

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 19049 of Caesar Junker, et. al., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit B11400387 allowing the expansion of the upper portion of an existing building on the C-2-A portion of the property located at 1351 Wisconsin Avenue, N.W., where the property is split-zoned (existing building front two-thirds C-2-A zone/carriage house rear third R-3 zone) (Square 1243, Lot 811).

HEARING DATE: July 21, 2015
DECISION DATE: July 21, 2015

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the “Board”) on May 7, 2015, challenging DCRA’s decision to approve a building permit (the “permit”) on December 10, 2014 allowing various interior and exterior renovations at the subject property. The property owner to whom the permit was issued, 1351 LLC, (the “Owner”) moved to dismiss the appeal, and DCRA filed a similar motion. The Board conducted a public hearing, at which time it heard from the Owner, from DCRA, and from the Appellant. After consideration of the written submissions and arguments from the parties, the Board found that the appeal was untimely filed. As a result, it granted the motion to dismiss. 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 hearing on July 21, 2015. 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”) 2E (the ANC in which the subject property is located), the Owner, and DCRA.

Parties

The Appellants in this case are four individuals who live in close proximity to the property, Caesar Junker, Christian Mulder, Bill Gallagher, and Tom Adams. Mr. Junker was the

BZA APPLICATION NO. 19049

PAGE NO. 2

spokesman for the group.¹ The Appellants will be referred to collectively as Mr. Junker or the Appellant.

The property is owned by 1351 LLC, who is an automatic party to the appeal pursuant to 11 DCMR §3199.1(a)(3). The Owner was represented by the law firm of Sullivan & Barros, LLP, Martin Sullivan, Esq. (Ex. 21.)

DCRA appeared during the proceedings and was represented by Assistant General Counsel Maximilian Tondro, Esq.

ANC 2E, as the affected ANC, was automatically a party in this Appeal. However, the ANC did not submit a report or take a position regarding the appeal.² Nor did it participate in the proceedings.

Motion to Dismiss

The Owner and DCRA each filed a motion to dismiss prior to the hearing scheduled on July 21, 2015. (Exs. 22 and 23). In addition to considering the written submissions, the Board heard argument from each of the parties.

FINDINGS OF FACT

The Property

1. The subject property is improved with a building known as the Georgetown Movie Theater (the “building”), as well as a carriage house at the rear of the property (the “carriage house”).
2. The property is split zoned. The front portion of the property on which the building is located is in the C-2-A zone. The rear portion of the property on which the carriage house is located is in the R-3 zone.

Communications between the Parties

3. Sometime during 2014, the Owner developed plans to convert the building used as a theater to a mixed use building with four residential units, and to convert the carriage

¹ The Appeal forms list Mr. Junker, Mr. Mulder and Mr. Adams, but do not list Mr. Gallagher. (Exs. 1 and 2). However, at the public hearing, Mr. Junker stated there were four individuals prosecuting this appeal, and Mr. Gallagher identified himself as one of the four (Tr., July 21, 2015, p.30).

² In 2014, the ANC submitted a report to the Board opposing a request for zoning relief at this property (Ex. 5), but the zoning application was ultimately withdrawn (BZA Application No. 18884). The work covered by the permit in this appeal differs from what was proposed in the BZA application. The BZA application requested special exception and variance relief to connect the rear carriage house in the R-3 zone portion to the principal structure in the C-2-A portion of the property. The permit at issue here approved – as a matter-of-right -- the expansion of the upper portion of the principal structure.

house into a home office use. These plans were submitted to DCRA in connection with an application for a building permit.

