

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Appeal No. 18031-C of West End Citizens Association**, pursuant to 11 DCMR §§ 3100 and 3101, from a November 4, 2009 decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. C01000323, for a grocery store in the R-5-E District at premises 2140 F Street, N.W. (Square 81, Lot 811).

**BOARD'S HEARING DATE:** February 23, 2010

**BOARD'S DECISION DATE:** February 23, 2010

**DATE OF FINAL ORDER:** August 24, 2010

**COURT OF APPEALS  
DECISION REMANDING  
TO BOARD:** August 16, 2012, amended December 19, 2012

**BOARD'S PROCEDURAL  
ORDER ON REMAND:** July 1, 2013

**BOARD'S DECISION AS  
TO SCOPE OF HEARING:** October 8, 2013

**BOARD'S LIMITED  
HEARING ON REMAND:** December 3, 2013

**BOARD'S DECISION  
ON REMAND:** February 11, 2014

**PROPOSED DECISION AND ORDER**  
**ON REMAND<sup>1</sup>**

The record in this case was remanded to the Board of Zoning Adjustment ("Board" or "BZA") by the District of Columbia Court of Appeals for it to consider whether its authority extended to

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<sup>1</sup> The Memorandum, Opinion, and Judgment that remanded this case was amended by an Order dated December 19, 2012. That Order noted that this was a record remand and therefore the court retained jurisdiction over the case. Since the Board is without jurisdiction, this decision and order is being issued as a proposed action of the Board. As instructed by the Order, the Board will return the augmented record and take such action as the court thereafter directs.

the consideration of the timeliness of the appeal pursuant to 11 DCMR § 3112.2 and to hear and decide claims of estoppel and laches raised by Foggy Bottom Grocery, LLC (“FoBoGro”), the lessee of the subject property. The timeliness issue was raised for the first time by the court.

At a Decision Meeting held on October 8, 2013, the Board concluded the timeliness rule was not jurisdictional and that the Department of Consumer and Regulatory Affairs and FoBoGro had forfeited their ability to seek dismissal upon that ground having failed to raise the issue in the original proceeding before the Board. Following a limited hearing on the *laches* and *estoppel* claims, the Board deliberated on February 11, 2014 and determined the FoBoGro had failed to prove *laches* but did prove the elements of *estoppel*, thereby granting the motion to dismiss. The facts and legal conclusions that justify these determinations follow.

## **FINDINGS OF FACT**

### **Procedural History**

#### *The Board Proceedings*

1. Appeal No. 18031 was filed with the Board of Zoning Adjustment by the West End Citizens Association (“WECA”) on November 10, 2009, challenging the November 4, 2009 issuance of Certificate of Occupancy (“C of O”) No. CO1000323 (“the 2009 C of O”) issued to Foggy Bottom Grocery, LLC (“FoBoGro”).
2. The District Department of Consumer and Regulatory Affairs (“DCRA”) issued the 2009 C of O, thereby permitting the use of the premises at 2140 F Street, N.W. (the “subject property”) for a “Retail Grocery Store” with an “accessory prepared food shop”.
3. WECA claimed that the 2009 C of O impermissibly expanded the existing one-story nonconforming grocery use by permitting an accessory prepared food shop, and by authorizing all three floors of the building for the grocery store use.
4. FoBoGro filed a motion to dismiss that, among other things, claimed that the appeal was barred by the equitable doctrines of *estoppel* and *laches*.
5. FoBoGro never argued in its motion, or otherwise, that the appeal was filed beyond the time limits set forth at 11 DCMR § 3112.2(a) (§ 3112 or “the timeliness rule”).<sup>2</sup>
6. Therefore FoBoGro never contended that WECA’s appeal was untimely as a matter of law pursuant to § 3112.2, but rather as a matter of equity.
7. DCRA did not request the Board to dismiss the appeal as untimely as a matter of law or equity.

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<sup>2</sup> This provision states, in part: “An appeal shall be filed within sixty (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.”

8. The Board determined that it would not hear testimony on the equitable defenses unless and until it found that the appeal had merit. Because the Board ultimately found no merit to WECA's claims, it denied the appeal and made no findings regarding the equitable defenses.
9. The Board issued an Opinion and Order on August 10, 2010 (the "Board's 2010 Order"), denying the appeal.

