

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Rec'd.
Oct. 28, 2010
@ 11:55 AM
EB

Re: Appeal of Certificate of Occupancy Nos. 1001838 and 1002471 issued to Stadium Group LLC for 2127 Queens Chapel Road NE.

BZA Appeal No. 18114

**APPELLANT'S OPPOSITION TO DISTRICT OF COLUMBIA'S AND
PROSPECTIVE INTERVENER'S MOTIONS TO DISMISS FOR LACK OF
STANDING**

Appellant, the Ward 5 Improvement Association ("Association") respectfully asks the Board of Zoning Adjustment ("Board") to deny the District of Columbia's motion to dismiss for lack of standing. The Association also asks the Board to deny a similar motion to dismiss filed by the Prospective Intervener, Stadium Group LLC ("Stadium").

Since both the District's and Stadium's motions raise similar issues, the Association addresses each of them in this brief in opposition.

As laid out more fully in the attached Memorandum of Points and Authorities, the District's motion should be denied because the Association meets the standing requirements established by the Supreme Court and codified in DC Code § 29-971.07. The Association has at least one member who would have standing in his or her own right; the purpose of the Association is germane to the matter before the Board; and the claim brought and relief sought do not require the participation of an individual member.

In addition, the Association has standing in its own right.

Stadium's motion should also be denied because the Association is a legal entity under the law of the District of Columbia and is competent to sue.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18114
EXHIBIT NO. 29

Board of Zoning Adjustment
District of Columbia
CASE NO. 18114
EXHIBIT NO. 29

For the foregoing reasons, the Association respectfully asks that both motions to dismiss be denied.



Don Padou
President
Ward 5 Improvement Association
1335 Lawrence Street NE
Washington, D.C. 20017
(202) 832-4038

10/26/10

Date

MEMORANDUM OF POINTS AND AUTHORITIES

FACTUAL AND PROCEDURAL BACKGROUND

On April 21, 2010, the Zoning Administrator granted a temporary Certificate of Occupancy (C of O) to Stadium Group LLC ("Stadium") to operate a strip club at 2127 Queens Chapel Road NE. Appellant's Brief for the Appeal of the Issuance of Certificates of Occupancy (hereafter "App. Brf.") Disclosure B.¹ The C of O was for a non-sexually oriented business establishment. App. Brf. Disclosure B.

On June 11, 2010, the Ward 5 Improvement Association ("Association") filed an appeal with the Board of Zoning Adjustment ("Board"), arguing that the strip club operated by Stadium was a sexually oriented business establishment ("SOBE") as defined by 11 DCMR § 199.1 and that, therefore, the Zoning Administrator erred in granting Stadium a non-SOBE Certificate of Occupancy. Appeal of the Issuance of a Certificate of Occupancy (hereafter "Appeal") at 1.

In May and June 2010, Mr. Padou sent numerous emails to DCRA protesting the issuance of a non-SOBE Certificate of Occupancy to a strip club. App. Brf. Disclosure E.

On June 22, 2010, the Zoning Administrator granted a permanent non-SOBE Certificate of Occupancy to Stadium to operate a strip club. App. Brf. Disclosure D. The Association amended its appeal to cover the issuance of the permanent C of O. DCR vol 57/34, August 20, 2010.

¹ To avoid confusion, the Attachments to Appellant's Brief for the Appeal of the Issuance of Certificates of Occupancy will be called "Disclosures" in this document.

The Association served copies of its appeal on the affected ANC (ANC 5B); on the owner of 2127 Queens Chapel Road NE (RF Holdings LLC); on Stadium, the tenant; and on Matthew LeGrant, the DC Zoning Administrator. Appeal at 5-6.

The Association is an unincorporated association formed pursuant to DC Code § 29-971. App. Brf. Disclosure O. The purpose of the Association is to improve the quality of life for residents and businesses in Ward 5. *Id.* Members of the Association have been actively protesting the creation of a red light district in Ward 5. See protest groups before Alcoholic Beverage Control Board against strip club liquor licenses for Stadium Group LLC and AKA, Inc, July and August 2010. See also Abigail Padou Decl. ¶ 6 (attached).

Members of the Association include the First Christ Apostolic Church located at 2130 24th Place NE, a property abutting Stadium at the rear. See official zoning map and atlas of the District of Columbia. See also Abigail Padou Decl. ¶ 3. The Association also includes two members, Camilla and Herbert Faulkner, who live approximately 1,000 feet from the strip club. Abigail Padou Decl. ¶ 4.

DISCUSSION

A. District of Colombia's Motion to Dismiss

1. The Association has standing to appeal on behalf of its members (associational standing).

The Supreme Court has explained that an unincorporated association has standing when:

“(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977); see

also *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553, 116 S.Ct. 1529, 1534, 134 L. Ed. 2d 758 (1996).

The Supreme Court's test for associational standing is codified at DC Code § 29-971.07.

The Court of Appeals has consistently applied the Supreme Court's three prong test. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1207-1208 (D.C.2002) (Appellant denied standing only because it did not have any members, with the court saying, "We do not doubt that if Friends had such members, [Friends] would have standing"); *Cathedral Park Condominium Committee v. District of Columbia Zoning Com'n*, 743 A.2d 1231, 1238 (D.C.2000) (Condo association could appeal PUD because had one member with standing in her own right); *DuPont Circle Citizens Ass'n v. Barry*, 455 A.2d 417, 421 (D.C.1983) (Association challenged building permit).

Here, the Association meets all three prongs of the test.

