

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17513 of Advisory Neighborhood Commission 2E pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs (DCRA) to issue Building Permit No. 88614 allowing additions to an existing single-family dwelling, allegedly in violation of the lot occupancy (§ 403) and nonconforming structure provisions under subsection 2001.3 for the property at 1242 Potomac St., N.W., in the R-3 District.

HEARING DATE: October 10, 2006
DECISION DATE: October 10, 2006

DISMISSAL ORDER

INTRODUCTION

Advisory Neighborhood Commission 2E (“ANC 2E” or “Appellant”) filed this appeal with the Board of Zoning Adjustment (“Board”) on April 19, 2006, pursuant to 11 DCMR §§ 3100 and 3101, challenging the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs (“DCRA”), to issue Building Permit 88614, dated January 20, 2006, to the property owners of 1242 Potomac Street, N.W., Washington, D.C., allowing additions to an existing single-family dwelling.

Appellant alleged that the addition would exceed the maximum lot occupancy permitted by 11 DCMR § 403 and thereby did not meet one of the three prerequisites of the matter of right expansion of a nonconforming structure delineated in 11 DCMR § 2001.3.

On October 5, 2006, the property owners, through their attorneys, filed a Motion to Dismiss, alleging that the appeal was untimely. The Board heard the motion as a preliminary matter at the October 10, 2006 hearing on the appeal. Upon hearing from all the parties to the matter, the Board voted to grant the motion and dismissed the appeal. A full discussion of the facts and law that support this conclusion follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a public hearing on the appeal on October 10, 2006. In accordance with 11 DCMR §§ 3112.13 and 3112.12, the Office of Zoning mailed notice of the hearing to the Appellant, the property owner, and DCRA. The Office of Zoning advertised the hearing notice in the *D.C. Register* at 53 DCR 30 (July 28, 2006).

Parties

The Appellant in this case is Advisory Neighborhood Commission 2E (“ANC 2E” or “Appellant”). The ANC was represented by Laurie B. Horvitz, Esq., Finkelstein & Horvitz, P.C.

The Appellee, DCRA, was represented by its attorney, Matthew Green, Esq. Also present at the hearing to give testimony was the Zoning Administrator, Bill Crews.

The appeal relates to construction at 1242 Potomac Street, N.W., Washington, D.C. (“Subject Property”). The owners of the subject property are Harry L. and Anne A. Gutman (the “Gutmans” or the “property owners”). The property owners were represented by Whayne S. Quin, Esq. and Carolyn Brown, Esq., of the law firm of Holland and Knight. As the property owners, the Gutmans were automatically deemed a party under 11 DCMR § 3199.1.

The Board granted a request for party status made by the Citizens Association of Georgetown (“CAG”), finding that the organization had a significant relationship to the property because the property is located in Georgetown where its members live. In addition, the organization was in a position to address the broader context or ramifications of the appeal issues on Georgetown properties in general.

FINDINGS OF FACT

1. The property that is the subject of this appeal (“Subject Property”) is located at 1242 Potomac Street, N.W. in the R-3 zone district.
2. The Subject Property is improved with a multi-story, one family semi-detached dwelling, a carriage house, and a shed, which together occupy 48 percent of the lot. The maximum lot occupancy in an R-3 District is 40 percent for a one family semi-detached dwelling and 60 percent for row dwellings.

