

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18469 of Susan L. Lynch, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), to issue Building Permit Nos. RW1200113, RW1200111, B1207072 and B1207074 approving the construction of two one-family detached dwellings and retaining walls in the R-1-B District at premises 2334 King Place, N.W. (Square 1394, Lot 24) and 2338 King Place, N.W. (Square 1394, Lot 23).

HEARING DATE: October 16, 2012

DECISION DATE: December 18, 2012

DECISION AND ORDER

Susan Lynch filed this appeal with the Board of Zoning Adjustment (the "Board" or "BZA") on August 28, 2012. Ms. Lynch challenged the administrative decision of the Zoning Administrator ("ZA") to approve the issuance of Building Permit Nos. RW1200113 and B1207072 for 2338 King Place, N.W., Square 1394, Lot 23, and Building Permit Nos. RW1200111 and B1207074 for 2334 King Place, N.W., Square 1394, Lot 24. The "RW" permits were issued on June 29, 2012, and authorized the construction of a retaining wall comprised of a masonry wall, geogrid fabric and fill dirt.

The ZA granted zoning approval of the RW permit applications approximately a month earlier on May 30, 2012. The "B" permits authorized construction of one one-family dwelling on each lot. Those permits were issued on February 7, 2012, and revised on April 6, 2012, to remove the retaining wall structures from the scope of work. With respect to the "RW" permits, Ms. Lynch claimed that the Zoning Administrator erred in (i) issuing a retaining wall permit instead of a building permit for the masonry wall, geogrid fabric and fill dirt structure; (ii) finding that the structure was exempt from the side yard, rear yard, and lot occupancy requirements under § 2503 of the Zoning Regulations (Title 11 DCMR); (iii) finding that that structure complied with the side yard requirements of § 405; (iv) finding that the structure complied with the rear yard setback requirements of § 404; (v) finding that the structure did not exceed the maximum percentage of lot occupancy under § 403; and (vi) finding that the structure did not exceed the lot occupancy limitation of 50% for any required yard, as established in the definition of "yard" under § 199.1. With respect to the "B" permits, Ms. Lynch did not claim any specific zoning

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error in their issuance.

On October 12, 2012, the owners of 2334 and 2338 King Place, N.W., filed a motion to dismiss the appeal as untimely filed.

As to the "RW" permits, the property owners alleged that the decision complained of was the Zoning Administrator's approval of the RW permits on May 30, 2012, which was posted that same date on DCRA's electronic permit system. The property owners contended that as a result of Ms. Lynch's monitoring of the electronic permit system, it could be inferred that she had notice of the zoning approval as of the day it was posted, *i.e.* May 30th, or that such knowledge could be imputed to her as a result of her attorney's acknowledgement of the zoning approval on June 1st. At the latest, Ms. Lynch knew of the decision on June 6th, which is the date she confirmed having such knowledge in an email to her attorney.

With respect to the "B" permits, the property owners contended, and the Appellant did not dispute, that the houses were under roof by April 30 (2334 King Place) and July 12 (2338 King Place). Therefore, pursuant to § 3112.2(b)(1), appeals of those permits were required to be filed no later than May 10 and July 22, respectively.

Based on the evidence of record, the Board agrees with the ZA and the property owner that the appeal was filed more than 60 days after the Appellant had knowledge of the zoning decision pertaining to the "RW" permits. The Board also agrees that appeal of the "B" permits was also untimely filed, although the appeal related to 2334 King Place was required to be filed by June 5, 2012 in order to permit a full 60 day period from the date of permit issuance as required by § 3112.2 (c).

Thus this appeal was untimely filed as to all of the permits and is dismissed. A full discussion of the factual and legal basis of the Board's decision follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on October 16, 2012. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, Advisory Neighborhood Commission ("ANC") 3D (the ANC in which the property is located), the property owners, and to DCRA.

Parties

The appellant in this case is Susan L. Lynch ("Appellant"), the owner-occupant of the one-family dwelling at 2344 King Place, N.W., which is immediately adjacent to, and contiguous with, the property at 2338 King Place, N.W. The Appellant was represented by the law firm of Sullivan & Barros, LLP, Martin P. Sullivan, Esq. The Appellee, DCRA, was represented by its Office of the General Counsel, Jay Surabian, Esq., Assistant Attorney General for the District of Columbia.