*The Court of Appeals Proceedings*

10. WECA petitioned the Court of Appeals to review the Board's 2010 Order.
11. The court issued a Memorandum Opinion and Judgment ("MOJ") that found no error in the Board's determination that the incidental sale of prepared food fell within a grocery store use, but reversed the Board's determination that the grocery store use could extend beyond the first floor.
12. The MOJ also remanded the case to the Board for it to consider whether the appeal was timely as a matter of law. The relevant portion of the MOJ stated:

The BZA found it unnecessary to reach FoBoGro's contention that WECA's appeal of its C of O was untimely as a matter of law, which would be an alternative basis for the BZA's denial of the appeal. The BZA will have to address that contention on remand, as it potentially has merit.

13. The court thought such a contention might have potential merit because an earlier Certificate of Occupancy issued in 2008 also appeared to permit all three floors of the building to be used as a grocery store. If true, that would have been the first and only relevant iteration of the zoning decision complained of and therefore WECA would have had 60 days from when it knew or should have known of the decision to file an appeal. The court suggested that WECA knew of the decision in September 2009, but waited until November to file the appeal.
14. WECA then filed a Petition for Rehearing arguing that no remand was needed because the Board had found the appeal to be timely.
15. In response, the Board indicated that FoBoGro had never contended that the appeal was untimely as a matter of law and that the Board had made no finding as to the relevance of the 2008 C of O to the timeliness of the appeal. However, because FoBoGro had raised the equitable defenses of *estoppel* and *laches*, remand was appropriate for the Board to now hear and decide those issues.
16. In an order filed December 19, 2012, the Court of Appeals apparently accepted the Board's position and amended the MOJ to remand the record to the Board for it to determine: (1) whether the Board's authority extends to the belated consideration of

whether WECA's appeal was timely as a matter of law; and; (2) whether WECA's appeal was barred by the equitable defenses of *laches* and *estoppel*.

*The Instant Remand Proceedings*

17. In response to the amended MOJ, the Board issued a "Procedural Order on Remand" on July 1, 2013. (Exhibit 30.)
18. The Board determined to resolve the jurisdictional question as a preliminary matter and directed the parties to brief the following issue:

Does the Board have the authority as part of the proceeding on remand to consider whether WECA's appeal was timely as a matter of law when the issue was not raised by any party or the Board during the earlier proceeding but was identified for the first time in these proceedings by the Court of Appeals?
19. The Board received briefs from the parties addressing this issue: DCRA (Exhibit 32), FoBoGro (Exhibit 33), and WECA (Exhibit 34).<sup>3</sup>
20. DCRA and FoBoGro asserted that the Board had the authority to consider the timeliness issue because the appeal filing deadline stated in § 3112 is mandatory and jurisdictional, and therefore may be addressed at any time.
21. WECA argued that, according to recent cases decided by the United States Supreme Court and the District of Columbia Court of Appeals, the timeliness rule is not jurisdictional, but merely a "claim-processing" rule. WECA further argued that because compliance with the rule was not raised as a defense to the appeal, its application was "forfeited" by the parties defending.
22. At a Decision Meeting held on October 8, 2013, the Board deliberated on this question and found that the § 3112.2 is a claim processing rule and is not jurisdictional. The Board also concluded that FoBoGro and DCRA had forfeited the issue by not raising it in the original proceedings. Therefore, the Board would not consider whether the appeal was untimely as a matter of law.
23. The Board then set the remanded appeal for a limited hearing on the issues of *laches* and *estoppel* and requested additional briefs on these issues from the parties.
24. At its decision meeting held February 11, 2014, the Board concluded that FoBoGro had not proven *laches*, but had established the elements of *estoppel*.

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<sup>3</sup> The legal issues raised will be discussed more fully in the "Conclusions of Law" section of this Order.

**The Merits of the Laches and Estoppel Claims**

25. The subject property is owned by The George Washington University (“GWU”) and is located at address 2140 F Street, N.W., in Square 81, Lot 811, in an R-5-E zone district.
26. The building on the subject property has three stories, consisting of a basement, a first or main floor, and a second floor.
27. Some portion of the structure has housed a retail grocery store since 1946.
28. At the time of the adoption of the present version of the Zoning Regulations on May 12, 1958, the property became zoned R-5-D. All R-5-D properties were rezoned into new R-5-E zones by the Zoning Commission on November 13, 1992 as a result of the publication of Zoning Commission Order No. 721.
29. A grocery store use was not permitted in an R-5-D District as of May 12, 1958.
30. As a consequence of the rezoning, the lawfully established grocery store use became a nonconforming use. (See, Definition of “Nonconforming Use” at 11 DCMR § 199.1.)
31. A nonconforming use may not be extended to portions of a structure not devoted to that nonconforming use at the time of the enactment of, or amendment to, Title 11 that rendered it nonconforming. (11 DCMR § 2002.3.)
32. The earliest extant C of O, issued prior to May 7, 1958 authorized the first floor of the building for use as a grocery store. Neither the basement nor the second floor was mentioned on the C of O.
33. The District of Columbia Court of Appeals held that the nonconforming grocery use was limited to the first floor and that the 2009 Certificate of Occupancy allowed for an impermissible expansion of the conforming use. This determination would ordinarily require the Board to reverse the Zoning Administrator.
34. FoBoGro argues that the Board should nevertheless dismiss the appeal based upon the equitable principles of *laches* and *estoppel*.

