

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18499 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from a decision by the Department of Consumer and Regulatory Affairs to issue Building Permit No. B1209455, dated November 1, 2012, approving the construction of a gasoline station and grocery store in the HS/C-2-A District at premises 1400 Maryland Avenue, N.E. (Square 1049, Lots 21 and 803).

HEARING DATE: February 12, 2013

DECISION DATE: February 12, 2013

ORDER DISMISSING APPEAL

This appeal was submitted on November 14, 2012 by Advisory Neighborhood Commission (“ANC”) 6A (“Appellant”) to challenge a decision of the Zoning Administrator (“ZA”), at the Department of Consumer and Regulatory Affairs (“DCRA”), to issue Building Permit No. B1209455, allegedly with an incorrect zone so that the permitted structure did not comply with requirements for the correct zone, for a property at 1400 Maryland Avenue, N.E. (Square 1049, Lots 21 and 803). Following a public hearing, the Board voted on February 12, 2013 to dismiss the appeal as untimely.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated November 14, 2012, the Office of Zoning provided notice of the appeal to ANC 6A, the ANC in which the subject property is located as well as the Appellant; Single Member District/ANC 6A02; the ZA, at DCRA, with a copy to 1400 Maryland Avenue Ltd. Empire Leasing, Inc. as the owner of the property that is the subject of the appeal; the Office of Planning; and the Councilmember for Ward 6. Pursuant to 11 DCMR § 3112.14, on November 27, 2012 the Office of Zoning mailed letters providing notice of the hearing to the Appellant, the owner of the subject property, and the ZA. Notice was also published in the *D.C. Register* on November 30, 2012 (59 DCR 13685).

Party Status. Parties in this proceeding are the Appellant, DCRA, and DAG Realty, LLC, the ground lessee of the subject property.

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Appellant's Case. The Appellant challenged the issuance, on November 1, 2012, of Building Permit No. B1209455 on the ground that the permit indicated a C-3-A zone while the subject property, 1400 Maryland Avenue, N.E., is zoned HS-A/C-2-A, and thus the ZA erred by not requiring the subject property to comply with the requirements of §§ 1324.2 and 1324.10. According to the Appellant, the Board previously approved a special exception to construct a gas station at the subject property in Application No. 17825,¹ the applicant in that case applied for a building permit on May 31, 2011, and DCRA issued Building Permit No. B1107494 on May 4, 2012 for the renovation of an existing vehicle fuel service station at the subject property. The Appellant asserted that the initial building permit did not include construction of a grocery store, “which was the reason why the applicant applied for #B1209455 on May 29, 2012.

The Appellant argued that DCRA erred in issuing the second building permit, #B1209455, “because the zoning of the site changed from C-3-A to HS-A/C-2-A on December 9, 2011 as part of Zoning Commission case #10-19.” Because the application for the second permit was made more than two years after issuance of the Board’s order approving a special exception for the site, the Appellant contended that the Board’s order had “expired when the applicant applied for #B1209455, and the building permit should have been evaluated under a HS-A/C-2-A zone rather than a C-3-A zone.” Instead, according to the Appellant, the second permit approved a building that would not comply with the design requirements set forth in §§ 1324.2 and 1324.10. The Appellant asked the Board to order DCRA to revoke the second building permit in light of the incorrect application of the C-3-A zone instead of the HS-A/C-2-A zone.

DCRA. At the public hearing, the Department of Consumer and Regulatory Affairs indicated its agreement with a motion to dismiss the appeal submitted by the ground lessee of the subject property.

Ground Lessee. The ground lessee, DAG Realty LLC, submitted a motion to dismiss the appeal because (i) it was “not timely filed, and therefore the Board does not have jurisdiction”; (ii) the issues raised in the appeal were already decided by the Board in Appeal No. 18439, “and therefore under the doctrine of administrative collateral estoppel, a subsequent appeal about the same matter should be dismissed”; and (iii) “it is plain that the arguments set forth in the Appeal are without merit and should be summarily dismissed.” With regard to the lack of timeliness, the ground lessee asserted that the arguments raised by the Appellant all related to issues determined in a prior building permit, No. B1107494, which was issued on May 4, 2012, and the appeal was not submitted until November 14, 2012, past the 60-day deadline for a timely appeal.