SSB 2338 King LLC, the owner of 2338 King Place, N.W., and Ben and Amy Chew, the owners of 2334 King Place, N.W., ("Property Owners") were automatic parties to the proceeding under 11 DCMR § 3199.1. The Property Owners were represented by the law firm of Holland & Knight, Mary Carolyn Brown, Esq. ANC 3D, also an automatic party in the case, did not participate in the proceeding or otherwise take a position on the appeal.

Motion to Dismiss

On October 12, 2012, the Property Owners filed a motion to dismiss the appeal, contending that the appeal was untimely filed. (Exhibit 18 & 18L.) DCRA filed its opposition to the appeal, in which it stated its support for the Property Owners' motion to dismiss. (Exhibit 19.) By a separate pleading, Appellant filed her opposition to the motion dismiss on October 16, 2012. (Exhibit 20.)

Hearing and Closing of the Record

The public hearing took place on October 16, 2012, during which time the Appellant, DCRA, and the Property Owners presented their respective cases. The Board closed the record, except to receive certain specified submissions. These were (i) an affidavit from the Appellant attesting to her efforts to obtain plans and records associated with the "RW" permits, due by October 23, 2012; (ii) a counter-affidavit from DCRA regarding the availability of those materials to the public and to the Appellant, in particular, due by October 29, 2012; and (iii) proposed findings of fact and conclusions of law from all parties due by October 29, 2012. The case was scheduled for decision on December 18, 2012, at which time the Board voted 3-1-1 to dismiss the appeal as untimely.

FINDINGS OF FACT

The Property

1. The subject properties are located at Square 1394, Lot 23, premises address 2338 King Place, N.W. ("2338 Property"), and at Square 1394, Lot 24, premises address 2334 King Place, N.W. ("2334 Property") in the R-1 B District.
2. Each lot is rectangular in shape with street frontage on King Place. Other residential properties abut the remainder of the lots. The rear yard of each lot slopes downward, with a change in grade of approximately eight to 10 feet from the backs of the houses to the rear lot lines.

Events Leading to the Filing of the Appeal

3. On February 7, 2012, DCRA issued permits authorizing Sandy Spring Builders ("SSB") to construct two detached one-family dwellings, one on the 2334 Property and a second on the 2338 Property, and retaining walls surrounding the properties. The work was authorized

under Building Permit Nos. B1110274 (2334 Property) and B1200230 (2338 Property).

4. Shortly after issuance of these permits, the Appellant contacted SSB in February 2012 to complain about the scope of construction. On March 9, 2012, Appellant's counsel sent an email to SSB stating that he believed the permits were issued in error and in violation of the Board's ruling on "retaining walls" and "elevated platform structures" in *BZA Appeal No. 17285 of Patrick J. Carome*, March 24, 2006, ("Carome Appeal") and as upheld by the D.C. Court of Appeals in *Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427 (D.C. 2008) (collectively, the "*Economides*" case). Appellant's counsel stated that he had contacted the Zoning Administrator and that if the permits were allowed to stand, he would appeal the issuance of the permits to the BZA. (Exhibit 18I.)
5. After receiving a complaint from the Appellant in early March 2012, the ZA conducted a review of the plans, discussed them with the Property Owners, and determined that the building permits had, in fact, been issued in error. Specifically, the ZA determined that the retaining wall was comprised of fill dirt supported by geogrid sheets that were anchored to a masonry wall. The ZA determined that these three elements created an "elevated platform structure" under the *Economides* case and, as designed, violated 11 DCMR § 2503.2 as being in excess of four feet in height in the required rear yard. On April 2, 2012, DCRA revoked Building Permit Nos. B1110274 and B1200230.
6. In order to allow construction to continue on the houses authorized under the permits, the Property Owners amended the permits to exclude the retaining wall/platform structure from the scope of work. On April 6, 2012, DCRA issued revised Building Permit Nos. B1207074 and B1207072, allowing for the construction of a detached one-family dwelling on the 2334 Property and 2338 Property, respectively. Stop work orders, however, were issued for the retaining walls/platform structure.
7. The Appellant continued to express concerns about construction at the property. She met with her councilmember and staff on April 15, 2012, and followed up with emails describing the alleged violations and suspicions that the stop work orders were being violated. (Exhibit 18J.)
8. At the same time, the Property Owners worked with the ZA to resolve the zoning issues with the retaining wall/platform and bring it into compliance. The changes proposed by the Property Owners included lowering the height of the wall and the retained soil in the rear yard. On April 23, 2012, CAS Engineering, the Property Owner's civil engineer, submitted a report to the ZA (the "April 23rd Report"), which explained the changes that would be made to the platform. The ZA reviewed this report and found the proposed construction described therein to be in compliance with the Zoning Regulations.
9. The Property Owners asserted, and the Appellant did not contest, that the house at 2334 King Place was "under roof" as of April 30, 2012 within the meaning of 11 DCMR § 3112.2(b)(1).