*The Laches Claim*

35. On August 21, 2008, the DCRA Zoning Administrator (the “ZA”) issued a C of O (the 2008 C of O) to FoBoGro to for the grocery store at the property. (Exhibit 9, Attachment A.)
36. Although the 2008 C of O did not expressly indicate how many floors of the building would be devoted to the grocery store use, it specified the square footage that the store could occupy. That square footage equaled the area occupied by all three floors in the building.

37. The 2008 C of O was unknown to WECA until almost a year later.<sup>4</sup>
38. DCRA's representative stated that DCRA notifies the Advisory Neighborhood Commissions ("ANCs") on a weekly basis regarding all newly issued C of Os and building permits. However, there was no evidence that WECA received such notice regarding the 2008 C of O through any ANC.
39. Although FoBoGro's owner met with WECA's representative in February 2009, the 2008 C of O was not provided or shown to WECA at that time.
40. On August 16, 2009, DCRA issued a building permit to FoBoGro authorizing renovations to an "existing townhouse" (the "2009 building permit")<sup>5</sup>. (Exhibit 9, Attachment C.)
41. The 2009 building permit did not indicate an existing or proposed use.
42. There were no publicly displayed activities at the building between August, 2008 and July or August of 2009.
43. Construction at the property did not begin until late September or early October of 2009.
44. On or about late July of 2009, WECA first learned of the existence of the 2008 C of O when FoBoGro applied to the District for the transfer of an alcohol license, and a hearing was set with the District's Alcoholic Beverage Control Board (the "ABC Board").<sup>6</sup>
45. On August 31, 2009, WECA copied the ZA on a letter to the ABC Board, in which it protested FoBoGro's application and specifically complained of the use of all three floors of the building for a grocery store.
46. Starting around September 2009, WECA began contacting the ZA and urging him to revoke the 2008 C of O. WECA complained, among other things, that the C of O improperly expanded a nonconforming use by allowing the grocery use on all three floors.
47. On October 14, 2009, the ZA revoked the 2008 C of O, but not because FoBoGro expanded beyond the first floor. Instead, the revocation was based upon the fact that the C of O erroneously permitted a "sandwich shop" use in addition to the grocery store use.

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<sup>4</sup> FoBoGro's owner testified that he posted the 2008 C of O at the property. However, this claim was not substantiated. However, even if the posting was substantiated, there is no evidence that WECA had knowledge of it.

<sup>5</sup> The parties dispute whether these renovations were exterior, interior, or a combination of both. However, this distinction is not critical. What is critical is whether the permit authorized construction for a building-wide grocery store. As stated, the permit did not mention a use and referred to the property as an existing townhouse.

<sup>6</sup> Barbara Khalow, who testified on behalf of WECA, stated that a placard posted at the property advertising the ABC Board application induced WECA to do further research. (Tr. December 3, 2013.)

48. A new C of O was issued on November 4, 2009 (the “2009 C of O”). The 2009 C of O permitted FoBoGro to operate a retail grocery store with an accessory prepared food shop at the subject property, and specifically noted that the grocery store use was authorized to occupy all three floors of the building.
49. On November 10, 2009, WECA filed an appeal with the BZA challenging the issuance of the 2009 C of O.