3. The Subject Property is located within the Georgetown Historic District.
4. Early in 2005, the property owners initiated plans to build an addition to their house. The first design concept was a large addition at the rear of the house that would have been connected by an enclosed passageway to an existing, free-standing garage at the rear of the property. This first plan was considered by the ANC on March 1, 2005 at which time the ANC recommended that any approvals of the addition be denied as too large for the site. *See*, Exhibit 23, Property Owner's Motion to Dismiss at 2 – 3, and Tabs A and H.
5. On March 3, 2005, the Old Georgetown Board (“OGB”) reviewed the first scheme and recommended that the addition be reduced in size. *See*, Exhibit 23, Property Owner's Motion to Dismiss, at 2, and Tabs A and H.
6. In May 2005, the property owners shared revised drawings with their then neighbors to the north and south. The revised design would have reduced the size of the addition by 60% and relocated and rebuilt the existing shed and pergola (at times referred to as the “trellis”) to extend from the side of the main house to the south property line. *See*, Exhibit 23, Property Owner's Motion to Dismiss, Tabs B and H.
7. On May 31, 2005, the ANC, responding to continuing objections from the two abutting neighbors, recommended denial of the second set of drawings. The minutes of that meeting stated:

The architect for the project presented revised plans for the addition. The new proposal was 60% smaller than the previous version. Thus, due to the wooden trellis structure currently existing on the south side of the home, a special exception would no longer be needed as lot occupancy would be 54%. The architect claimed, much to the dismay of neighbors and several Commissioners, that the trellis qualified the home as a row house and not a semi-detached house. The neighbors to the north and the south opposed the plans due to loss of light and open space in their backyards. Other aesthetic and structural changes to the existing carriage house were proposed. Commissioner Starrels moved (Clements Second) for the following which passed by a vote of 7-0:

ANC 2E has no objections to the alterations to the carriage house.

In addition, the following resolution was proposed. Commissioner Starrels moved (Lever Second) for the following which passed by a vote of 7-0:

Because of the negative impact on the light and open space of the abutting neighbors, especially the neighbor at 1244 Potomac Street, ANC 2E cannot endorse the plans as presented. Also, ANC 2E does not appreciate the manner in which the applicant is trying to increase their lot coverage.

Exhibit 23, Property Owner's Motion to Dismiss, Tab D.

8. After this May 2005 meeting the ANC approached the ZA and asked whether this was an appropriate way in which to expand lot coverage. The ANC represented at the hearing that it was assured that any such permit application for this property would be placed in a holding pattern if the trellis was the basis for zoning approval. *See*, Transcript at 131. At the hearing the ZA explained that while he was in fact waiting for a decision from this Board in another case to determine whether the permit was issued in error, he did not indicate to the Appellant that it should wait for this determination prior to bringing this appeal. *See*, Transcript at 187 - 189.

9. The OGB met on June 2, 2005, at which time the property owners described the 54% lot occupancy and neighbors objected to the property owners' interpretation of the zoning regulations. *See*, Exhibit 23, Property Owner's Motion to Dismiss, Tab H.

10. On July 7, 2005, the OGB considered the revised scheme and recommended approval of the project in concept, including the pergola extending to the south property line, with minor modifications. The ANC and CAG were present at the OGB meeting and an ANC representative spoke in opposition to the project. *See*, Exhibit 23, Property Owner's Motion to Dismiss at 4 and Tab H, and Exhibit 25, Property Owner's Supplemental Exhibits, Tab B.

11. On July 21, 2005, the Commission on Fine Arts ("CFA") adopted the OGB's recommendation to approve the project. *See*, Exhibit 23, Property Owner's Motion to Dismiss at 4 and Tab H, and Exhibit 25, Property Owner's Supplemental Exhibits, Tab C.

12. In October 2005, the property owners applied for a building permit. *See*, Exhibit 20, Appellant's Supplemental Filing in Support of Appeal, Tab 6.

13. On November 4, 2005, the OGB considered the project for final review and recommended approval of the permit. The final drawings included the pergola connection. The OGB recommended approval of the permit. In that approval the OGB indicated that "you can't amend the plans without coming back [to the OGB]." The ANC

was present at the OGB meeting. *See*, Exhibit 23, Property Owner's Motion to Dismiss, at 4 and Tabs E and H.

