeting, and opining that the Owner's plans would "fatally damage" significant trees.

10. On or about June 3, 2011, the UFA sent a memorandum to the ZA expressing certain concerns and listing additional tree protection recommendations. (The UFA memorandum is contained at Tab E, Exhibit 1.) The Owner incorporated the UFA recommendations into an amended Tree Protection Plan.

11. In separate emails on June 14, 2011, the ZA notified the Ausubels' counsel and the Owner's counsel, that based on all of the information submitted, he had determined that the project complied with applicable zoning regulations. The Appellants do not contest the receipt of the email on the same date.

12. The ZA's email to the Ausubels stated, in pertinent part, that "the proposed addition is in compliance with the underlying R-1-A Zone and applicable TSP provisions set forth in Sections 1513 and 1514. Accordingly, I will proceed to approve the revised plans for [the] submitted building permit application." (Exhibit 27, Tab A.)

13. On July 13, 2011, DCRA issued the building permit for the proposed project.

14. The Ausubels met with the ZA on July 15, 2011 and, according to their minutes of the meeting (Exhibit 9), they informed the ZA that they planned to appeal his decision to the Board.

15. On July 22, 2011, the Ausubels' counsel filed a Complaint for Injunction and a Motion for temporary, preliminary, and permanent injunctive relief in the D.C. Superior Court.

16. The Ausubels filed this appeal with the Board on September 9, 2011 – 86 days after the ZA emailed his decision that the project complied with the zoning requirements.

CONCLUSIONS OF LAW

As explained, the Ausubels moved for a stay of the building permit and an expedited hearing on the merits of the appeal. However, the Owner filed a motion to dismiss the appeal for lack of jurisdiction on grounds of timeliness. As this Board has held before, it is bound to consider the jurisdictional question first, prior to consideration of the merits and prior to Appellants' request for a stay or an expedited hearing. *See, BZA Appeal No. 17411 of Basken and Meyer, at p. 4, affirmed, Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008).

It is well settled that the timely filing of an appeal is mandatory and jurisdictional. If an appeal is not timely filed, the Board is without power to consider it. *Economides v. District of Columbia Bd. of Zoning Adjustment,* 954 A.2d 427 (D.C. 2008); *Waste Mgmt. of Md., Inc. v. District of Columbia Bd. of Zoning Adjustment,* 775 A.2d 1090 (D.C. 2001); *Mendelson v. District of Columbia Bd. of Zoning Adjustment,* 645 A.2d 1090 (D.C. 1994).

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Subsection 3112.2(a) provides that an appeal must be filed within 60 days from the date the person filing the appeal first had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier.

There is no dispute that the zoning decision complained of is the ZA's determination that the proposed project complied with tree protection provisions of the TSP Overlay. The question is whether the appealable form of that decision was ZA's June 14, 2011 email or the July 13th building permit. Because the Board concludes that only the email constituted the decision, this appeal must be dismissed.

The Board's decision is based upon its examination of three District of Columbia Court of Appeals' decisions. The first decision is *Goto v. District of Columbia Bd. of Zoning Adjustment,* 423 A.2d 917 (D.C. 1980). *Goto* involved a ZA determination that no building permit was needed to build a kiln near a pottery shop. That decision was first orally communicated to the appellant and then later confirmed in writing. The issue was not whether the decision was appealable, but whether the earlier oral communication started the time for appeal. The Court of Appeals affirmed the BZA conclusion that only written decisions are appealable. Since the case did not involve an application for a building permit, it did not address the question of whether a written decision issued during the review of such an application could be appealed.

That issue was presented, but not resolved in *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment,* 894 A.2d 423 (D.C. 2006). In *Bannum,* the BZA appellant was an ANC that appealed a building permit rather than earlier ZA letters confirming that the proposed use was permitted as matter of right. As here, a motion to dismiss was filed claiming that the ANC should have appealed the letters and was now precluded from appealing the permit. The Board made two holdings. First it held that such interlocutory written decisions could have been appealed. Second, it held that the ANC had the option to wait until a building permit was issued. The Court of Appeals did not address the first holding, because it agreed "with the BZA's further conclusion that the ANC's failure to appeal from a concurrence letter ... does not bar a subsequent appeal of the related building permit." *Bannum,* 894 A.2d at 430. The court reached this conclusion principally based its decision upon DCRA's obligation to provide the ANC with notice.