*Estoppel Claim*

50. Before FoBoGro purchased the grocery business, the previous owner used the main floor of the building for display and sales, the basement for storage and food preparation, and the second floor for more inventory storage, as well as for the business operation of the grocery store operation, which led FoBoGro to believe that the use of all three floors was lawful.
51. This belief was confirmed by DCRA’s issuance of the 2008 C of O.
52. While specific floors were not mentioned, the 2008 C of O obtained by FoBoGro permitted the grocery store use on “1,835 square feet” of the building, a figure equivalent the entire floor area of the building.
53. The Board concludes that FoBoGro reasonably believed the 2008 C of O authorized the continuation of the grocery store use on all three floors of the building.
54. FoBoGro relied on the 2008 C of O to its detriment by taking a variety of actions; specifically:
- a. Purchasing the grocery store business from Mesco Inc.;
  - b. Signing a 15 year lease with GWU, the owner of the building;
  - c. Entering into contracts for architectural and engineering plans and construction;
  - d. Allocating over \$1,000,000.00 towards renovations, expenses and business operations, and expending over \$500,000.00 in renovations alone;
  - e. Hiring employees for the grocery store; and
  - f. Entering into contracts with distributors for grocery inventory.

(Exhibits 9 and 40.)

**CONCLUSIONS OF LAW**

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) (2012 Repl.). *See also* 11 DCMR § 3100.2.) Appeals to the Board of Zoning Adjustment “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) (2012 Repl.).)

**Preliminary matter – Timeliness issue**

As noted, the original MOJ first remanded the record for the Board to determine whether this appeal was filed within the timeframe established by 11 DCMR § 3112.2, believing that the issue had been raised by FoBoGro. After being advised by the Board that FoBoGro’s timeliness assertion was based upon the equitable defense of *laches*, the Court issued an order amending the MOJ to allow the Board to hear and decide FoBoGro’s equitable defenses and left “it for the BZA to consider whether its authority extends to the belated consideration of whether WECA’s appeal was timely as a matter of law.”

In response to the Board’s requests for briefs on the authority issue, DCRA and FoBoGro contended that the Board retained the authority to hear the timeliness issue because compliance with § 3112.2 was jurisdictional in nature and can be raised at any time. WECA claimed that the rule was a claims processing rule, which the BZA forfeited by purportedly consenting to hold a hearing on the appeal and the parties forfeited by not raising the issue below.

For the reasons stated below, the Board agrees with WECA that § 3112.2 is a claims processing rule, but disagrees that the mere scheduling of a hearing on appeal deprives the Board from hearing and granting motions to dismiss based on that subsection or from raising the issue on its own motion. Nevertheless, the Board concludes that DCRA and FoBoGro forfeited their right to add the defense at this late date and therefore the issue will not be considered.

Certainly DCRA and FoBoGro are correct that the Court of Appeals had consistently held that if an appeal is not timely filed, the Board was 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).

However, as WECA correctly noted, in 2009 a division of the Court of Appeals issued *Smith v. US*, 984 A.2d 196 (2009), which recognized that a court filing deadline could either be a claim processing rule or jurisdictional. The Court adopted the distinction made by the United States Supreme Court in *Bowles v. Russell*, 551 U.S. 205 (2007). As explained in *Smith*:

There the Court stated that “claim-processing” rules are “court-promulgated rules,” “adopted by the Court for the orderly transaction of its business.” 551 U.S. at 211, 127 S.Ct. 2360. Those kinds of rules are “not jurisdictional and can be relaxed by the Court in the exercise of its discretion....” *Id.* at 211, 212, 127 S.Ct. 2360 (quoting *Schacht v. United States*, 398 U.S. 58, 64, 90 S.Ct. 1555, 26

L.Ed.2d 44 (1970)). By contrast, “jurisdictional” rules are those rules enacted by Congress, meant to be strictly imposed limits on the cases the courts may hear. *Bowles*, 551 U.S. at 212, 127 S.Ct. 2360.  
*Smith v. United States*, 984 A.2d 196, 200 (D.C. 2009).

Applying these principles to District law, the Court of Appeals in *Smith* held that the Superior Court’s rule requiring that motions to reduce sentences be filed within 120 days was a claim processing rule. Therefore, the United States’ failure to object to such a late filing forfeited its right to later challenge the reduction granted. More recently, the Court of Appeals extended this principle to quasi-judicial administrative bodies, such as the BZA, and held that the Water and Sewer Authority’s (“WASA”) rule requiring that challenges to water delinquency be filed in 15 days was a claim processing rule because it was not adopted by the Council. *See, Gatewood v. District of Columbia Water and Sewer Auth.* 82 A.3d 41 (2013).

Applying these principles to § 3112.2, the Board did not adopt the rule, and therefore it is not presumptively a claim processing rule. However, the body that adopted it – the Zoning Commission – has no authority to define the Board’s subject matter jurisdiction. Rather, that jurisdiction was created by Congress when it adopted § 8 of the Zoning Act of 1938 (D.C. Official Code § 641.07). Since the Zoning Commission cannot add to or reduce the Board’s jurisdiction, § 3112.2 cannot be jurisdictional in nature.

