GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 14101 of the Midway Civic Association, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Zoning Administrator dated October 31, 1981, approving the issuance of Certificate of Occupancy No. B127525 to use all floors and basement of premises 1531-33-35 P Street, N.W. as a rooming and boarding house, fifteen bedrooms, forty-five to fifty persons, in an SP-1 District, (Square 194, Lot 813).

HEARING DATE: February 22, 1984
DECISION DATE: February 22, 1984 (Bench Decision)

FINDINGS OF FACT:

1. The property which is the subject of this appeal is located on the north side of P Street to the east of the intersection of 16th and P Streets, and is known as premises 1531-33-35 P St., N.W. It is zoned SP-1.

2. The subject premises, along with the property immediately adjacent to the west, known as 1537 P Street and 1501 16th Street, were previously considered by the Board in BZA Application No. 13927.

3. BZA Application No. 13927 was originally advertised as seeking special exception relief to permit the use of the premises for SP office use and for variances from the floor area ratio and parking requirements for the SP-1 District.

4. As set forth in Findings of Fact No. 2 and 3 of BZA Order No. 13927, dated September 27, 1983, the application was amended to delete the request for variances and further to limit the proposed SP office use to exclude medical or dental offices.

5. The appellant in the instant case appeared as a party in opposition to the granting of Application No. 13927.

6. As noted in Finding of Fact No. 23c of BZA Order No. 13927, the opposition alleged that the applicant in that application required variances from the floor area ratio and on-site parking requirements of the Zoning Regulations.

7. In Finding of Fact No. 24b of that order dated September 27, 1983, the Board found that the only relief required was a special exception. If the opposition thought otherwise, it should have filed an appeal of the decision of the Zoning Administrator.

8. The opposition filed a timely motion for reconsideration of the Board's order of September 27, 1983, based on the following:

A. The application requires variance relief, rather than a special exception.

B. The certificate of occupancy issued for the prior use of the subject premises as a rooming and boarding house was erroneously issued and the decision of the Zoning Administrator approving the issuance of that certificate of occupancy should be reversed.

C. The amount of office space which would require parking, regardless of the variance question, was erroneously calculated, because the parking credit was calculated including the basement, and the square footage of office space used in the calculation of square footage eliminates the basement space. The Board did not prohibit the use of the basement level as office space.

D. The adequacy of existing parking facilities in the immediate area to satisfy the needs of the occupants of the subject premises and existing problems with parking congestion in the area were not addressed in the Board's Order.

E. It is inappropriate for the Board to consider the applicant's alleged desire to comply with the requirements for Certified Historic Structures in that no such application was presented at the public hearing and it is not required by the Board's Order.

9. Counsel for the applicant opposed the motion based on the following:

A. The public hearing on the subject application was continued at the request of the opposition on the identical issue of whether a variance was required.

B. All of the issues raised in the Motion were presented by the opposition at the public hearings and are specifically and adequately addressed in the Board's Order.

10. By order dated December 23, 1983, the Board denied the motion for reconsideration. The Board concluded that the opposition raised no new issues which were not previously considered by the Board and that the Board committed no error in deciding the subject application. The issues of the opposition were presented thoroughly at the public hearing. The opposition was advised at the original hearings that an appeal of the decisions of the Zoning Administrator could be pursued under the separate procedure as set forth in Sections 8102 and 8206 of the Zoning Regulations. No materially different relevant evidence had been submitted in support of the motion that was not considered previously by the Board. The issues were addressed in the Order.

11. The subject appeal challenges the decision of the Zoning Administrator made on October 23, 1981, approving the issuance of Certificate of Occupancy No. B-127525 to use all floors and basement of premises 1531-33-35 P Street, as a rooming and boarding house, fifteen bedrooms, forty-five to fifty persons.

12. The appellant alleged that it is aggrieved by that decision because the parking requirements for the use proposed in BZA No. 13927 were offset because three spaces were required for the previous use of the premises as a rooming house pursuant to Certificate of Occupancy No. B-127525.

13. The owners of the subject property appeared as a party pursuant to Section 100.7 of the Supplemental Rules of Practice and Procedure before the BZA.

14. As a preliminary matter, counsel for the owners moved that the subject appeal be dismissed based on the following:

A. The appeal was not timely filed as required by Section 201.1 of the Rules and therefore did not fall under the appellate jurisdiction of the Board.

B. The appeal is barred by the doctrine of laches.

C. The case is moot because the building is vacant.

D. The Midway Civic Association lacks standing to file the appeal.

15. The first argument considered by the Board in support of the motion to dismiss was the issue of timeliness.

16. The subject Certificate of Occupancy was issued on October 23, 1981. Counsel for the owners argued that the appellant had knowledge of the Zoning Administrator's

decision since at least March 9, 1983, when the first public hearing on BZA Application No. 13927 was held. The subject appeal was filed on January 5, 1984, almost ten months later.

17. Counsel to the owners further argued that the time to file an appeal ordinarily commences to run when notice, actual or constructive, is given the party affected by the order to be appealed.

18. The D.C. Court of Appeals, in Goto vs. the D.C. Board of Zoning Adjustment (423 A.2d 917, 923, 1980) held that "the question of timeliness is jurisdictional; if the appeal was not timely filed, the Board was without power to consider it." Counsel for the owners asserted that the Board therefore lacked jurisdiction because the subject appeal was not timely filed.