10. On May 30, 2012, the ZA gave final zoning approval to the plans and entered the approval into the DCRA database, which then made the approval publicly known and available that same day through the Permit Information Verification System ("PIVS"). (Hearing Transcript, October 16, 2012 at 143-44.)
11. On June 1, 2012, Appellant's counsel sent an email to the ZA stating that he understood that "there has been a zoning approval on the new building permit applications for the elevated platform structure/retaining wall on the King Place lots. You mentioned that you would advise us of your determination on this. We look forward to hearing more on this, under what rationale the [elevated platform structure] is now approved, and whether or not their current situation is in compliance with this new determination. If there is a written determination letter underlying, we'd appreciate a copy." (Exhibit 18J.)
12. That same day, immediately after receiving the email, the ZA telephoned Appellant's counsel to explain his decision. (Exhibit 29, Declaration of Matthew LeGrant.)
13. On June 6, 2012, the Appellant emailed her counsel to inquire whether the plans approved by zoning on May 30, 2012, were available to the public. The email indicates that the Appellant was monitoring the progress of the "RW" permits through PIVS, and also posed a question to her counsel regarding the structural review comments posted on the system. Appellant's counsel referred the questions to his permit expeditor, Ms. Rochelle Joseph, who was retained to obtain information from DCRA regarding building permit applications for property located at 2334 and 2338 King Place, N.W. Ms. Joseph replied on June 7, 2012, that the "permit and approved plans become a matter of public record once the permit has been issued rather than when each discipline approves" and that "Records Management will not release the documents to the public until the process is complete." Neither the Appellant, nor Appellant's counsel, nor Ms. Joseph made any further attempt to request copies of the drawings approved by the ZA until June 27, 2012. (Exhibit 25.)
14. Between June 27 and July 5, 2012, Ms. Joseph made four separate requests of DCRA Records Management, asking for access to view and copy the plans.
15. Meanwhile, on June 12, 2012, after a meeting with the ZA on a different matter, Appellant's counsel asked the ZA again about his decision to approve the revised permits for the 2334 Property and the 2338 Property. However, Appellant's counsel did not request a copy of the plans approved by the ZA or otherwise indicate that he had difficulty obtaining copies of the plans from DCRA. (Exhibit 29, Declaration of Matthew LeGrant.)
16. After the revised permit applications and plans were reviewed by other disciplines within DCRA, Building Permit Nos. RW1200111 and RW1200113 were issued for the construction of the retaining wall/platform on June 29, 2012.
17. Separate efforts by another attorney to review the approved plans were more successful. On July 3, 2012, the Appellant's counsel and the other attorney met with Mr. Rohan Reid, of the

DCRA Zoning Division, to view the “RW” permits and approved plans. Applicant’s counsel’s requested to be provided certain pages and it was agreed that the copies would be provided after the July 4th holiday. In fact, the requested pages were provided to Ms. Joseph on July 11th. (Exhibit 28, Declaration of Rohan Reid). However, the Appellant did not make any independent, earlier attempts to secure such a meeting upon learning of zoning approval on May 30, 2012.

18. Ms. Joseph obtained copies of the permits and plans on July 12, 2012.
19. The Property Owners asserted, and the Appellant did not refute, the house at 2338 King Place was "under roof" as of July 12, 2012 within the meaning of 11 DCMR § 3112.2(b)(1).
20. The Appellant lodged her appeal on August 28, 2012.

CONCLUSIONS OF LAW

Before ruling on the merits of an appeal, the Board is bound to consider a motion to dismiss an appeal for lack of jurisdiction on timeliness grounds. *See Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008). It is well settled that the timely filing of an appeal is mandatory and jurisdictional. If an appeal is not timely filed, the Board is 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 1117 (D.C. 2001); *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090 (D.C. 1994).

