

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal by ANC 8(E) from an April 1, 2010, decision)
by the Director of DCRA to issue a building permit)
(No. B1002975) for interior renovation of an apartment) BZA No. 18103
building, for Peaceoholics, Inc., in the R-5-A District at)
premises 1300 Congress Street, S.E. (Square 5915, Lot 12))

2010 SEP 28 AM 10:57

NO. OFFICE OF ZONING

**MOTION TO HOLD APPEAL IN ABEYANCE
UNTIL ISSUANCE OF CERTIFICATE OF OCCUPANCY**

Introduction

This motion to hold the above-captioned appeal in abeyance is filed by Brian Townes, Tonette Sivells, and Shayla Edgerton, who have filed a request to appear as a party in support of the above-captioned appeal ("hereinafter referred to as "Requesters") filed by Advisory Neighborhood Commission ("ANC") 8E of building permit (No. B1002975) issued to Peaceoholics, Inc., to renovate an "apartment building" at 1300 Congress Street, S.E. Requesters believe that the zoning error about which the appeal is concerned -- a determination by the Zoning Administrator that the use of the building will be a Community Based Residential Facility ("CBRF") -- will not occur -- if it occurs at all --- until Peaceoholics applies for a certificate of occupancy ("C of O"). Indeed, when reviewing Peaceaholic's application for a C of O, the Zoning Administrator may ultimately determine that the Peaceoholics' use is a CBRF and deny the C of O, or Peaceoholics may simply apply for a special exception, as Requesters believe it is required to do. In either case, since it is possible that the zoning error about which this appeal is concerned may never occur, this appeal is not ripe for review, and should be held in abeyance until such time as a C of O is issued.

Discussion

Given the widespread public knowledge of Peaceoholic's intended use of the building as a CBRF, the ANC prudently filed the instant appeal of a building permit issued to renovate an "apartment building," notwithstanding the absence of any certificate of occupancy or zoning review pertinent to Peaceoholics' intended use of the property. The ANC 8E's decision not to await the issuance of a certificate of occupancy to raise this issue was necessary, given the draconian consequences of awaiting issuance of a C of O to file a zoning appeal. *See, e.g. Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008) (appeal of DCRA's decision to issue a certificate of occupancy for a seven-unit apartment building was dismissed on timeliness, finding that the zoning error complained of -- the conversion from a three- to a seven-unit apartment building -- was made in the issuance of the building permit).

In this case, however, as the Department of Consumer and Regulatory Affairs ("DCRA") points out in its prehearing statement, Peaceoholics' actual use of the building was apparently not examined by the Zoning Administrator at the building permit stage. Rather, as DCRA states, "When DCRA does receive an application for a certificate of occupancy from Peaceoholics, DCRA will review it to ensure that the use applied for complies with the Zoning Regulations." DCRA Prehearing Statement, at 2 (Sept. 23, 2010). As DCRA further points out, "no certificate of occupancy has been applied for or issued to Peaceoholics." *Id.*

The building permit, as DCRA appears to concede, does not implicitly encompass any decision to approve any subsequent use of the building as a CBRF. Unlike the case of a gas station, a restaurant, or a waste processing facility, for example, the configuration of the building as set forth in the building plans filed with DCRA in connection with the permit application

would not place the public on notice that the building was intended for use as a CBRF. This is because the height, , dimensions, or configuration of the renovations authorized by the building permit are not relevant to whether a building constitutes a CBRF: CBRFs can be located in buildings constructed as single family homes, flats, apartment buildings, dormitories, or hotels. Rather, a determination that a building is a CBRF is based solely on whether the residents “have a common need for treatment, rehabilitation, assistance, or supervision in their daily living.” 11 DCMR § 199.1.

Thus, the fact that the building renovations could also satisfy the definition of an apartment building does not end the inquiry, since if a use constitutes a CBRF use, it cannot constitute any other use, including an apartment building. 11 DCMR § 199.2 (definition of CBRF). Therefore the issuance of a building permit for an apartment building does not encompass the zoning error about which is appeal is concerned. Instead, the applicant’s intended use will be reviewed and determined by DCRA when Peaceoholics applies for a certificate of occupancy.