Because § 3122.2 is a claims processing rule, WECA claims that that DCRA and FoBoGro forfeited their ability to invoke the rule because they did not raise it in the original proceedings and the Board agrees. The Court of Appeals has stated that “only under ‘exceptional circumstances,’ *Jewell v. District of Columbia Police and Firefighters Ret. and Relief Bd.*, 738 A.2d 1228, 1231 (D.C.1999), where ‘manifest injustice’ would otherwise result, *Goodman v. District Columbia Rental Hous. Comm’n*, 573 A.2d 1293, 1301 (D.C.1990), will the court consider claims that were not presented to the agency.” *Sims v. D.C.*, 933 A.2d 305, 309-10 (D.C. 2007).

Based upon this standard, the Board concludes that FoBoGro and DCRA forfeited their right to invoke § 3112.2 before the Court of Appeals and the Board finds no justification to allow this remand to serve as a vehicle to make a claim that could not have been appealed. Therefore, the Board will not consider whether this appeal is untimely as a matter of law.<sup>7</sup>

### **The Merits**

#### **FoBoGro did not establish laches**

The Court of Appeals has consistently recognized the availability of *laches* in zoning appeals.

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<sup>7</sup> Because of this ruling, the Board will not discuss WECA’s alternative argument that the Board somehow waived its right to dismiss the appeal pursuant to § 3112.2, but notes that WECA’s two premises -- that the Board was akin to an enforcement entity that consented to an untimely requested hearing and that it previously found the appeal timely notwithstanding the issuance of the 2008 C of O -- are erroneous.

*See, Sisson v. District of Columbia Bd. of Zoning Adjustment*, 805 A.2d 964, 972 (D.C. 2002). *Kuri Bros., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 891 A. 2d 241, 248 (D.C. 2006); *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917 (D.C. 1980).

However, *laches* is rarely applied in the zoning context except in the clearest and most convincing circumstances. *Sisson*, 805 A.2d at 971-972. To determine the validity of a *laches* defense, the Board must look at the entire course of events. *Laches* will not provide a valid defense, unless two tests are met: *Laches* will bar a party's claim if the party has been prejudiced by the delay and that delay was unreasonable. *Id.*

FoBoGro did not carry its burden of establishing that WECA unreasonably delayed in bringing its appeal. There is no doubt that WECA appealed from the 2009 C of O – not the 2008 C of O – and that WECA filed its appeal in less than a week after the 2009 C of O was issued.

FoBoGro contends, however, that the actual decision complained of was first contained in the earlier 2008 C of O because that C of O provided notice of a grocery store use extending to all three floors of the building. As such, it argues, WECA unreasonably delayed filing the appeal until November 2009, more than 14 months later.

The certificate of occupancy did authorize the grocery store throughout the subject property and was sufficiently clear in this regard so that FoBoGro made significant expenditures in reliance upon its issuance. However, WECA provided credible testimony that it was unaware of the 2008 C of O until approximately August of 2009.<sup>8</sup> Almost immediately, WECA was diligent in pursuing a remedy. DCRA revoked the 2008 C of O on October 14, 2009, approximately six weeks after WECA had notice of it. After that revocation, WECA had no obligation to take any further action unless and until a subsequent certificate of occupancy was issued. When a new C of O was issued on November 4, 2009, WECA filed this appeal six days later.

To recapitulate: a *laches* claim consists of two elements: unreasonable delay and prejudice as a result of that delay. *Sisson, supra*. Here, the Board finds no delay at all on WECA's part, let alone an unreasonable delay. FoBoGro argues that it has been prejudiced as a result of delays, citing the long delays associated with the BZA proceedings and legal proceedings, and the financial losses sustained. While FoBoGro may have sustained financial losses, it was not due to delay on WECA's part.

### **The appeal is barred by the doctrine of estoppel**

The Court of Appeals has also recognized the availability of *estoppel* in zoning appeals. See *Sisson, supra, Saah v. D.C. Bd. of Zoning Adjustment*, 433 A.2d 1116 (D.C. 1981). See also, *Rafferty v. D. C. Zoning Comm'n.*, 583 A.2d 169, 175 (D.C. 1990); *Interdonato v. D.C. Bd. of Zoning Adjustment*, 429 A.2d 1000, 1003 (D.C. 1981); and *Wieck v. D.C. Bd. of Zoning*

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<sup>8</sup> DCRA argued that WECA was on notice regarding the 2008 C of O when it became available to the affected ANC shortly after the C of O's issuance. However, the Board has rejected that very argument, finding that an ANC's knowledge of a building permit or C of O cannot be imputed to every person or association that may be affected. *Appeal No. 17109 of Kalorama Citizens Association* (2005).

