

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 19627 of ANC 7F, pursuant to 11 DCMR Subtitle Y § 302, from a decision made October 2, 2015, by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1501924 to construct a 71-unit apartment house in the RA-3 district at premises 4000 Benning Road, N.E. (Square 5081, Lot 52).^{1, 2}

HEARING DATES: December 13, 2017 and January 10, 2018
DECISION DATE: January 10, 2018

ORDER DISMISSING APPEAL

This appeal was submitted on September 7, 2017, by David Belt on behalf of Advisory Neighborhood Commission (“ANC”) 7F (collectively, the “**Appellants**”) to challenge a decision made October 2, 2015, by the Zoning Administrator (“**ZA**”), at the Department of Consumer and Regulatory Affairs (“**DCRA**”), to issue a building permit to authorize construction of a 71-unit apartment house in the RA-3 district at 4000 Benning Road, N.E. (Square 5081, Lot 52) (the “**Property**”). Following a public hearing, the Board of Zoning Adjustment (the “**Board**”) voted to dismiss the appeal as untimely.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda and letters dated October 27, 2017, the Office of Zoning provided notice of the appeal and of the public hearing to ANC 7F, the ANC in which the Property is located as well as an appellant, and to Single Member District ANC 7F01, the Zoning Administrator, the Office of Planning, the Councilmember for Ward 7, the ward in which the Property is located, the Chairman and the four at-large members of the D.C. Council, and the owner of the Property. Notice was published in the *D.C. Register* on October 27, 2017. (64 DCR 11036.)

¹ This order refers to zone districts in effect under the Zoning Regulations of 1958 when the decision was made. The 1958 Regulations were repealed as of September 6, 2016, and replaced by the 2016 Regulations; however, the repeal and adoption of the replacement text has no effect on the validity of the Board’s decision in this case or of this order.

² The caption has been revised to indicate that Building Permit No. B1501924 was issued October 2, 2015 (and not February 2, 2015, as was mistakenly stated in the public hearing notice for this appeal).

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Board of Zoning Adjustment
District of Columbia
CASE NO.19627
EXHIBIT NO.37

Party Status. The Appellants, DCRA, and 4000 Benning Road LLC (the “**Property Owner**”) were automatically parties in this proceeding. There were no requests for intervenor status.

Appellants’ Case. The Appellants challenged the decision of the Zoning Administrator to issue a building permit for construction of a new building at the subject property based on claims of zoning violations with respect to a retaining wall structure, the rear wall measuring point for calculating the depth of the rear yard, a wall check relative to the front lot line, lot occupancy, and encroachment into an area shown on a plat as an unimproved alley. (Exhibit 9.)

DCRA. The Department of Consumer and Regulatory Affairs submitted a motion asking the Board to dismiss the appeal as untimely and outside the scope of the Board’s jurisdiction with respect to claims about a wall check and public space, which are not governed by the Zoning Regulations, and for failure to state a claim as to lot occupancy on the ground that the Appellants failed to provide any statement or evidence in support of their allegation of a lot occupancy violation. (Exhibit 28.)

Property Owner. By motion submitted December 8, 2017, the Property Owner asked the Board to dismiss the appeal as untimely and, with respect to public space permits, beyond the scope of the Board's jurisdiction. (Exhibit 30.)

FINDINGS OF FACT

1. The Property that is the subject of this appeal is located at 4000 Benning Road, N.E. (Square 5081, Lot 52).
2. The Appellant David Belt lives in a residence adjoining the Property. The site is located within the boundaries of ANC 7F, also an Appellant.
3. Around 2012, a prior owner of the Property, Holy Christian Missionary Baptist Church, began contract negotiations to sell the Property to the Property Owner, 4000 Benning Road LLC. (Exhibit 30.)
4. On April 19, 2013, Mr. Belt filed a petition with the Zoning Commission seeking to rezone the subject property from the C-3-A district to the R-1-B district. ANC 7F submitted a report in support of the petition. The Zoning Commission held a public hearing on the proposed map amendment on September 26, 2013 (Z.C. Case No. 13-07). The Property Owner (then the contract purchaser) testified in opposition to the proposed rezoning, citing expenditures and efforts already undertaken toward the development of the property with a 71-unit affordable housing project. The Zoning Commission voted to

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rezone the Property from C-3-A to R-5-C, rather than the proposed R-1-B. (*see* Z.C. Order No. 13-07, issued June 9, 2014).³ (Exhibits 30, 35.)