19. The appellant asserted that the subject appeal was filed in response to the Board's Order No. 13927, dated December 23, 1983, which states that "The movant was advised that an appeal of the decision of the Zoning Administrator could be pursued under the separate procedure as set forth in Section, 8102 and 8206 of the Zoning Regulations." The appellant argued that the appeal is therefore timely in that it was filed on January 5, 1984, less than two weeks after the issuance of the order.

20. The Board notes that in Finding of Fact No. 24b of its order dated September 27, 1983, the remedy of filing an appeal of the decision of the Zoning Administrator was stated.

21. The appellate jurisdiction of this Board is conferred by the Zoning Act, Section 5-424, D.C. Code, 1981 ed., as set forth by the Zoning Commission in the Zoning Regulations. Section 201.1 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment requires that an appeal be filed in a "timely manner."

22. Even though the Rules do not specify a number of days within which a decision must be appealed, inherent in the "timely" requirement is a jurisdictional criteria that an appeal may not be brought after an unreasonable period of time has elapsed. Even without such an express requirement, appeals must be brought within a reasonable period of time in order to invoke the appellate jurisdiction of the Board. The Board may not waive a jurisdictional impediment and, consequently, may not waive the requirement that an appeal be "timely" filed.

23. The subject appeal was filed on January 5, 1984, approximately three years and nine months after the decision which is being appealed was made and approximately ten

months subsequent to the first public hearing on BZA Application No. 13927.

24. The Board finds that the appeal, as filed, clearly indicates that it contests the ruling of the Zoning Administrator dated October 23, 1981. The orders of the Board issued in BZA Application No. 13927 advise the appellant that an appeal of that decision would have been the appropriate remedy. The appellant was not advised that an appeal filed subsequent to the issuance of those orders was appropriate or would be considered as timely. The filing of BZA Application No. 13927 did not in any way affect the validity of the certificate of occupancy previously issued for the use of the subject premises as a rooming house, the issuance of which is being appealed in the instant case.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and the evidence of record, the Board concludes that it is faced with the jurisdictional question of whether the appeal was file in a timely manner. The Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment do not set a specific time limit following a decision within which an appeal may be filed. Because appeals may be filed by persons who are aggrieved by a decision who are not applicants for permits or who are not directly notified of the decisions, it is possible that an appellant may not know of a decision until some other action has occurred, such as the beginning of construction or the opening of a use.

Although this Board has set no specific limit for the filing of appeals, it has uniformly held in those cases where the issue has been raised that appeals filed seven to nine months after the Zoning Administrator's action are untimely. See Orders of the Board in Appeal of Robert E. Love, BZA Appeal No. 14054, May 29, 1984 (eight month delay); Appeal of California Steak House, BZA Appeal No. 13967, November 22, 1983 (ten and one-half months); Appeal of Sheridan Kalorama Neighborhood Council, BZA Appeal No. 11872, February 14, 1975 (eight month delay); Appeal of Arthur H. Fawcett, Jr., BZA Appeal No. 11158, July 22, 1976 (seven month delay); and Appeal of Christian Embassy, Inc., BZA Appeal No. 12142, June 18, 1976 (nine month delay).

In the subject appeal, the identical issues had been brought to the Board's attention by the appellant during the public hearings on Application No. 13927 and in the motion for reconsideration of the Board's decision in that case. The Board concludes that the appellant was clearly aware of the decision being challenged in this appeal during the processing of BZA Application No. 13927. The Board further concludes that the references to the filing of an appeal from the Zoning Administrator's decision contained in its

orders dated September 27, 1983, and December 23, 1983, reflect the finding of the Board that the appeal process had been available and were not intended as indications that an appeal should be filed, subsequent to the issuance of those orders. The subject appeal was filed in excess of three years after the issuance of the certificate of occupancy in question and approximately ten months subsequent to the initial public hearing on BZA Application No. 13927 in which the appellant raised identical issues before the Board.

The Board further concludes that the appellant is in error in arguing that the filing of the appeal can be considered timely based upon the issuance of the Board's order in Application No. 13927. What is at issue in this appeal is not the Board's decision in that case, but a decision of the Zoning Administrator made in October, 1981. The appellant clearly had knowledge of that decision in March of 1983. Appeals of decisions of the BZA are properly taken to the D.C. Court of Appeals, a remedy which the appellants herein are already pursuing with regard to Application No. 13927.

The Board concludes that the passage of approximately ten months from the time that the appellant raised the issue and was advised of the right to appeal to the filing of this appeal is too long a period for this appeal now to be considered timely filed. It is therefore hereby ORDERED that the appeal is DISMISSED for lack of jurisdiction as untimely filed. Having disposed of the appeal on the jurisdictional question of timeliness, the Board makes no findings or conclusions on the other elements of the intervenor's motion to dismiss or on the merits of the appeal.

VOTE: 3-0 (Walter B. Lewis, William F. McIntosh and Carrie L. Thornhill to dismiss, Charles R. Norris and Douglas J. Patton not voting, not having heard the case)

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

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: JUN 27 1984

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

14101order/DON5