ANC Report. By letter dated November 13, 2012, ANC 6A indicated that, at a properly noticed meeting on November 8, 2012, with a quorum present, the ANC voted 6-0-0 to appeal the ZA’s decision to issue Building Permit #B1209455. The letter states that the permit “was incorrectly issued for a C-3-A zone, while the correct zoning is HS-A/C-2-A,” and the plans approved in

¹ This order, issued January 26, 2010, granted, subject to conditions, an application for special exception approval of a gasoline service station and convenience store at the subject property.

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conjunction with the permit did not comply with the design requirements of the HS-A/C-2-A zone. The ANC requested that the Board order the revocation of Building Permit #B1209455.

By letter dated February 3, 2013, the chairman of ANC 6A indicated that the ANC “has decided not to appear in its appeal of building permit #B1209455” but that the ANC did not “withdraw from the appeal.” The letter reiterated the ANC’s belief “that the Zoning Administrator erred in this case....” ANC 6A did not appear at the public hearing on this appeal.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 1400 Maryland Avenue, N.E. (Square 1049, Lots 21 and 803).² The subject property was formerly zoned C-3-A but was rezoned to HS-A/C-2-A by Zoning Commission Order No. 10-19, effective December 9, 2011.
2. By order issued January 26, 2010 (i.e. before the property was rezoned) in Application No. 17825, the Board granted a request by 1400 Maryland Avenue, Ltd. Empire Leasing for a special exception to establish a gasoline service station and convenience store at the subject property, subject to 12 conditions. The order indicates that, because a convenience store is a matter-of-right use in the C-3 District, the sole focus of the Board’s decision was the gasoline service station use.
3. Building Permit No. B1107494 (the “May permit”) was issued to 1400 Maryland Avenue Ltd on May 4, 2012 for the “Renovation Alteration and Repair for Existing Vehicle Fuel Service Station with BZA Order #17825 Special Exception Granted on 01/26/2010 Pursuant to 2 Exhibits No 60 & 66A with 12 Conditions.”
4. On July 2, 2012, ANC 6A filed an appeal of the May permit on the ground that DCRA had erred in issuing a building permit even though one of the conditions of approval in Application No. 17825 had not been satisfied, a violation of § 3205.3 of the Zoning Regulations. However, by letter dated October 12, 2012, the ANC withdrew its appeal as moot. (*See* Appeal No. 18438.)
5. The May permit was also appealed by Valor 1350 Maryland, LLC, the owner of a parcel across 14th Street from the subject property. As finally amended, the appeal challenged the decision of DCRA to issue a building permit before the subdivision of the lots comprising the subject property into a single record lot had been completed.³ ANC 6A submitted a letter

² The ground lessee indicates that “Lots 803 and 21 were combined to create Lot 36 by Subdivision Plat recorded ... on January 10, 2013.

³ In Appeal No. 18439, the appellant, Valor 1350 Maryland, LLC, submitted a motion seeking to amend the appeal to include Building Permit No. B1209455, but withdrew that motion at the public hearing. Thus, Appeal No. 18439 concerned only Building Permit No. B1107494, which ultimately was not challenged on any ground other than the timing of the issuance of the permit relative to the recordation of the subdivision.

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into the record in support of the Appellant's arguments. That appeal was denied by the Board. (*See* Appeal No. 18439, order denying appeal issued the same date as the instant order.)

6. Building Permit No. B1209455 (the "November permit") was issued to 1400 Maryland Avenue Ltd on November 1, 2012 for "Grocery Store to be Added to Existing Vehicle Service Station Under Separate Building Permit No. B1107494. Originally the 1 Story Store was Part of the Previous Application, and Was Removed to Become This Permit." The permit was issued for Lot 803 in Square 1049, zoned C-3-A. The permit type was "alteration and repair." The existing and proposed uses were both shown as "Gas Station with minimart."

CONCLUSIONS OF LAW AND OPINION

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) (2008 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) (2008 Repl.). *See also* 11 DCMR § 3200.2.

