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**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

Appeal of Mehmet Kocak and
Philly Pizza & Grill, Inc.

BZA Appeal No. 18027
Hearing Date: January 12, 2010
ANC 2E

APPELLANT'S OPPOSITION TO NEIGHBORS' MOTION TO INTERVENE

The Appellant, Mehmet Kocak and Philly Pizza & Grill, Inc., by and through undersigned counsel, respectfully submits this Opposition to the Motion For Leave to Intervene¹ by Ms. Lynn Schubert, Ms. Anne Alonzo and Mr. Alex Meeraus (the "Neighbors") in this Amended Appeal, pursuant to 11 DCMR §§ 3100 and 3101, from: 1) the October 14, 2009 Notice to Revoke Certificate of Occupancy No. CO 0800124; and 2) the November 2, 2009 Notice to Revoke Certificate of Occupancy No. CO 0903354, for a Restaurant, by the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), in the C-2-A District at premises 1211 Potomac Street, N.W. (Square 1207, Lot 124) (the "Property").

I. ARGUMENT

A. Introduction

Each of the Neighbors claim to own and occupy property in close proximity to the Appellant's Restaurant and as a result "have a specific right and interest" in this Amended Appeal based solely on "significant negative impact[s]" on them from the Restaurant's lawful operations.

¹ The Neighbors' Motion for Leave to Intervene was filed on December 29, 2009, but only received by Appellant's counsel electronically on Monday, January 4, 2010.

B. Neighbors Have No Specific Right Or Interest

In an Appeal case, the Zoning Regulations impose a higher standard for intervention than in an application for a variance or special exception.² Specifically, 11 DCMR § 3112.15 provides:

At the time of the hearing on the appeal, the Board, in its discretion and for good cause shown, may permit persons **who have a specific right or interest that will be affected by action on the appeal to intervene in the appeal for such general or limited purpose as the Board may specify.**

11 DCMR § 3112.15 (*Emphasis added*).

Despite this higher standard, the Neighbors have not shown any recognizable “specific right or interest that will be affected by action on the Appeal.” Instead, the Neighbors claim only proximity to the Property and negative impacts from the Restaurant’s operations, including noise, litter, late hours and privacy. The only evidence provided by the Neighbors in their Motion to Intervene and their January 8, 2010 Opposition, are a series of photographs of Potomac Street outside the Restaurant. The Neighbors have not provided any photographs or other evidence showing the interior of the Restaurant or other evidence on its actual operations.

The Court of Appeals has narrowly interpreted and applied 11 DCMR § 3112.5 clearly requiring the Board of Zoning Adjustment (“Board”) to deny the Neighbors’ Motion to Intervene. Concerned Citizens of Brentwood, et. al v. District of Columbia Board of Zoning Adjustment, 634 A.2d 1234 (D.C. 1993) (BZA acted arbitrarily and capriciously in not

² By contrast, in 11 DCMR § 3106.2, a person seeking party status in a variance or special exception application must establish only: (4) the environmental, economic, social, or other impacts likely to affect the person and/or person’s property if the zoning relief requested of the Board is approved or denied; and (5) an explanation of how the person’s interests as identified in response to paragraph (4) would likely be more significantly, distinctively, or uniquely affected in character or kind by the proposed zoning relief than those of other persons in the general public.

allowing citizens at hearing to intervene, but that error was harmless.) Specifically, in BZA Appeal No. 15563 (appeal from decision of Zoning Administrator requiring a use variance for a recycling facility in C-M-1 zone), twenty-one neighbors requested intervenor status citing objectionable conditions, including noise, traffic conditions, health hazards and rodents. The Court found that after announcing the correct standard for intervention under § 3112.15, the Board acted unreasonably by arbitrarily and capriciously preventing any of the twenty-one neighbors from presenting their argument(s) in favor of intervention. 634 A.2d, at 1239-1240.