However, the suggestion by DCRA that Peaceoholics’ use of the premises can only be addressed in “an enforcement action” if, “after the issuance of a Certificate of Occupancy, DCRA finds that the use of the property is inconsistent with the permitted use,” should be rejected out of hand. DCRA Prehearing Statement, at 2. Rather, DCRA has an obligation, as DCRA concedes, to review Peaceoholic’s “*application* for a certificate of occupancy” in order “to ensure that the use applied for complies with the Zoning Regulations.” *Id.* (emphasis added). DCRA’s responsibility to apply and interpret the zoning regulations in reviewing applications for certificates of occupancy rests squarely with the Zoning Administrator, and to suggest that this

responsibility should be delegated to DCRA's inspectors flies in the face of agency practice and precedent. To the contrary, this Board routinely hears appeals of the Zoning Administrator's decision to issue a certificate of occupancy based on allegations that the permitted use is not in fact the applicant's actual intended use. *See e.g.* Appeal No. 17214 of ANC 6A (June 13, 2005) (sustaining ANC appeal of certificate of occupancy issued for matter of right restaurant on grounds that establishment was really a fast-food establishment, which is not a matter of right).

It is also possible that Peaceoholics will ultimately apply for a special exception with this Board to permit a CBRF to be located in the building, as Requesters believe is the appropriate course of action. Alternatively, DCRA's Zoning Administrator, in reviewing an application for a C of O for an apartment building, may determine that Peaceoholics intends to use the building as a CBRF and denies the C of O, as Requesters believe it must. Under either of these scenarios, this appeal will become moot. Accordingly, hearing this appeal now makes little sense, because the issue of Peaceoholics intended use of the building has not yet been reviewed and evaluated by the Zoning Administrator, and likely will not be reviewed until the C of O application is filed. At this stage, however, there is simply no administrative determination by the Zoning Administrator for this Board to review.

Accordingly, the issue of the intended use of the building is best addressed in the context of a certificate of occupancy application. At that point, the Zoning Administrator can and should inquire of Peaceoholics into the nature of its operations and elicit information to determine whether the 13 at-risk youth who will be housed in the "apartment building" are being provided with the services characterizing a CBRF. If, at that point, the ANC and requesters believe that the Zoning Administrator has improperly issued a certificate of occupancy, this

appeal can be amended to encompass. As this Board has previously noted, “[t]he Board has broad discretion to allow amendments to appeals, derived from its power to control its docket.” *Appeal of Kalorama Citizens Association*, BZA Appeal No. 17109, at 6 (Nov. 8, 2005).

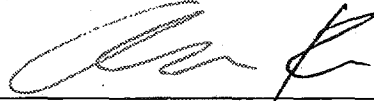
Such a result is consistent with the approach taken by the court in cases where judicial review must be sought within strict jurisdictional time limits, but which present similar ripeness concerns. In cases where the project that is being challenged “awaits uncertain approvals from other agencies,” the Courts have opted to hold the case in abeyance until such time as the project sponsor secures the necessary permit. *Devia v. Nuclear Regulatory Com’n*, 492 F.3d 421, 426 (D.C. Cir. 2007) (holding in abeyance petition to review permit for a nuclear power plant issued by the Nuclear Regulatory Commission due to the absence of a necessary permit from another agency).¹ As the Court in *Devia* explained, “the institutional interests in deferring review here are high. Those include avoiding, until the impact on the parties is more certain, the expenditure of judicial resources on a complex, fact-intensive case” and “also include avoiding the issuance of what could effectively become an advisory opinion.” *Devia v. Nuclear Regulatory Com’n*, 492 F.3d at 426. The same institutional interests warrant holding the instant case in abeyance unless and until a C of O for an apartment building is approved by the Zoning Administrator.

Conclusion

For the foregoing reasons, Requesters believe that this appeal should be held in abeyance until a certificate of occupancy is issued.

¹ See also *Town of Stratford, Conn. v. F.A.A.* 292 F.3d 251 (D.C. Cir. 2002) (Court issued an order holding appeal of FAA order approving an airport master plan when the Court learned “that part of the property subject to the FAA’s challenged approval of the Airport Master Plan was under the Army’s control and the Army had not yet taken actions to dispose of the property,” until

Respectfully submitted,



Andrea C. Ferster (D.C. Bar # 384648)
2121 Ward Court, N.W., 5th Fl.
Washington, D.C. 20037
(202) 974-5142
aferster@railstotrails.org

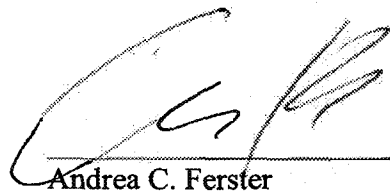
CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2010, a copy of the foregoing Motion to Hold Appeal in Abeyance was served by mail, or as otherwise indicated, on the following:

Jay Surabian *
Assistant Attorney General
DCRA
1100 4th Street SW 5th Fl.
Washington, DC 20024

Peaceoholics, Inc
606 Raleigh Place, S.E.
Washington, D.C. 20032

Commissioner Sandra Seegars, Chair *
ANC 8E
1107 Savannah St., SE
Washington, D.C. 20032


Andrea C. Ferster

*Also served by email

such time as the Army took action.)