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Paragraph (a) provides that an appeal must be filed within 60 days from the date the person filing the appeal first had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier. In addition, Paragraph (b) provides that:

If the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure ... :

- (1) No appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof. For purposes of this subparagraph, 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

The Board will apply these principles to the two sets of permits being appealed.

1. The “RW” permits.

As to the “RW” permits, there is no dispute that the zoning decision complained of is the ZA's determination that the proposed elevated platform structure complied with the provisions of the zoning regulations. The question is whether the appealable form of that decision was the ZA's approval issued on May 30, 2012 of which the Appellant had actual knowledge or the “RW” permits issued on June 29, 2012. The Board concludes it was the former. The Board also finds that the Appellant had knowledge of the approval no later than June 6th, and therefore was required to file this appeal no later than August 6, 2012. Because no appeal was filed by that date and because the Appellant failed to prove the existence of extenuating circumstances that prevented her from filing her appeal by that date, this appeal must be dismissed as to the “RW” permits.

The Board's bases its decision upon precedent established by the D.C. Court of Appeals and this Board, most recently in *BZA Appeal No. 18300 of Lawrence and Kathleen Ausubel* (April 11, 2012). See also *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946A.2d 356 (D.C. 2008); *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A.2d 423 (D.C. 2006); *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917 (D.C. 1980).

In the *Ausubel* case, the Ausubels filed an appeal challenging the zoning approval of a building permit issued for their neighbor's house based on an alleged violation of the Tree and Slope Overlay ("TSP") under Chapter 1511 of the Zoning Regulations. They became aware of the permit application for the proposed addition shortly after it was filed, and discussed their concerns regarding compliance with the TSP Overlay with the ZA. The neighboring property owner also met with the ZA to ensure compliance with the regulations and provided supplemental information in response to the ZA's requests. After his review of the additional information, as well as other material furnished by the Ausubels and the Urban Forestry Administration, the ZA approved the permit application for zoning purposes and notified the Ausubel's counsel by email of his decision. Approximately 30 days later, DCRA issued the building permit. Several days thereafter, the Ausubels informed the ZA that they intended to appeal his decision. They filed a complaint in D.C. Superior Court two weeks after the permit was issued and lodged an appeal before this Board approximately 55 days after permit issuance, but 86 days after the ZA emailed his decision that the project complied with the zoning requirements.

The Board concluded that the Ausubel appeal was untimely. The Board held that the ZA's email to the Ausubels included a decision that cleared the way for the issuance of a permit. In the email, the ZA unequivocally stated that he "would proceed to approve the revised plans for [the] submitted building permit application," thus removing all zoning obstacles to permit issuance. *Ausubel*, at 8. Moreover, the ZA made his decision after a full briefing of the facts from numerous sources and the email "gave the Appellants their first notice that such a decision had been made." *Id.* While the Ausubels argued that the email was ambiguous, this Board disagreed, finding that the meaning of the email was crystal clear. "Because the email constituted an 'administrative decision based in whole or in part upon the zoning regulation,...the

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Appellants were required to appeal it no later than 60 days after it was received" *Id. citing* D.C. Official Code § 6-641.07(f). In reaching its conclusion, the Board relied on and provided an exhaustive analysis of the case law on timeliness for BZA Appeals. *See Basken, Bannum, and Goto, supra.*

The ZA's approval of the "RW" permits was similarly unequivocal and assuming approval by the other disciplines would result in the issuance of the "RW" permits. That decision was made known to the public, including Ms. Lynch and her attorney, through its posting on the PIVS. The word "approved" next to zoning in PIVS, without any qualifications whatsoever, was unequivocal: the permit had been cleared by zoning for issuance. Thus any member of the public accessing this information, including the Appellant, knew that the ZA had approved the revised permit applications for zoning purposes. And, similar to the Appellants in *Basken* and *Ausubel*, Ms. Lynch's knowledge of the approval gave her the first notice of the zoning decision complained of. Since the approval represented a final decision, rather than an interim written determination, there is no need to also find that the ZA was fully briefed on the issue, although it is clear from the record that he was.

