

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17468 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator to issue approvals for electrical, fire, mechanical, and plumbing disciplines (DCRA tracking No. 236 D5) with the intention of issuing building permits to allow the expansion of a nonconforming apartment building from 3 units to 6 units.¹ The subject property is located in the R-4 District at premises 1124 E Street, N.E. (Square 984, Lot 44).

HEARING DATE: May 16, 2006

DECISION DATE: May 16, 2006

ORDER

Advisory Neighborhood Commission 6A appealed the issuance of trade approvals needed to complete the interior renovation of an apartment house. The renovation would increase the number of the building's dwelling units from 3 to 6. The appeal alleges that the proposed increase in dwelling units did not comply with the lot area and parking requirements of the Zoning Regulations. The Board considered the appeal to be of the building permit that actually authorized the renovation. For the reasons stated below, the Board dismisses the appeal as untimely.

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The parties to the proceeding are the Appellant Advisory Neighborhood Commission 6A ("ANC"), the appellee the District of Columbia's Department of Consumer and Regulatory Affairs ("DCRA"), and Endalkachew Tesfaye, the owner of the property that is the subject of the appeal.

Notice of Hearing. The Office of Zoning provided notice of the hearing on the appeal to the parties, including Mr. Tesfaye. The Office of Zoning advertised the hearing notice in the *D.C. Register* at 53 D.C. Reg. 2183 (March 24, 2006).

¹ This caption is based upon the original characterization of the appeal by the Appellant. The record reflects that the approvals described actually occurred *after* the issuance of a building permit that authorized the renovation of the apartment house in question. In addition, because the Board did not reach the merits of the appeal, it made no finding as to whether the apartment house was nonconforming or whether the additional dwelling units would expand it.

FINDINGS OF FACT

1. The property that is the subject of the appeal is located at 1124 E Street, N.E. (Square 984, Lot 44).
2. The property is located in the R-4 zone district.
3. The property is improved with an apartment building that has an approved use for 3 units that pre-dates the Zoning Regulations.
4. On February 2, 2005, the Department of Consumer and Regulatory Affairs issued Building Permit B469531 for the property, which authorized “[i]nterior renovation and new electrical mechanical and plumbing” for an apartment house with 6 units and 2 parking spaces.
5. The Application for the Building Permit, but not the Building Permit itself, states the number of existing units as 3 and the number of proposed units as 6.
6. The renovated apartment house would have less than 900 square feet for each unit.
7. On February 25, 2005, the owner posted the building permit and began construction at the property
8. Signs of ongoing construction beginning on February 25, 2005, that were visible to the neighbors included the presence of a large dumpster, replacement of the roof and the gutting of the interior.
9. DCRA issued electrical permits on May 12, 2005, plumbing permits on June 15, 2005 and air conditioning permits on July 8, 2005.
10. At a date uncertain constituents of the Appellant who live near the building noticed from their windows construction, plumbing and appliances that indicated an expansion of the existing building. They brought their concerns regarding expansion of the building to Appellant’s attention in late October, 2005.
11. ANC 6A filed this appeal on December 15, 2005, alleging error in the issuance of the trade approval for electrical, fire, mechanical, and plumbing. Each of these approvals occurred after the issuance of the building permit, with the last approval being issued on July 8, 2005.

12. The appeal alleged that the approvals should not have been given because the property's lot size and the number of parking spaces to be provided were less than what is required for a six unit apartment house in an R-4 District.²
13. The decisions to issue the trade approvals did not authorize an increase in unit size and were not based in whole or in part upon an interpretation of the Zoning Regulations.

CONCLUSIONS OF LAW

Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799); D.C. Official Code § 6-641.07(f) (2001, authorizes appeals to this Board of “any decision of the Inspector of Buildings [now DCRA] granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map adopted under” the Zoning Act of 1938.

The Appellant is appealing the issuance of electrical, fire, plumbing, and mechanical trade approvals. None of these approvals were based in whole or in part on the Zoning Regulations, but on the Building Code. Accordingly, the Board would not have subject matter jurisdiction over the decisions alleged to be the subject of this appeal.