5. The Property Owner acquired the Property on March 31, 2014, and continued to pursue plans to build an apartment house, a use permitted as a matter of right under the new R-5-C zoning. The Property Owner submitted an application for a building permit for the project on November 24, 2014, using plans that were substantially the same as building plans submitted into the record in Z.C. Case No. 13-07. (Exhibits 30, 35.)
6. On October 2, 2015, DCRA issued Building Permit No. B1501924, authorizing construction of a four-story apartment house on the Property. (Exhibit 30.)
7. DCRA sent notice of the building permit to ANC 7F in October 2015 as part of a list sent every two weeks by the agency in accordance with D.C. Code § 1-309.10(c)(3).⁴ (Exhibit 35.)
8. The Property Owner began construction of the project in March 2016. The building permit was posted at the Property. (Exhibits 30, 35.)
9. On April 27, 2016, Mr. Belt met with members of the development team to discuss issues relating to the construction, including the rear retaining wall and the closing of the rear alley. (Exhibits 30 at Exhibit A, 35.)
10. Members of the development team attended a monthly meeting of ANC 7F on May 19, 2016, to discuss the project. Mr. Belt was also present at the meeting and “voiced concerns about the project.” (Exhibits 30 at Exhibit A, 35.)
11. The development team continued to meet with Mr. Belt and with Mrs. Marcia Jones-Pisi, the owner of a property on Benning Road near the Property, during the ensuing weeks. On July 19, 2016, Mr. Belt, Mrs. Jones-Pisi, and members of the development team executed a written agreement on issues related to the planned alley closing. (Exhibit 30 at Exhibit A, Exhibit 1.)
12. Discussions between Mr. Belt and members of the development team about issues pertaining to the retaining wall and alley closure continued throughout the Fall of 2016. (Exhibit 30, Exhibit A.)

³ The zoning classification of the subject property became RA-3 when the 2016 Zoning Regulations went into effect.

⁴ That provision requires DCRA to:
ensure that each affected Commission, the Commissioner representing the affected single member district, the affected ward Councilmember, and the Office of Advisory Neighborhood Commissions is provided a current list at least twice a month of applications for construction, demolition, raze, and public space permits. The list may be provided by electronic mail. . . .

13. Mr. Belt contacted DCRA on several occasions in March and April of 2017, with concerns and assertions that the project was not in compliance with zoning requirements in various respects. DCRA responded by, among other things, sending a third-party inspector to the Property; the inspector determined that the building was being constructed according to approved plans. (Exhibit 35.)
14. The building at the Property was under roof by May 15, 2017. (Exhibits 30, 35)
15. Mr. Belt and commissioners of ANC 7F sent and received emails about the project with representatives of DCRA in August 2017. A timeline prepared by DCRA reflects that the agency communicated with Mr. Belt repeatedly between March 2017 and June 2017 on issues related to the construction at the Property. (Exhibit 3.)
16. The appeal was filed on September 7, 2017.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to “hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal” made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.)) Appeals to the Board “may be taken by any person aggrieved, or organization authorized to represent that person, ... affected by any decision of an administrative officer... granting or withholding a certificate of occupancy... based in whole or part upon any zoning regulations or map” adopted pursuant to the Zoning Act. (D.C. Official Code § 6-641.07(f) (2018 Repl.); *see also* Subtitle Y § 302.1.)

A zoning appeal may be taken only 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. (Subtitle Y § 302.5.) In this case, Appellant challenged the issuance of Building Permit No. B1501924 on October 2, 2015, which was the “first writing” of zoning decisions made in the authorization of the 71-unit apartment house at the Property. Ordinarily, the building permit is the document that reflects a zoning decision on whether a proposed structure, and its intended use as described in the permit application, conform to the Zoning Regulations. *See, e.g., Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008).

Pursuant to Subtitle Y § 302.2, a zoning appeal must be filed within 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. The Board may extend the 60-day deadline for the filing of a zoning appeal only if the

appellant demonstrates that: (a) there are exceptional circumstances outside 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 would not prejudice the parties to the zoning appeal. (Subtitle Y § 302.6.) If the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, the following paragraphs establish the latest date on which a zoning appeal may be filed: (a) no zoning appeal shall be filed later than 10 days after the date on which the structure or part thereof in question is under roof, where the phrase "under roof" 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; and (b) the provisions of this subsection shall not relieve an appellant of the jurisdictional requirement in Subtitle Y § 302.2 of filing a timely zoning appeal. (Subtitle Y § 302.3.)

In this case, the permit in question was issued on October 2, 2015, the building authorized by the permit was under roof by May 15, 2017, and the appeal was filed on September 7, 2017. Based on the findings of fact, the Board concludes that Appellants had notice of the building permit relatively soon after it was issued.⁵ The ANC received notice of the permit directly in October 2015. The building permit was posted at the Property by the time construction began in March 2016. Appellants are a close neighbor of the property and the ANC in whose jurisdiction the property is located. Both Appellants had prior knowledge of the Property Owner's plans to develop an apartment house at the site, and of zoning requirements for any development at the Property as a result of their participation in the Zoning Commission's map amendment proceeding. Appellants met and communicated on various occasions with both DCRA and the Property Owner about the apartment house project, including with respect to Appellants' allegations of violations. In light of these events, the Board concludes that Appellants knew or reasonably should have known that a building permit had been issued for the apartment house by at least March 2016.⁶

Appellants did not immediately file an appeal despite their familiarity with the planned development, including aspects of the project that gave rise to Appellants' claims of zoning violations. Nor did Appellants demonstrate any exceptional circumstances outside their control that could not have been reasonably anticipated but that substantially impaired their ability to file a zoning appeal to the Board. *See Chiapella v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 996, 1002 (D.C. 2008) (BZA properly dismissed an appeal as untimely where no extraordinary circumstances existed to excuse the late filing; when appellant was aware of the

⁵ The Board was not persuaded by DCRA's assertion that "[i]n this case . . . this 60-day period was triggered by the ZA's approval of the application on July 22, 2015. . . ." (Exhibit 28.) DCRA did not provide any evidence suggesting that Appellants knew or should have known when the Zoning Administrator approved the Property Owner's application for a building permit other than to indicate that the information was available on DCRA's publicly accessible website.