14. On November 17, 2005, the Commission on Fine Arts ("CFA") adopted the OGB's recommendations to approve the permit. In the minutes of the November 17th CFA meeting, the CFA's recommendation states: "No objection to concept design for proposed two-story rear addition as shown in supplemental drawings received and dated 24 June 2005...File new submission of working drawings, including dimensions and details, with permit application for review by the Commission when ready." *See*, Exhibit 23, Property Owner's Motion to Dismiss, Tab H and Exhibit 25, Property Owner's Supplemental Exhibits, Tab C.

15. On January 11, 2006, the property owners' architect notified the neighbors on either side that construction was to begin shortly and that the neighboring properties would be protected during construction. *See*, Exhibit 23, Property Owner's Motion to Dismiss at 5 and Tab F.

16. DCRA issued Building Permit No. 88614 on January 20, 2006. The permit was posted on January 24, 2006, in the front window of the property owners' house. The permit described the work to be done as follows: "Demo[lish] existing prior addition and rebuild 2 story basement and addition at rear of house. Renovate interior." Under "Conditions/Restrictions" the permit added the details: "CFA Note: Approved as per supplemental drawings received 26 October 2005." *See*, Exhibit 20, Appellant's Supplemental Filing in Support of Appeal, Tab 1.

17. According to the Appellant, construction began soon after the permit was issued. *See*, Transcript at 134.

18. On February 1, 2006, one of the two neighbors, Mr. Cooley, contacted the property owners' architect to inquire whether the plans approved under the building permit were the same as those approved by the OGB. The architect informed Mr. Cooley that the plans were the same drawings and that copies should be available through the public record at DCRA. *See*, Exhibit 23, Property Owner's Motion to Dismiss at 5 and Tab H, and Exhibit 25, Property Owner's Supplemental Exhibits, Tab D.

19. On March 7, 2006, ANC 2E Chairman Ed Solomon e-mailed Zoning Administrator Bill Crews, stating that it had been about a month since he had requested a copy of the permit application for the work being done at 1242 Potomac Street, N.W. Chairman Solomon indicated the issue was whether a trellis was being used as the basis for granting a permit for a semi-detached house that would be beyond the allowable 40%

lot occupancy. He further stated, “The permit 88614 was issued on January 20, 2006. I want to keep our ANC option viable in case we wish to appeal the permit.” *See*, Exhibit 23, Property Owner’s Motion to Dismiss, Tab G.

20. Zoning Administrator Crews replied to Chairman Solomon on March 8, 2006 that he had found the permit file and would give Chairman Solomon a telephone call once Zoning Administrator Crews checked into another issue with the application. His e-mail indicated that, “[b]ased upon the plat drawings, it appears that they are replying (sic) on an existing shed/ pergola.” *See*, Exhibit 23, Property Owner’s Motion to Dismiss, Tab G.

21. On March 23, 2006, the Zoning Administrator met with members of the ANC and the community and shared the permit application with them, but did not provide them with a full set of plans.

22. On April 4, 2006 Chairman Solomon e-mailed Zoning Administrator Crews and thanked him for meeting with the ANC Commissioners and informed him that the issue of appealing the permit was on the ANC’s April 4th agenda for its general meeting. Chairman Solomon asked if new information had developed with regard to DCRA’s internal process to issue a stop work order. He further indicated that the permit information Zoning Administrator Crews had provided had not addressed the trellis issue, nor had the ANC received a copy of the plans that might have addressed the issue. *See*, Exhibit 23, Property Owner’s Motion to Dismiss, Tab G.

23. The ANC did not ask the property owners for a copy of the permit plans. *See*, Transcript at.176-78.

24. On April 17, 2006, Chairman Solomon e-mailed Zoning Administrator Crews to inquire about the status of the permit. In that e-mail, Chairman Solomon stated that “[a]lthough ANC 2E is in the process of filing an appeal to this permit, this appeal [may] be moot if the permit is withdrawn by DCRA.” Chairman Solomon also stated that “[a]t our meeting [Zoning Administrator Crews] advised community leaders that the basis of a trellis to justify this permit would not stand.” *See*, Exhibit 23, Property Owner’s Motion to Dismiss, Tab G.