*Adjustment*, 383 A.2d 7, 11 (D.C. 1978). The application of *estoppel* is limited to situations where the equities are strongly in favor of the party invoking the doctrine. *Wieck at 11*.

To make a case of *estoppel*, FoBoGro must show that it: (1) acted in good faith; (2) on the affirmative acts of a municipal corporation; (3) made expensive and permanent improvements in reliance thereon; and (4) the equities strong favor the party invoking the doctrine. *Sisson*, 805 A.2d at 971.

The Board has no doubt that FoBoGro acted in good faith. As set forth above, immediately before FoBoGro's purchase of the business, the grocery store was operated on all three floors. Therefore, FoBoGro had no reason to believe that the grocery store use had been impermissibly expanded. While negotiating the purchase of the grocery store, FoBoGro acted in good faith and applied for a C of O. The 2008 C of O authorizing the use throughout the building was issued the same day and FoBoGro moved forward with the project. When the C of O was later revoked by the ZA, FoBoGro promptly responded to the ZA's concerns and a new C of O was issued. (Findings of Fact 45 – 47.)

There is also no doubt that FoBoGro relied on the affirmative act of DCRA when the ZA issued the 2008 C of O authorizing the grocery store use within the entire building area. FoBoGro relied on the 2008 C of O when it purchased the business and consummated the lease. FoBoGro further relied upon the issuance of the 2008 C of O when it entered into contracts for architectural and engineering plans and construction. Thereafter, FoBoGro hired employees for the store, and entered into contracts with distributors for grocery inventory. All told, FoBoGro allocated over \$1,000,000.00 towards renovations, expenses, and business operations, and expended over \$350,000.00 in renovations alone.

When balancing the equities, the equities favor FoBoGro. FoBoGro acted in good faith and reasonably believed the DCRA's 2008 certificate of occupancy authorized it to use the entire building for the grocery store. As outlined above, FoBoGro spent considerable sums in connection with the grocery business. While WECA has also acted in good faith, there is no evidence that it will be harmed by the continued operation of a grocery store that has been a neighborhood institution for over 60 years. In fact, WECA has never argued that it has been harmed in any way by the operations of the grocery store.

Finally, WECA argues that *estoppel* is not available because the Court of Appeals found the expanded grocery store use to be illegal. This argument would negate the ability to invoke *estoppel*, because that defense only becomes relevant after the government discovers (or in this case is told) that it erroneously permitted an unlawful structure or use and then seeks or is requested to commence enforcement. Thus, the continuation of the unlawfully expanded grocery did not bar *estoppel*, but the impact of that use was part of the balancing of equities just performed by the Board. The Court of Appeals certainly understood this distinction when it authorized the Board to consider the *estoppel* claim, rather than holding that its finding of error also barred the Board's consideration of equitable defenses.

The 2009 C of O continued to permit the entire building to be used as a grocery store. The *estoppel* considerations discussed above would have required the ZA to issue that certificate

even had he realized that the 2008 C of O impermissibly allowed the expansion of the nonconforming grocery store use beyond the first floor. These same considerations require the Board, as a matter of equity, to dismiss the portion of the appeal alleging the unlawful expansion of the grocery store use beyond the first floor.

**CONCLUSION**

For the reasons stated above, the Board concludes that the Board's timeliness rule is a claims processing rule, and is not jurisdictional. Because FoBoGro and DCRA failed to raise the rule during the Board's proceedings, they have forfeited their ability to raise it now. The Board also concludes that FoBoGro did not meet its burden of demonstrating that WECA's appeal was barred by *laches*. However, the Board concludes that FoBoGro has established the defense of *estoppel* and therefore the portion of the appeal challenging the expansion of the nonconforming grocery store use beyond the first floor is dismissed.

Accordingly, it is **ORDERED** that the portion of the appeal remanded to the Board is **DISMISSED**.

**VOTE:**       **4-0-1** (Lloyd J. Jordan, Michael G. Turnbull, Jeffrey L. Hinkle, and S. Kathryn Allen (by absentee vote) to Dismiss the remanded portion of the appeal; 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. BARDIN  
Director, Office of Zoning

**FINAL DATE OF ORDER:** December 8, 2014

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.