⁶ Appellant Mr. Belt acknowledged an awareness of construction activity on the site when trees were removed, which he estimated occurred in May 2016. (*see*, BZA Public Hearing Transcript of January 10, 2018 ("Tr.") at 35.)

permit and of the alleged violations in time to file a timely appeal, appellant's choice to delay filing, in part to garner ANC support for the appeal, was not outside appellant's control or reasonably unforeseeable).

Appellant Mr. Belt submitted a statement purporting to explain why the appeal could not have been timely filed. (Exhibit 7.) The statement, dated September 7, 2017, acknowledged that the Zoning Commission proceeding "was the first mention of this project to the public or the ANC," and that "[i]t does appear that the building permit was issued 10/2/2015 and the construction began towards mid-2016." According to Appellant, "[t]here was no way for anyone to know that they were not building according to submitted plans or within the zoning regulations until certain portions were built." However, the statement does not specifically describe allegations of error that could not have been determined based on approved plans, or otherwise demonstrate any exceptional circumstances outside Appellants' control that substantially impaired Appellants' ability to file a timely appeal to the Board. Especially in light of Appellants' repeated communications with DCRA and with the Property Owner about Appellants' concerns relating to the development, the Board was not persuaded by an unsubstantiated statement that Appellants had "no way to know" that an appeal was warranted before "certain portions were built" and the 60-day deadline for a timely appeal had long passed. As DCRA noted, the claims of zoning error made by Appellants were related "not to the enforcement of the approved plans, but to the actual plans that were approved by the permit" (Tr. at 41). Appellants did not allege that the apartment house, as built, differed from the plans for the building that DCRA approved by issuing the building permit. Their assertion that certain aspects of the approved plans did not comply with zoning requirements did not require waiting to file an appeal until after the building was constructed.

Nor did Appellants' communications with DCRA negate the applicability of the 60-day deadline for filing an appeal with the Board. *See* BZA Appeals No. 16451 and 16452 (order issued May 22, 2000) (a long interval between a zoning decision and an appeal of that decision does not become reasonable merely because an appellant initially chooses to pursue other options instead of preserving its appeal rights by filing a timely appeal); *affirmed, Waste Management of Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1122-1123 (D.C. 2001) (deadlines for appeals serve important ends and should not be extended without good cause; the fact that an appellant chose to concentrate on avenues that reasonably may have appeared more promising than an appeal does not excuse delay in filing an appeal).

Appellants did not demonstrate that the extension of time to file an appeal would not prejudice the other parties. Late appeals are more difficult for DCRA to address, due to the need to locate older records. (Exhibit 28.) The Property Owner asserted that "allowing this appeal to proceed will cause substantial prejudice" because the Property Owner built the apartment house in reliance on the building permit, and the building was substantially completed by May 2017. (Exhibit 30.)

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The appeal was also untimely by operation of the “under roof” rule. The decision complained of in this appeal involved the construction of a structure. The building was under roof by May 15, 2017. The Board’s Rules of Practice and Procedure (11 DCMR Subtitle Y) specify that no zoning appeal can be filed later than 10 days after the date on which the structure is under roof, and even so an appellant is not relieved of the jurisdictional requirement in Subtitle Y § 302.2 of filing a timely zoning appeal. (Subtitle Y § 302.3.) Appellants filed this appeal more than three months after the building was under roof.

The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)).) In this case, the affected ANC, ANC 7F, was also an appellant. ANC 7F submitted a report acknowledging that the ANC had been “kept abreast of alleged zoning infractions” at the subject property and asking the Board to “waive the time restrictions” to allow the appeal. However, the ANC did not demonstrate that any exceptional circumstances impaired the ANC’s ability to file a timely appeal to the Board, or that an extension of time would not prejudice the other parties. For the reasons discussed above, the Board concludes that the appeal was not timely filed and must be dismissed.

Based on the findings of fact and conclusions of law, the Board concludes that Appellants did not file a timely appeal to challenge a decision made October 2, 2015, by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1501924 to construct a 71-unit apartment house in the RA-3 district at 4000 Benning Road, N.E. (Square 5081, Lot 52). Accordingly, it is therefore **ORDERED** that the **APPEAL** is **DISMISSED** and the Zoning Administrator’s determination is **SUSTAINED**.

VOTE: 4-0-1 (Frederick L. Hill, Carlton E. Hart Lesylleé M. White, and Peter G. May to DISMISS; one Board seat vacant)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY:



SARA A. BAROIN
Director, Office of Zoning

FINAL DATE OF ORDER: July 16, 2019

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.