Nevertheless, the Appellant argues that the zoning decision was not final, that plans could have changed in response to reviews by other disciplines, which in turn, presumably, could have required further review by the zoning division. Under the facts of this case, however, the Appellant's argument is only speculative in nature and unsupported by law. As the D.C. Court of Appeals held in *Basken*, "the zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specific type of notice....[O]ur case law specifically recognizes that a letter from DCRA or the Zoning Administrator conveying a zoning decision may be an appealable decision." *Basken*, 946 A.2d at 366, *citing Goto*, 423 A.2d at 825; *see also Ausubel* at 7-8 (ZA email informing appellants of decision to approve permits was not ambiguous under totality of circumstances).

Having found that the zoning approval of the "RW" permits became the only appealable decision, the Board must next determine when Ms. Lynch acquired such knowledge. The Board finds that she knew of that decision no later than June 6, 2012. Clearly Ms. Lynch's counsel knew of the ZA's approval, as evidenced by the email from Appellant's counsel to the ZA on June 1, 2012. Although the Board could reasonably impute such knowledge to Ms. Lynch, there is no need to do so, since the Appellant herself acknowledged knowledge of the approval in a June 6th email to her counsel.

Even so, the Appellant asserts that the 60-day clock can only start once she was on notice as to what plans were approved by the ZA. Only then would she have an opportunity to analyze whether the plans did, in fact, comport with the zoning regulations. This is incorrect. Subsection 3112.2 (a) provides that the time for filing an appeal begins when "the person appealing the administrative decision had notice or knowledge of the decision complained of". There is no requirement that person also know the basis for the decision. Instead, knowledge of a decision starts a 60-day clock for determining that basis and the existence of any error. Should an impediment arise, § 3112.2 (b) allows the Board to extend the 60-day period if:

- (1) There are exceptional circumstances that are outside of 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, as identified in § 3199.1.

However, no such exceptional circumstances are presented here.

The Appellant's permit processor Ms. Joseph did not request the plans until June 27, 2012. The delay resulted from her belief that DCRA had a policy of not releasing plans that are still undergoing the permit review process. The Board finds such a belief to be unreasonable. The Appellant points to nothing in writing from DCRA establishing such a policy, and, having been represented by counsel, the Appellant should have known that the District's Freedom of information Act ("FOIA") provides to the contrary. Specifically, the FOIA law provides that any "person has a right to inspect, and at his or her discretion, to copy any public record of a public body", unless the document is subject to a specific exemption. D.C. Official Code § 2-532 (a). None of the exemptions appear to apply. The Appellant, made no attempt to test or challenge this purported policy and therefore any delay was self-imposed.

In any event, the Appellant counsel was able to view the plans on July 3rd, at which time he requested that only certain pages be provided. These were sent to Ms. Joseph on July 11th and she secured the full drawings the next day. This was more than enough time for Ms. Lynch, with the assistance of her counsel, to determine whether a good faith appeal could be filed.

2. The "B" Permits

As noted, the Property Owners asserted, and the Appellant did not contest, that the house at 2334 King Place was "under roof" as of April 30, 2012 and the house at 2338 King Place was "under roof" as of July 12, 2012. This would ordinarily means that the appeals of the "B" permits were required no later than May 10 and July 22, respectively. (11 DCMR § 3112.2 (b)(1).) However, Paragraph (c) provides that even when a structure is under roof "an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal." In this case the "B" permits were issued on February 7, 2012 and revised permits were issued on April 6th. Assuming that the April 6th revised permits are the administrative decision complained of,¹ the time for appealing the "B" permit for 2338 King Place would remain July 22nd, because that date this is more than 60 days after April 6th. However, the appeal time for at 2334 King Place would have to be extended until June 5, 2012 to permit a full 60 days from permit issuance. Since the appeal was filed on August 28th, it is untimely as to both "B" permits.

¹ In fact, the only change was the removal of the retaining wall and so there was no change to the approval with respect to the houses.

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For reasons discussed above, the Board is divested of jurisdiction to hear this appeal due to its untimeliness. It is therefore and hereby **ORDERED** that the motion to dismiss the appeal as untimely is **GRANTED**.

Vote taken on December 18, 2012.

VOTE: **3-1-1** (Lloyd J. Jordan, Jeffrey L. Hinkle, and Nicole C. Sorg to Grant the motion to dismiss; Peter G. May to deny the motion 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. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: March 19, 2013

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.

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As Director of the Office of Zoning, I hereby certify and attest that on March 19, 2013, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail or delivered by electronic mail in the case of those ANC's and SMD's that have opted to receive notices thusly, 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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