> Because the issuance of a building permit requires the DCRA to comply with the public notice and other requirements set forth in the zoning regulations, we hold

> that a party such as ANC 5-B may wait to appeal until the DCRA takes official action by issuing the permit, regardless of whether or not that party has appealed (or tried to appeal) from any earlier interlocutory "administrative decision."

Id.

In addition, the court noted that it was "by no means clear that the ANC had notice of the concurrence letters at the time they were issued." *Id.* at 430 n. 10.

This issue of whether an interlocutory administrative decision could be appealed was at last resolved by the Court of Appeals in *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008). The Court of Appeals not only decided that an appeal could be taken, but identified the circumstances when a person with notice of the decision could not wait to appeal the subsequently issued permit.

The Basken case concerned the construction of a three-story addition to an existing apartment house and an increase in the number of apartment units. The building was located in an R-4 Zone District where new apartment houses are not permitted, but existing apartment buildings may be expanded provided there is a minimum amount of land area for each unit. In December of 2004, DCRA issued a revised building permit authorizing the construction of the addition "subject to zoning approval of number of units in zone."

In May of 2005, after the addition was nearly completed, the DCRA Director issued a letter conceding that the permit should not have issued because the minimum land area requirement was not met. However, the letter further indicated that as a matter of fairness DCRA would not deny a certificate of occupancy ("C of O") based upon the zoning review error. The certificate of occupancy was issued one month later. An appeal of the two building permits and the certificate of occupancy was filed on August 5, 2005, 231 days after the revised permit was issued, 70 days after the appellants became aware of letter, and 56 days after the C of 0 was issued.

The property owner moved to dismiss the appeal as untimely, claiming that the revised building permit contained the only appealable decision. The BZA disagreed, holding that the "subject to zoning approval" language in the permit made it unclear whether a zoning decision had been made and therefore did not start the appeal clock. However, the Board concluded that the DCRA letter, and not the subsequently issued certificate of occupancy, was the zoning decision and dismissed the appeal as untimely.

The BZA appellants petitioned the Court of Appeals to review the dismissal, but the court affirmed the Board. First, the court reached the issue left unresolved in *Bannum* and found that the DCRA Director's letter was appealable. The court noted that

> The zoning statute and regulations do not tie the time for appealing to the BZA to

> the issuance of a specified type of notice. *See* D.C. Code § 6-641.07(f) (authorizing appeals from "any other administrative decision") and 11 DCMR § 3112.2 (providing for an appeal by any person aggrieved by "any order, requirement, decision, determination, or refusal" within sixty days from the date the person knew or reasonably should have known of "the decision complained of.'

946 A.2d at 366.

The court further concluded that the subsequently issued certificate of occupancy did not restart the time for filing the appeal because it "represented neither a new decision on this issue nor the present petitioners' earliest notice of the decision." 946 A.2d at 368. The court then explained why the *Bannum* precedent was not available to the petitioners.

> Unlike the ANC that sought BZA review in that case, petitioners here were not entitled to formal notice that permitted them to wait for issuance of a permit (here, an occupancy permit) before their time to appeal the underlying zoning decision began to run. It is also clear that, unlike the ANC in Bannum, petitioners did have notice of the DCRA letter

946 A.2d at 639.

The court also noted that the decision letter before it differed in several important respects from the concurrence letters in *Bannum*.

First, unlike the *Bannum* letters, which expressed no intent to issue a building permit, the DCRA letter "clearly signified a decision not to withhold a certificate of occupancy". 946 A.2d at 370. Second, the letter in *Basken* "was issued after DCRA had been fully briefed on how the [project] conflicted with the zoning regulations applicable to R4 districts, so that it represented a decision on the very issue that petitioners asked the BZA to review." *Id.* In contrast, the letters in *Bannum* "were issued by DCRA without information about the details of Bannum's proposed facility." *Id.*

Applying the principles stated in *Basken* to the factual findings made above, the Board first concludes that the June 14th email contained the same attributes of the DCRA letter in *Basken* that caused the Court of Appeals to recognize it as an appealable decision.