Pursuant to § 3112.2 of the Zoning Regulations, an appeal must be filed within 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." (11 DCMR § 3112.2(a).) The Board may extend the 60-day deadline for the filing of an appeal only if the appellant demonstrates that (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 would not prejudice the parties to the appeal.... (11 DCMR § 3112.2(d).)

In this case, the ground lessee submitted a motion to dismiss the appeal as untimely, which the Board must consider before ruling on the merits of an appeal. *See Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008). 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, 434-35 (D.C. 2008); *Waste Mgmt. of Md., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121 (D.C. 2001); *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994).

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The Board concludes that the ANC's appeal of the November permit is untimely because, as noted by the ground lessee, the argument raised by the Appellant in this appeal related to an issue determined in the prior building permit, which was issued on May 4, 2012, and the appeal was not submitted until November 14, 2012, past the 60-day deadline for a timely appeal. The project at the subject property was authorized by the initial May permit, and the subsequent November permit did not create a new zoning decision with respect to the zoning category of the subject property, the ground on which the ANC challenges the November permit. Ordinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure and its intended use, as described in the permit application, conform to the zoning regulations. *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008). As with a letter issued by a zoning official after a permit has been issued or a certificate of occupancy, a subsequent building permit cannot be appealed unless it contains a new decision. *See Appeal No. 17915 (Bolduc)*, 56 DCR 9698 (2009), citing *Appeal No. 16982 (Herron and ANC 3F)*, 52 DCR 3904 (2005), *Appeal No. 17411 (Basken and Meyer)*, 53 DCR 2495, *affirmed, Basken*, 946 A.2d at 362 (D.C. 2008); *Appeal No. 17830 (Cooper)*, 56 DCR 3737 (2009).

The May permit and the November permit, which specifically mentions the May permit, were obtained to carry out the project approved by the Board in Application No. 17825, a proceeding in which ANC 6A was automatically a party. The ANC had actual knowledge of the May permit within 60 days of its issuance: the ANC's appeal of the May permit was filed July 2, 2012 (No. 18438), and ANC 6A submitted a letter into the record of another appeal of the same permit (No. 18439). The ANC has not alleged any exceptional circumstances that would warrant an extension of the 60-day deadline, or shown that an extension of time would not prejudice the other parties to this appeal. Nor has the ANC shown that the November permit reflected a new zoning decision, or that it is unusual for DCRA to issue more than one building permit for a project such as that undertaken at the subject property.

ANC 6A suggests that the November permit addressed a grocery store use while the May permit concerned a gasoline station. As previously noted, the construction at the subject property arose from Application No. 17825, a request for special exception approval of a gasoline service station and convenience store at the subject property; the Board's consideration of the application focused solely on the gasoline service station use because the planned grocery store was a matter-of-right use in the C-3 District, which was then applied to the subject property. The ANC has known the nature of the project since its participation in that proceeding, when the Board approved plans for the development in its order granting the requested special exception. The same plans formed the basis for approval of the May permit by DCRA, and did not change prior to the issuance of the November permit. The Board finds no reason to consider that the grocery store component somehow represents a new zoning decision that would make the November permit separately appealable.

Because the Board concurs with the ground lessee that the appeal is untimely, there is no need to address the other grounds asserted by the ground lessee in its motion to dismiss the appeal.

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The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001).) In this case, ANC 6A is also the appellant, and, as discussed above, the Board concludes that it lacks jurisdiction to consider the issues and concerns raised by the ANC in this appeal due to its lack of timeliness. *See Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C. 1993) (“great weight” requirement applies to an ANC’s issues and concerns that are legally relevant).

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not submitted a timely appeal with respect to the claim of error in the issuance of Building Permit No. B1209455 for construction at 1400 Maryland Avenue, N.E. (Square 1049, Lots 21 and 803). Accordingly, it is therefore **ORDERED** that the appeal is **DISMISSED**.

VOTE: **5-0-0** (Lloyd J. Jordan, Nicole C. Sorg, S. Kathryn Allen, Jeffrey L. Hinkle, and Robert E. Miller voting to dismiss the appeal)

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

A majority of Board members approved the issuance of this order.

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: June 19, 2013

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.