However, the Court immediately determined that the Board's error was harmless, finding that:

The purpose of the hearing was not to decide whether to grant a variance to the applicant but, rather, to determine whether a variance was necessary at all. The applicant's appeal therefore required the **BZA only to resolve a narrow legal question, namely, whether the proposed use was permissible as a matter of right** under applicable zoning regulations for C-M districts. Because this court reviews the BZA's resolution of that legal question essentially *de nova*, we hold that petitioner's exclusion from the case did not infringe their rights in these limited circumstances.

634 A.2d at 1240. (*Emphasis added*).

In the same manner as Concerned Citizens of Brentwood, the Amended Appeal presents a narrow legal issue that can be resolved by the Board without input from the Neighbors. Further, as suggested by the Neighbors, relevant and admissible evidence, if any, can be coordinated and presented through ANC 2E and DCRA without duplication or prejudice. Certainly, under the extremely limited circumstances, the Neighbors in conjunction with ANC 2E, have no reasonable basis for making an one hour presentation, as requested.

Finally, the Neighbors greatly overstate the significance of BZA Appeal No. 16679 of Spring Valley-Wesley Heights Citizen's Association ("SV-WHCA") (June 2005), including

the unique circumstances and history of that case and the limited participation of the immediate neighbors in the appeal. BZA Appeal No. 16679 was the third and final chapter of long running dispute dating back to 1998 involving Mr. Charles Sisson as the property owner of 3020 43rd Street, N.W. In BZA Appeal No. 16405 of Mildred Rodgers Crary (December 1999), affirmed, Sisson v. District of Columbia Board of Zoning Adjustment, et. al, 805 A.2d 964 (D.C. 2002) (Mrs. Crary was also an Intervenor in the Court of Appeals), the Board granted Mrs. Crary's (Mr. Sisson's immediate neighbor) appeal finding that the Zoning Administrator had erred in issuing five building permits to Mr. Sisson in violation of the Wesley Heights Overlay District. In BZA Application No. 16521 (December 2001), Mr. Sisson sought, but was denied after-the-fact variance zoning relief arising from the Board's decision in Appeal No. 16405. Mrs. Crary and George Watson, President of the Wesley Heights Historical Society and principal proponent for the enactment of the Wesley Heights Overlay District, were both granted party status in Application No. 16521. Finally, in Appeal No. 16679, the Board granted the appeal finding that the Zoning Administrator again erred in issuing yet another permit to Mr. Sisson, directly related to and arising out of the decisions in Appeal 16405 and Application 16521. Mrs. Crary, Mr. Watson for the Wesley Historical Society, and the other immediate neighbor, Mr. Stein were allowed to intervene on a limited basis arising from their specific legal interest in the enforcement of the Board's earlier and directly related decisions in Appeal No. 16405 and Application No. 16521.³

³ The undersigned was counsel for Mrs. Crary in BZA Appeal No. 16405 and BZA Application No. 16521 and counsel for SV-WHCA and Mrs. Crary in BZA Appeal No. 16679.

C. Negative Impacts Are Irrelevant to this Appeal and Have Been Excluded by the Board

The negative impacts claimed by the Neighbors are entirely irrelevant to the Amended Appeal pending before the Board. The Amended Appeal is limited to whether the Zoning Administrator erred in issuing the two Notices to Revoke, not whether the Restaurant creates any objectionable conditions or negative impacts. Further, the Board has clearly already determined that whether the Appellant's Restaurant is a good neighbor or creates negative conditions is not relevant, outside the scope of its inquiry and will not be permitted during the January 12, 2010 public hearing. Based on the limited nature of the Amended Appeal and the Board's established evidentiary limitations, there is no basis for the Neighbor's to Intervene.

II. CONCLUSION

For the foregoing reasons, the Neighbor's Motion to Intervene must be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Pre-Hearing Statement was served by electronic mail and by first-class mail, this 11th day of January 2010, upon the following:

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