4. Appellants knew about the permit application and associated plans during the DCRA review process, as evidenced by the following:
 - a. On or about May 5, 2014, a land use attorney retained by the Appellant e-mailed the Owner requesting a meeting, stating that her clients wished to discuss various claimed zoning violations that had been identified with the permit plans. (Ex .22, Tab A).
 - b. Also on or about May 5, 2014, Appellants themselves sent an e-mail to the Deputy Zoning Administrator (“ZA”) at DCRA who was reviewing the permit application. This e-mail explained why the Appellants believed the permit plans did not comply with the Zoning Regulations. For example, the e-mail stated that the Owner’s FAR³ calculations were incorrect and that the proposed project resulted in an FAR that exceeded the maximum allowable FAR of 2.5. (Exs. 6 and 24.)
 - c. The email from Appellants dated May 5, 2014 included a screenshot of the DCRA Permit Tracking system at that point in time.
 - d. During May, June, and July of 2014, Appellant sent “four letters and emails to DCRA advising the ZA that the permit under consideration was not a matter of right”. Appellant was represented by counsel during that period. (Tr., p. 39.)
5. The Board accepts DCRA’s assertion that the ZA posted its approval of the permit application to the Permit Tracking System on October 23, 2014. (Ex. 23.)
6. There is no evidence demonstrating that the Appellants knew the ZA had posted its approval on October 23, 2014.

The Building Permit

7. The Owner obtained Building Permit No. B1400387 on or about December 10, 2014, authorizing the proposed conversion and allowing, among other things, interior renovations at the building, raising the building ceilings to the height of the front façade, and extending the existing roof to the rear of the building. (Ex. 11.)
8. No material changes were made to the permit plans after the permit was issued.
9. Construction under the permit took place immediately after the permit was issued.
10. The Board finds that the building was under roof by April 16, 2015. The Owner testified

³ “FAR” stands for the “floor area ratio”, a figure that expresses the total gross floor area as a multiple of the area of the lot”. (§199.1 Definitions.)

that the converted building was under roof by April 16, 2015, and that fact was not rebutted by the Appellant.

Events Leading to the Filing of the Appeal

11. The Appellant asserts that the instant permit was part of a complex set of permits that was “ambiguous and confusing” to the neighbors. (Ex. 3.)
12. The Appellant asserts that the FAR calculations were only clarified by the issuance of a memorandum from the ZA to the District Office of Planning (“OP”) that was dated April 10, 2015. This memorandum (the “ZA memo”) concerned the subject property but was written in connection with the Owner’s request for zoning relief in Application No. 18884. The ZA memo is Exhibit 4 in the record of this appeal.
13. Among other things, the ZA memo explains the FAR calculations that were provided by the Owner to the ZA in connection with his proposed plans, and explains how the ZA calculated FAR.
14. The Appellant testified that the project was “over-built” and that the alleged FAR violations are the basis of this appeal. (Hearing Transcript of July 21, 2015, “Tr.,” p. 41.)
15. The Appellant testified that he took issue with the permit “both before the permit was issued and after the permit was issued”. (Tr., p. 47.)

The Instant Appeal

16. The Appellant filed this appeal on May 7, 2015, almost five months after the building permit was issued and approximately 21 days after the building was under roof.

CONCLUSIONS OF LAW

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 conversion or alteration of a structure, the appeal must be filed no later than ten days after the date on which the structure is under roof.

Although the Board has concluded that this rule is not jurisdictional and therefore failure to raise a timeliness argument during the pendency of an appeal bars its consideration before the Court of Appeals or in a subsequent remand, *see Appeal No. 18031-C of West End Citizens Association (2014), affirmed on other grounds, W. End Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 112 A.3d 900, 903 (D.C. 2015), if a timeliness argument is raised during an appeal, the Board must dismiss the case if the 60-day timeframe is not met, unless the time is extended for the reasons discussed later in this order. As will be explained, the appeal was untimely filed and no circumstances exist to allow its late filing.

The appeal in this case relates to DCRA's issuance of the building permit. Ordinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure and its use conform to the Zoning Regulations. *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (2008), citing, *Schonberger v. District of Columbia Bd. of Zoning Adjustment*, 940 A.2d 159 (2008).