25. On April 19, 2006, the ANC filed an appeal, 88 days after the issuance of the building permit.

CONCLUSIONS OF LAW

Pursuant to the Zoning Act, the Board has jurisdiction to hear appeals alleging “error in any order, requirement, decision, determination, or refusal made by...any [District] administrative officer or body in the carrying out or enforcement of” the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1) (2001).

Appellant has appealed Building Permit No. 88614 on grounds that DCRA issued the permit based on an erroneous classification of the dwelling as a row dwelling. The Appellant further claims that the permit was issued in violation of the zoning regulations of the District of Columbia related to maximum lot occupancy and the expansion of nonconforming structures.

Motion to Dismiss

The Property Owners filed a motion to dismiss the appeal on grounds that: (1) the appeal was untimely filed as it was filed 88 days after the building permit was issued or 28 days beyond the 60-day time limit for filing an appeal and (2) laches.

The District of Columbia Court of Appeals has held that “[t]he timely filing of an appeal with the Board is mandatory and jurisdictional.” *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C., 1994.) If an appeal is not timely filed, the Board lacks jurisdiction to consider it. *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C., 2001) Accordingly, the Board must consider the jurisdictional question of timeliness first, prior to a consideration of the merits.

The Board’s Rules of Practice and Procedure governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Subsection 3112.2 (a) requires that all appeals be filed within 60 days after the date the person filing the appeal had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier. This 60-day time limit may be extended only if the appellant shows that: (1) “There are exceptional circumstances that are outside the appellant’s control and could not be 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 ANC acknowledged in its appeal that the official decision complained of is the issuance of Building Permit No. 88614 on January 20, 2006. In its appeal, the Appellant identified the error complained of as the classification of the dwelling as a row house, and stated that the issuance of the Building Permit violated the zoning laws and regulations of the District of Columbia relating to lot occupancy and nonconforming structure requirements. *See*, Exhibit 20 at 1.

The ANC does not contest that it did not appeal the permit within 60 days of when it knew or should have known of the issuance of the permit. Rather it asserts that the time should run from March 23, 2005, when the Zoning Administrator shared the permit application with the ANC and informed the Appellant that the approved plans and the ZA's review of it were premised on the deconstructed pergola and shed that had been moved. The ANC argues that prior to that time it did not know the rationale for the issuance of the permit and therefore the grounds for the appeal. Alternatively, the ANC argues that the time for appealing the permit should be extended because its ability to file the appeal within 60 days of the issuance of the permit was impaired by its lack of knowledge of the rationale for the permit until that March 23, 2005 meeting.

The Board finds that the time for appealing the permit, which is the administrative decision in which error is alleged in this appeal, runs from the issuance of the permit on January 20, 2005, not from the March 23, 2005, meeting. The clear language of § 3112.2 speaks to knowledge of the decision complained of, not to knowledge of the rationale for the decision. The information provided by the Zoning Administrator on March 23, 2005, was a verbal confirmation and explanation, of the official approval contained in the already-issued permit. *See Application No. 16982 of J. Brendon Herron and ANC 3F* (April 7, 2005) (60-day time frame for bringing the appeal may not be re-started by a subsequent DCRA communication except when DCRA reverses its position. *Id* at 10.)

Nor does the Board find that the ANC was substantially impaired by exceptional circumstances outside its control that could not reasonably have been anticipated from filing its appeal within 60 days of issuance of the permit. The evidence in the record reflects that this is not a case where the ANC had difficulty learning what the permit authorized, but to the contrary – that the ANC had been following this specific zoning issue through various proceedings even prior to the issuance of the permit and was well aware of the zoning issues it has appealed.