However, the zoning issues raised in the appeal arise from the issuance of the building permit described in Finding of Fact No. 4. In essence, Appellant is challenging the expansion of the building from 3 units to 6 as a violation of the Zoning Regulations. That reconfiguration was allowed by the issuance of the building permit. Therefore, the Board determined that it had jurisdiction to consider the Intervenor's motion to dismiss this appeal on grounds of timeliness, with respect to the appeal of the building permit.

The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days from the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2 (a). This 60-day time limit may be extended only if the appellant shows that: (1) there were 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. 11 DCMR § 3112.2 (d). The Board has no jurisdiction to hear an untimely appeal. *Waste Management of Maryland, Inc. v. BZA*, 775 A.2d 1117 (D.C. 2001).

² After the filing of this appeal, the Zoning Administrator denied the issuance of a certificate of occupancy for the renovated apartment house based on its lot size. The Board reversed that decision in *Appeal No. 17468A of Endalkachew Tesfaye* (Nov. 15, 2006).

In light of the Board's determination that the zoning issue over which it would have jurisdiction arose in the building permit, it needed to determine when the Appellant knew or should have known of that issue. It is undisputed that the building permit was issued February 2, 2005, and that ANC 6A filed its appeal December 13, 2005 - more than 10 months later. Accordingly, the appeal was filed more than 60 days after the issuance of the building permit.

However, the date for calculating when the time begins to run is not necessarily the date the permit is issued, but rather, the date when Appellant had notice or knowledge of the decision complained of or reasonably should have had notice of the decision complained of - in this case the authorization for the apartment building to reconfigure from 3 dwellings to 6 dwellings - whichever is earlier. While Appellant ANC 6A contends that it did not have actual notice of this decision until informed by its constituents in late October, 2005, the regulations require that the Board determine if there is an earlier date when the Appellant reasonably should have known of the authorization provided by the building permit.

The undisputed evidence in this case shows that there were a series of activities that should have put the ANC and its constituents on notice of the decision complained of dating back to February 25, 2005 when the owner posted the building permit on the property and when construction began. While the permit and the construction may not have put the ANC and its constituents on notice of the exact nature of the construction, the regulations contemplate an obligation within a reasonable period of time to undertake due diligence to determine such nature. The nature of the work was evident in the Application for the Building Permit, filed at DCRA and available for public viewing. That application clearly states on its face that the nature of the work was to reconfigure the apartment house from 3 units to 6 units.

However, assuming Appellant's argument that it was more difficult to notice the nature of the construction because it was internal, there were later public activities that should have put the Appellant on notice. In May, June and July of 2005, DCRA issued electrical, plumbing and air conditioning permits that in some instances listed appliances in multiples of six; i.e. 6 clothes dryers, 6 electric ranges, etc. These permits were posted on the building and these were in fact the subject of this appeal. While Appellant testified that the neighbors who lived around the building contacted him in late October, 2005, he also testified that they contacted him "because they saw the amount of plumbing and the appliances and the general construction and they could see from their windows that this was an expansion of the existing building." Tr. at 169. The Board finds it unlikely and unsubstantiated by the evidence in the record that the neighbors (and by extension the ANC) would not have viewed these activities until late October, in light of the fact that the permits authorized such activities in May, June and July.

Without pinpointing at exactly which moment in time the Appellant should have known of the authorization to reconfigure the apartment building from 3 dwellings to 6 dwellings, the Board concludes that even the most liberal reading of the facts leads to a finding that Appellant should have known of the authorized reconfiguration in July 2005, when the last permit that is the subject of this appeal was issued. Sixty days from that point would be September, 2005. This appeal was filed on December 13, 2005, approximately 5 months after the issuance of that permit, well beyond the 60-day limit.

As Appellant did not claim that the building permit file was unavailable or that there were any other exceptional circumstances outside the Appellant's control that impaired its ability to file this appeal, this appeal was untimely filed and the Board lacks jurisdiction to consider it.

Accordingly, it is hereby **ORDERED** that the appeal is **DISMISSED**.

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Michael G. Turnbull to dismiss the appeal).

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

Each concurring Board member approved the issuance of this order.

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER:

FEB 16 2007

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17468

As Director of the Office of Zoning, I hereby certify and attest that on **FEBRUARY 16, 2007**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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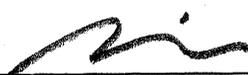
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TWR