

NOT DESIGNATED FOR PUBLICATION

**PLATYPUS MANAGEMENT,
INC., TRACY WILLIAMS AND
DAVID TAFFET**

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NO. 2013-CA-0657

VERSUS

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COURT OF APPEAL

**BOARD OF ZONING
ADJUSTMENTS FOR THE
CITY OF NEW ORLEANS,
AND THE CITY OF NEW
ORLEANS**

*

FOURTH CIRCUIT

STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-00572, DIVISION "A"
Honorable Tiffany G. Chase, Judge**

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Edwin A. Lombard,
Judge Joy Cossich Lobrano)

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NOVEMBER 20, 2013

REVERSED AND REMANDED

The defendant, The City of New Orleans, through its Board of Zoning Adjustments, appeals from a district court judgment, which granted plaintiffs/appellees' exception of prescription and dismissed an appeal filed by homeowner, Stephen Kennedy, to the Board of Zoning Adjustments. For the following reasons, we reverse the December 18, 2012 judgment of the district court.

FACTS

Platypus Management, Inc. ("Platypus") is the owner of the immovable property and the improvements at 1425 N. Prieur Street ("the property"). On February 28, 2011, Tracy Williams, in her official capacity and on behalf of Platypus, submitted a building permit application for the property to the Department of Safety and Permits for the City of New Orleans. On March 1, 2011, the Department of Safety and Permits issued Building Permit 11BLD-01854. The permit allowed "general renovations to existing single-family dwelling and existing pool house." Thereafter, in March and April of 2011, the Department of Safety and Permits received complaints from Williams' neighbors, Stephen and Glenda Kennedy, that plaintiffs were not renovating the existing single-story pool

house but rather building a new two-story pool house in violation of the permit. At that time, the Department of Safety and Permits issued a Stop Work Order on construction of the pool house. Ms. Williams then applied for a supplemental building permit and on July 14, 2011 received the building permit 11BLD-05205, for “renovation (non-structural)” work.

On September 29, 2011, the Department of Safety and Permits issued another Stop Work Order for the pool house. On October 4, 2011, Ms. Williams received a letter from Chief Building Inspector Johnny Odom advising of an apparent violation of the Comprehensive Zoning Ordinance. Specifically, the letter cited the following zoning violations:

(1)Allowing and or permitting an accessory structure to be constructed in the required rear yard within 3 feet of the rear property line is a violation of the City of New Orleans Zoning Code Ordinance 4264 Section 15.5.12 //2.

(2)Allowing and or permitting an accessory structure to be constructed in excess of the maximum permitted height of 14 feet. This is a violation of The City of New Orleans Zoning Code Ordinance 4264 Section 15.5.12//4.

On October 5, 2011, Mr. Odom sent a letter to Ms. Williams advising of an apparent violation of the Building Code for the City of New Orleans regarding the work being done on the property. The letter cited the following building code violations:

(1)An exterior wall constructed within 3 feet of a property line must have a 1 Hour Fire-Resistance Rating. The exterior wall of the accessory structure being constructed along the rear property line does not meet this requirement. This is a violation of The New Orleans Building Code Ordinance 22938 Section R 302 Table R302.1.

(2)Openings in the exterior wall within 3 feet of the property line are not permitted. The exterior wall of the

accessory structure being constructed has openings which are not permitted. This is a violation of the New Orleans Building Code Ordinance 22938 Section 302 Table R302.1

In response to the violation letters and the Stop Work Order, Ms. Williams met with Pura Bascos, the Director of the Department of Safety and Permits, Ann Duplessis, the Deputy Chief Administrative Officer for the City of New Orleans, and Mr. Odom on October 6, 2011. On October 10, 2011, the Department of Safety and Permits sent a letter to Ms. Williams informing her of its decision to rescind the violation letters and Stop Work Order and to allow construction to continue. Specifically, the letter stated that after “we all reviewed the documentation supporting your claim that work on the rear Pool House structure should not be considered a new building but a repair of a Historical Building on this lot” and that “we were all in agreement that this is not a new structure but a renovation of an old one.”

On November 7, 2011, Mr. Kennedy filed an appeal with the Board of Zoning Adjustments. In his letter requesting an appeal, Mr. Kennedy stated as follows:

This letter is to request an appeal in regard to the decision made by Safety and Permits to rescind violation letters and stop work orders on the newly constructed two story building which was a one story shed in rear of 1425 N. Prieur Street, which is built on our property line. This building is a projection beyond the boundaries of her estate onto our property according to Civil Code Article 663, which is stated in Louisiana Civil Code. We are also appealing because we did not have the opportunity to present our facts before the decision to issue a permit was made, which allowed construction to continue on this new two story building which replaced a one story shed that was torn down. We appreciate you considering our appeal application. This will afford us the opportunity to present our facts in appealing the decision made by Safety and Permits to rescind violation letters,

stop work orders and the decision made to issue a permit in error for the newly constructed building in rear of 1425 N. Prieur St. which is on our property line.

On December 12, 2011, the Board of Zoning Adjustments unanimously voted to grant Mr. Kennedy's appeal and ruled in favor of Mr. Kennedy. Specifically, the written judgment of the Board of Zoning Adjustments states, in pertinent part:

This is an appeal of the decision of the Director of the Department of Safety and Permits regarding the issuance of a building permit for a two-story accessory structure...[t]he Board is of the opinion that the weight of the evidence indicates that the Standards for Appeals of Administrative Decisions of Article 14, Section 14.5 have been met and therefore, a motion was made ...to the [sic] GRANT the appeal and overturn the Decision of the Department of Safety and Permits.