Like the DCRA's Director's letter in *Basken,* the ZA's email included a decision that cleared the way for the issuance of a permit, in this case a building permit. In the email, the ZA unequivocally stated that he "would proceed to approve the revised plans for [the] submitted building permit application". This effectively removed all zoning obstacles to permit issuance. And, like the DCRA Director, the ZA made his decision after being "fully briefed" about

whether the proposed addition complied with the tree protection provisions of the TSP. As indicated in Findings of Fact 6 through 10, the ZA received information from the Owner and the Ausubels (including a report by their arborist), sought the input of the Urban Forestry Administration, reviewed the UFA's memorandum, and only made his decision to approve the plans after the Owners' revised their Tree Protection Plan to incorporate the UFA's recommendations. Having been fully briefed on the Owner's proposal, his conclusion, that "the proposed addition is in compliance with the underlying R-1-A Zone and 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.

Appellants nevertheless claim that they were entitled to wait until the building permit was issued, claiming the email was ambiguous. The Board must disagree. The wording of the email is crystal clear. This is not like the building permit in *Basken* that facially suggested that no zoning decision has been made. In addition, the *Bannum* precedent is unavailable to the Appellants for the same reasons that it was unavailable to the appellants in *Basken.* Just as in *Basken*, the Appellants here were not entitled to formal notice that permitted them to wait for issuance of a permit and there also is no dispute that they received the ZA's email.

Finally, like the certificate of occupancy in *Basken,* the building permit appealed in this case did not represent a new decision nor did it present Appellants' earliest notice of the decision. The building permit was only issued because of the decision of zoning consistency reflected in the earlier June 14th email, which also gave the Appellants their first notice that such a decision had been made.

Because the email constituted an "administrative decision" based in whole or in part upon the zoning regulation", D.C. Official Code § 6-641.07 (f), the Appellants were required to appeal it no later than 60 days after it was received on June 14, 2011. As stated earlier, the 60 days expired on August 12, 2011, and this appeal was filed on September 9, 2011, 86 days after notice of the zoning decision complained of. (Finding of Fact 16.)

This then leads to the question as to whether the Board may extend the 60-day time limit. Pursuant to § 3112.2(d) such an extension may be granted if the appellant demonstrates that: (1) there are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal.

Appellants maintain that they lacked certain DCRA documents, including the revised plans, and that it was impossible to formulate an appeal without these documents. The Board is not persuaded by this argument in light of the fact that by the time the Ausubels met with the ZA on July 15, 2011 they had already formed an intent to appeal to the Board and were able to prepare and file a lawsuit on the same ground in the Superior Court on or about July 22, 2011, some three weeks before the 60-day period expired.

Therefore, the Board cannot find that exceptional circumstances impaired Appellants' ability to file an appeal prior to the expiration of the 60-day period on August 12, 2011. Nor can the Board find that an extension of the 60-day time period would not prejudice the Owner. The Owner has submitted a Declaration attesting to the fact that he will incur financial costs of approximately $58,333 per month as a result of any delay to construction pending appeal.

The Board is required to give great weight to the issues and concerns of ANC 3C pursuant to D.C. Official Code § 1-309.10(d) (2001). The ANC voted to support the Ausubels' appeal. However, because the Board did not reach the merits of the appeal, the ANC's issues and concerns are not legally relevant. *See, Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234 (D.C. 1993).

For reasons discussed above, the Board must grant the motion to dismiss the appeal. It is hereby **ORDERED** that the motion to dismiss the appeal as untimely is **GRANTED.**

Vote taken on November 8, 2011

VOTE: **4-0-1** (Lloyd J. Jordan, Jeffrey L. Hinkle, Nicole C. Sorg, and Meredith H. Moldenhauer, to Grant the motion to dismiss; No Zoning Commission member participating or voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this Decision and Order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: APR 1 1 2012

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.