The record shows that the ANC was actively scrutinizing this project since it first considered the design concept at its March 1, 2005, ANC meeting. As far back as May 31, 2005, the ANC's minutes show that the ANC was expressing its concern with what the property owner was proposing, as well as its understanding of the inherent zoning issue

involved. The minutes of the May meeting specifically indicate the ANC's disagreement with the architect's description that the trellis connection qualified the house as a row dwelling and not a semi-detached dwelling. *See*, Finding of Fact 7.

Moreover, the ANC spoke in opposition to the project at two OGB meetings: first, in June 2005 when the property owners discussed the 54 percent lot occupancy and the neighbors objected to their interpretation of the zoning regulations and again, on July 7, 2005, at the OGB's regular public meeting when OGB recommended approval of the project with the pergola connection. *See*, Findings of Fact 9 - 10. In addition, the CFA flagged in its final approval of the project at its November 17, 2005 meeting that the "permit application is pending final zoning review. Any modifications to the approved design as a result of further review in the permit process must be submitted to the Commission for approval." *See*, Findings of Fact 13 - 14. Finally, the ANC was in communication with the Zoning Administrator both before and after the permit was issued. *See*, Findings of Fact 8, 20 - 24.

Accordingly, the Appellant was well aware of the permit and the zoning issues that form the basis for this appeal prior to the March 23, 2006, meeting, particularly, in light of its active participation in the proceedings before the OGB.

Moreover, while the Appellant claimed that it had difficulty in obtaining copies of the plans from DCRA to review before and after the building permit was issued, neither the ANC nor the neighbors ever asked the property owners for a copy of their plans. *See*, Finding of Fact 23. Nor did the ANC's inability to obtain the plans from DCRA impair its ability to file this appeal as the ANC was aware of the zoning issues from the earlier plans reviewed by the OGB and, as early as February 2006, the architect for the property owner advised the abutting property owner to the south that the plans that were the basis for the permit had been the same plans previously submitted to the ANC and approved by the OGB. *See*, Finding of Fact 18. (*See also*, *Appeal of Henry P. Sailer, et. al.*, BZA Appeal No. 17054-A (2004) at 5 "Although it may have been difficult for the Appellants to obtain details from DCRA regarding the permits and plans, there is no evidence that DCRA's actions substantially impaired Appellant's ability to file the subject appeal.")

Finally, Appellant asserts that its delay in filing the appeal should be excused because it relied on the ZA's representation that the ZA was waiting for another decision from this Board in order to determine whether DCRA had issued the permit in error. However, the ZA acknowledged at the hearing that there was no functioning procedure for "holding" a permit once it has been issued and that, in any event, an appellant still needs to take whatever action is required to preserve its rights. The Board finds that if the Appellant did mistakenly rely on the ZA's representation of DCRA's intentions, that that reliance does

not constitute exceptional circumstances beyond its control substantially impairing its ability to file the appeal. (*Compare Appeal of Paul A. Basken and Joshua S. Meyer*, BZA Appeal No. 17411 (2005) (Reliance on opposing counsel's misrepresentation of the deadline for filing the appeal did not constitute exceptional circumstances impairing the appellant's ability to appeal a permit.")).

Accordingly, because Appellant filed this appeal beyond the 60-day time limit and its ability to file the appeal was not substantially impaired by exceptional circumstances beyond its control, this Board is without jurisdiction to hear the appeal.

Because of the disposition of this appeal on the grounds that it was not timely, the Board need not address the Property Owners' further assertions that the appeal is barred by the equitable doctrine of laches.

For the reasons discussed above, it is hereby **ORDERED** that the **MOTION TO DISMISS** the appeal as untimely is **GRANTED**.

Vote taken on October 10, 2006

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Gregory N. Jeffries to grant the motion).

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

Each concurring member has approved the issuance of this Order.

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JAN 04 2008

PURSUANT TO 11 DCMR § 3125.6, THIS 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. 17513

As Director of the Office of Zoning, I hereby certify and attest that on **JANUARY 4, 2008**, 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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