On January 19, 2012, plaintiffs filed a verified petition for appeal to district court/writ of certiorari and judicial review. On October 29, 2012, plaintiffs filed an exception of prescription arguing that the Board of Zoning Adjustments incorrectly granted Mr. Kennedy's appeal because the Kennedy's appeal alleges error in the issuance of a building permit and should have been filed within forty-five (45) days of the issuance of the permits, which had been issued on March 1, 2011 and July 14, 2011. The district court granted plaintiffs' exception of prescription on December 18, 2012. The City of New Orleans, through its Board of Zoning Adjustments, now appeals this final judgment.

STANDARD OF REVIEW

Generally, the district court's factual findings on a peremptory exception raising the objection of prescription are reviewed on appeal under the manifest error-clearly wrong standard of review. *Specialized Loan Servicing, LLC v. January*, 12-2668, p. 3-4 (La. 6/28/13), 119 So.3d 582, 584. However, in this case,

the issue of whether the action was prescribed involves the proper application and interpretation of La. R.S. 33:4727 (C) and the City Zoning Ordinance Section 14.5.4. The proper application and interpretation of a statute is a question of law. *Southern Yacht Club v. Zeno*, 12-1309, p. 4 (La. App. 4 Cir. 3/27/13), 112 So.3d 942, 944. Therefore, on review, this court must determine whether the district court was legally correct or legally incorrect in determining that Mr. Kennedy's appeal to the Board of Zoning Adjustments was untimely.

DISCUSSION

On appeal, The City of New Orleans, through its Board of Zoning Adjustments, argues that the October 10, 2011 decision of the Department of Safety and Permits to rescind the Stop Work Order and allow structural renovations to continue on the pool house provided the Kennedys with forty five days from that date to file an appeal and that the November 7, 2011 appeal to the Board of Zoning Adjustments was timely. Contrarily, Plaintiffs argue that the last action taken by the Department of Safety and Permits was the issuance of the two building permits on March 1, 2011 and July 14, 2011, and that the Kennedys failed to file an appeal within the mandatory forty-five period following the issuance of the permits.

The issue before this Court is whether the letter, sent by Mr. Odom, on behalf of the Department of Safety and Permits, stating its decision to rescind the plaintiffs' Stop Work Order constitutes an appealable "decision" under Section 14.5.4 of the City Zoning Ordinance. Section 14.5.4 of the City Zoning Ordinance states as follows:

An appeal may be considered within a reasonable time, but in no event shall an appeal be allowed after the expiration of forty-five (45) days from the date of refusal

of a permit, or from the date of an order, ruling, decision, or determination, by the Director of the Department of Safety and Permits. Appeals taken after forty-five (45) days from the date aforesaid shall neither be docketed nor considered by the Board; rather, the Board's staff shall notify the appellant that the appeal is untimely, shall not be considered by the Board, and is, accordingly, dismissed. Timely appeals may be taken by filing, with the Board, a notice of appeal specifying the grounds therefor, in accordance with Section 14.9. Notice and a public hearing shall be provided as specified in Section 14.9. The Director of the Department of Safety and Permits shall produce all papers, correspondence, and records requested by the Board of Zoning Adjustment for any hearing or meeting held by the Board. The Board of Zoning Adjustments shall decide on the appeal within forty-five (45) days following the hearing date.
(Emphasis Added)

La. R.S. 33:4727 C(2)(a) provides:

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Appeals shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken, and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken, after all transcript costs and all other costs of appeal are paid by the person or entity taking the appeal, the appellant.

In its oral reasons for granting the exception of prescription, the district court relied upon *Abaunza v. Roussou*, 339 So.2d 524 (La. App. 4 Cir. 1976), where this Court declared that plaintiffs seeking an injunction were relegated to the forty-five day prescriptive appeal period under the Board of Zoning Adjustments rules. However, *Abaunza* is not on point because in that case, the Department of Safety and Permits merely issued the permit and did not make any subsequent decisions regarding the permit. Thus, in *Abaunza*, the issuance of the permit was the only

conceivable trigger for the 45-day appeal deadline whereas, in this case, the Department of Safety and Permits rendered a subsequent decision to rescind the Stop Work Orders after issuing the permits.

We have been unable to find any jurisprudence that limits Section 14.5.4 of the City Zoning Ordinance “order, ruling, decision or determination” to the issuance of a permit. Further, we find merit in the City of New Orleans’ argument that the legislators clearly intended to expand the basis of an appeal, beyond the initial issuance of a permit, by including the language “or from the date of an order, ruling, decision, or determination.” Accordingly, because Mr. Kennedy specifically stated on his appeal application that he was appealing the “decision [on October 10, 2011] to rescind violations letters” and “stop work orders,” and because Section 14.5.4 of the City Zoning Ordinance allows him forty five days from a “decision...by the Director of the Department of Safety and Permits,” we find that the November 7, 2011 appeal to the Board of Zoning Adjustments was timely.

Accordingly, we find that the district court erred in granting plaintiffs’ exception of prescription and we hereby reverse the judgment of the district court.

REVERSED AND REMANDED