As stated in the Findings of Fact, the building permit was issued on December 10, 2015. In their filings, both DCRA and the Owner argue that Appellant had knowledge of the relevant zoning decision even before the permit was issued, on October 23, 2014, when the ZA posted his approval to the Permit Tracking System. However, during argument at the public hearing, the Owner altered its position, stating through counsel that the appeal period was triggered by the issuance of the building permit, not by the earlier ZA posting. (Tr., p. 34.)

Because DCRA maintained its original position, the Board will address whether the ZA's posting on October 23, 2014 was the first appealable notice of a zoning decision. As DCRA notes, the Board has found that "pre-permit" decisions may be the first instance of a zoning decision in certain cases and may trigger the appeal period if there was notice of the pre-permit decision. (See, for instance, *Appeal No. 18300 of Lawrence M. and Kathleen Ausubel* (2011) (Pre-permit email from ZA to Appellant constituted notice of zoning determination); *Appeal No. 18469 of Susan L. Lynch* (2013) (ZA posting on Permit Tracking System constituted notice of zoning determination where Appellant acknowledged knowledge of the zoning approval).

However, in this case no conclusive evidence was presented showing that the Appellant had notice and knowledge of the ZA's posting. DCRA maintains that Appellant knew about the Permit Tracking System, as evidenced by Appellant's email showing a "screenshot" of the System. (Finding of Fact 4(c).) However, while the Appellant may have been familiar with the Permit Tracking system, there is no evidence that Appellant knew of the ZA's actual determination or posting on October 23, 2014.

The Board accepts Appellant's assertion that it first learned of the final zoning decision when the permit was issued. Accordingly, the 60 day appeal period runs from that date, December 10, 2014. Appellant concedes that the appeal was not filed within the 60 day time period that began on that date. However, Appellant urges the Board to extend its time to file pursuant to § 3112.2(d). This provision allows for an extension of the 60 day time limit only if the appellant shows that: (1) there were exceptional circumstances outside of the appellant's control that substantially impaired its ability to file its appeal; and (2) the extension of time will not prejudice other parties to the appeal.

Here, the Board sees no exceptional circumstances that prevented Appellant from filing a timely appeal. There is nothing ambiguous about the building permit. Once the Appellant had knowledge of its issuance, the rule gave it 60 days within which to determine whether grounds existed to challenge its issuance. In fact, the Appellant had come to believe even before permit issuance that the project would exceed the permitted FAR. The Appellant complained about the alleged FAR violations for nearly a year before the appeal was filed, both in his email to DCRA

and in the email to the Owner from Appellant's retained zoning counsel. (Finding of Fact 4(a) and (b).) The Appellant also testified that he continued to complain to DCRA after the permit was issued in December, 2014, yet waited until May, 2015 to file the appeal. Even assuming as Appellant states, that the permit was part of a set of "complex" permits, the scope of work should have been obvious once the converted building was under roof and even then Appellant waited 21 days to file the appeal.

Moreover, the ZA memo that Appellant cites as an "exceptional circumstance" contained no new information. It was merely a clarification of the same zoning issues, such as FAR, that had been raised in the past. Even if the ZA memo gave Appellant some additional insight into the zoning issues, it in no way impaired Appellant from filing its appeal earlier. Given Appellant's one year scrutiny of the issues, the Board concludes that nothing prevented Appellant from filing his appeal as soon as he learned of the permit decision.

Additionally, the Board cannot justify extending Appellant's time to appeal because there is no doubt that the Owner would be prejudiced. The Owner asserts that he undertook "significant and sensitive construction, historic in nature and difficult to execute". (Ex. 22.) Therefore, it would be inequitable to extend the appeal period under these circumstances.

Thus, for reasons discussed above, the Board hereby **GRANTS** the **Motions to Dismiss** the appeal as untimely.

Vote taken on July 21, 2015.

VOTE: 4-0-1 (Lloyd J. Jordan, Marnique Y. Heath, Jeffrey L. Hinkle, and Robert E. Miller to Grant the motion to dismiss; Frederick L. Hill not voting, being necessarily absent.)

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: January 15 2016

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