

MEMORANDUM

To: Burlington Development Review Board

From: Alan Bjerke, Esq.
President, Champlain Heights Condominium Association

Date: July 27, 2020

Re: 20-0914CA/AP 4-8 Strong St

APPLICANT’S OPPOSITION TO REQUEST TO FILE APPEAL OUT OF TIME

The Champlain Heights Condominium Association opposes the request by Melissa Aloisi to be permitted to file an appeal after the expiration of the appeal period and the final permit had been issued, all for the reason’s more particularly described below.

LEGAL STANDARD OF REVIEW

A request to file an appeal after the time for appeal has passed is a matter that has been addressed by the Vermont Courts. In order to obtain permission to file out of time, the person requesting permission must establish that the failure to file in time resulted from either “good cause” or “excusable neglect.” “Good cause refers to situations in which there is no fault on the movant's part-e.g., failure of the Postal Service to deliver the notice of appeal. Excusable neglect assumes fault on the part of the movant. In recent decisions, the Vermont Supreme Court has followed the lead of a number of federal courts of appeal in applying the excusable neglect standard very strictly . . .” Vt. R. App. 4 (2006 Reporter’s Notes)

Many federal courts have taken what we think is an appropriately hard line when it comes to determining when neglect that stems from factors totally within the control of a party or its attorney is “excusable.” United States v. Hooper, 43 F.3d 26, 28–29 (2d Cir.1994) (per curiam) (affirming denial of Rule 4(b) extension where delay resulted from legal assistant's ignorance of the rules); see also Gibbons v. United States, 317 F.3d 852, 855 (8th Cir.2003) (affirming denial of extension where solo practitioner failed to timely file because of vacation followed by temporary illness); Graphic Communications, 270 F.3d at 8 (affirming **denial of extension because late filing was result of ignorance of the law and “inattention to detail”**); Canfield, 127 F.3d at 250 (affirming denial of extension when attorney's late filing was a result of his personal involvement in other business); Jin v. Metropolitan Life Ins. Co., 2003 WL 21436211 (S.D.N.Y. June 20, 2003) (denying extension because neglect occasioned by changes in attorney's office personnel and location was not “excusable”). Notwithstanding the flexibility of the “excusable neglect” concept, its application to cases like the instant one must remain strict lest there be a de facto enlargement of the

appeal-filing time to sixty days.

In re: Town of Killington, 2003 VT 87A, ¶ 17 (emphasis added)

The relevant portion of the Burlington Zoning Ordinance states as follows:

Sec. 12.2.5 Finality

Upon the failure of any interested person to appeal to the DRB or to the environmental court, all interested persons affected shall be bound by such decision or act of such administrative officer, such provisions or such decisions of the DRB, as the case may be, and shall not thereafter contest, either directly or indirectly, such decision or act, such provision, or such decision in any proceeding, including without limitation, any proceeding brought to enforce this ordinance.

FACTUAL BACKGROUND

The Champlain Heights Condominium Association is made up of four condominiums at 4 - 8 Strong St in Burlington. Melissa Aloisi and Erica Giannone own and reside in the single family residence abutting the Condominium to the east. They also “manage” the condominium unit at 4 Strong St, for the owners who reside out of state. In mid-December, 2019, the Association members exchanged a series of e-mail communications discussing the desire to refresh and re-establish the driveway between 8 and 14 Strong St. In response to those communications the owners of 14 Strong St spoke to me as the President of the Condominium Association to express their concerns about the proposal. I advised them that if and when a proposal was finalized, I would approach them to discuss it prior to filing for a permit.

Shortly after the Association voted to move forward with the permit application, on Monday morning, May 18, 2020, I dropped off the draft permit application to 14 Strong St. The owners were home and met me, but did not wish to go over the proposal at that time. I checked back with them over the next few days to inquire and follow up. Their response to me was that they had not even looked at the materials I dropped off to them. After a week had passed, the application was filed. Ms. Aloisi later spoke to me and indicated that she had no issue with the application, just that she wanted me to know her opinion of the location of the property line.

Once the permit application was filed, I followed its progress on the City of Burlington’s website, where under the Zoning Division’s webpage there is a street sorted list of pending and recently approved permits. The status listing includes the actual permit number and status. I checked the listing often and found that the information listed for our permit application was properly displayed.

The Permit was approved May 29, 2020. On Monday June 15, 2020, no appeal having been filed, I obtained the final approved permit and began laying out the markings for digsafe. Ms. Aloisi asked me about the markings and commented that she had meant to look at the approved permit but hadn’t.

As can be seen from the materials filled by Ms. Aloisi, from the date the permit application was filed, until after the final permit had been issued - - the only step taken by her, or anyone on her behalf to become informed about the permit that issued was to leave one voicemail in a general mailbox asking about a permit for an address that was not the same as the one listed on the application that had been given to her in advance, nor the same as was listed on the "Red Z" notice which was posted in a ground floor window facing her house. While the request for her appeal out of time goes into great detail about the communications she exchanged after the final permit had issued, those exchanges all occurred after the final permit had already been issued.

Ms. Aloisi is more familiar than most residents in the City with Burlington's Zoning Division and its permitting process. She is a licenced architect who practices regularly before the Development Review Board and is a former member of the DRB. In addition, I saw and spoke with her and Ms. Giannone nearly every day from the day the application was approved until it was final and issued, often several times a day. Had she asked me about the permit I would have told her what I understood to be the details of the approval - But neither Ms. Giannone, nor Ms. Aloisi ever inquired or expressed any difficulty reviewing the approved permit.

CONCLUSION

Ms. Aloisi does not claim that her failure to file an appeal on time resulted from good cause or anyone's fault but her own. Instead, she urges that she should be allowed to appeal out of time for excusable neglect. But her neglect is not excusable by Vermont's legal standards. Her basis for neglecting to file is clearly in line with the Graphic Communications, case cited by the Vermont Supreme Court in the *Killington* case above. She was not sufficiently diligent in investigating the matter and even if she was given some conflicting advice of the appeal deadline, ignorance of the law is no excuse. Her appeal was filed on Wednesday June 17, 2020 - days after even the later appeal deadline (4 PM Monday) which she now argues should have been the correct deadline.

Pursuant to Section 12.2.5 of the Burlington Zoning Ordinance, the Permit in this matter has become final when it was not appealed by the deadline and had been issued by the Administrative Officer. Ms Aloisi has not established facts that demonstrate that she acted diligently or paid sufficient attention to the details of the permit as issued to know whether she wanted to appeal it or not - - despite being provided an advance copy of the application, her personal and professional familiarity with the Burlington Zoning Division and its online resources which are available 24 hours a day, 7 days a week whether the office is open or closed. One telephone message left in a general mailbox asking about a permit at the wrong address is not sufficient diligence. As demonstrated by her several e-mail exchanges on June 15 and 16, the City responded promptly when contacted by e-mail addresses known to Ms. Aloisi. Champlain Heights had already commenced work as authorized by the permit before any request for an appeal was filed and would be unfairly prejudiced by allowing an appeal of the final permit after work had already commenced.