First, the Association has a member who would have standing to appeal the issuance of a Certificate of Occupancy in his or her own right. The church located at 2130 24th Place NE, First Christ Apostolic Church, is a member of the Association and is an abutting property owner. Abigail Padou Decl. ¶ 3. Two other members of the Association live just down the street from Stadium's strip club. Id ¶ 4.

Indeed, since membership in the Association is limited to those in Ward 5, *all* members have individual standing to appeal Stadium's Certificate of Occupancy because all members are in the zone of interest protected by 11 DCMR § 199.1 and 11 DCMR § 801.2. See, e.g. *Brentwood Liquors, Inc. v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 661 A.2d 652, 653 (D.C. 1995). The District government explicitly

recognizes that strip clubs have ward-wide impact regardless of their location in the ward. See DC Code § 25-374(c)(1) which limits transfers of strip club licenses to two *per ward*.

Even if the Board does not agree that all of the Association's members would have standing to appeal the issuance of the C of O, the members who are closest to Stadium's strip club do have standing and, under the Supreme Court's test, one member is sufficient. *Cathedral Park Condominium Committee v. District of Columbia Zoning Com'n*, 743 A.2d 1231, 1238 (D.C.2000).

The Association's purpose – proclaimed in the very name of the Association – is obviously germane to the appeal. The Association more formally described its purpose as: "to engage in civic activities intended to improve the quality of life of Ward 5 residents and business owners." App. Brf. Disclosure O. The appeal is of the issuance of a non-SOBE Certificate of Occupancy to Stadium Group LLC, which operates a strip club at 2127 Queens Chapel Road NE in Ward 5.

The District has long recognized the negative impact of strip clubs and this recognition is embodied in numerous statutes and regulations. See, e.g. D.C. Code § 25-371 (imposing a moratorium on new strip club licenses); D.C. Code § 25-374 (strictly limiting where existing strip clubs can relocate); D.C. Code § 25-403(g) (placing higher standards on strip club licensees than other licensees by requiring strip clubs to have a security plan); 10A DCMR 312 Policy LU-2.4.9 (limiting the proliferation of strip clubs); 11 DCMR § 801 (prohibiting strip clubs to operate as a matter of right in CM zoned districts); and 10 DCMR B5002 (prohibiting the use of the District's borrowing authority on behalf of strip clubs).

Preventing a strip club from operating in Ward 5 is plainly germane to improving Ward 5 and the purpose of the Association. The Association meets the second prong.

Courts have consistently explained that an action brought by an Association only requires the participation of an individual member if the association seeks monetary damages. *Borrero v. United Healthcare of New York, Inc.*, 610 F.3d 1296, 1306 (11th Cir. 2010) (Medical associations had standing to sue insurers because seeking only prospective relief); *Church of Scientology of California v. Cazares*, 638 F.2d 1272, 1280 (5th Cir. 1981). See, also *Warth v. Seldin*, 422 U.S. 490, 515, 95 S.Ct. 2197, 2213, 45 L. Ed. 2d 343 (1975) (Dicta discussion on prospective relief). Here, the Association does not seek monetary damages and, therefore, the Association easily meets the third prong of the test for associational standing.

Because the Association meets all three prongs of the test for associational standing, the Association has standing to appeal Stadium's Certificate of Occupancy. The District's motion to dismiss should, therefore, be denied.

2. The Association has standing in its own right.

An association has standing in its own right if it can demonstrate an "injury to the organization's activities... whether the injury is economic or non-economic." *Friends of Tilden Park*, 806 A.2d at 1207 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (holding that a fair housing organization has suffered injury in fact for standing purposes if racially discriminatory steering practices of defendant realty corporation "perceptibly impaired" the organization's ability to provide counseling and referral services to low- and moderate-income home-seekers by requiring it to devote significant resources to identify and counteract such practices))

“[A] plaintiff may assert...interests that fall within the zone of interests to be protected or regulated by the statute... in question.” *Friends of Tilden Park*, 806 A.2d at 1207 n.5; See, also, *Brentwood Liquors, Inc. v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 661 A.2d 652, 653 (D.C. 1995).

Here, the question is whether or not Stadium is a sexually oriented business establishment as defined by 11 DCMR § 199.1. The zoning regulations provide a zone of interest: sexually oriented businesses cannot operate in CM zones like 2127 Queens Chapel Road NE unless they first obtain a variance from the Board. 11 DCMR § 801.2. This is but one of the many provisions enacted by the District to limit where strip clubs and sexually oriented businesses may locate. Clearly, the District, in enacting such statutes, recognizes the negative impact of strip clubs and sexually oriented businesses. The negative effects recognized by the District are contrary to the Association’s mission and efforts to improve Ward 5. The Zoning Administrator’s practice of awarding non-SOBE Certificates of Occupancy to strip clubs in Ward 5 will harm the activities of the Association.

The Board has, on numerous occasions, granted standing to community or civic groups to appeal in their own right the decisions of the Zoning Administrator. See, e.g. *Kalorama Citizens Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 934 A.2d 393 (D.C.2007) (appealing building permit to demolish row house and replace with apartment building); *Woodley Park Community Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628 (D.C.1985) (community group challenging hotel renovations based on number of parking spots); *Sheridan-Kalorama Neighborhood Council v.*

District of Columbia Board of Zoning Adjustment, 411 A.2d 959 (D.C.1979) (group opposed conversion of diplomatic building into law offices in R3 zone).

Stadium provides another applicable precedent in its motion *in limine* when it cites *Appeal No. 16404A of the Capitol Hill Restoration Society (CHRS)* (March 8, 2000). Stadium Mot. in Limine at 1. In that case the Board granted standing to a civic association to appeal the grant of a home occupancy permit to a contract purchaser. *Appeal No. 16404* at 5. The civic group's purpose was to preserve the residential character of Capitol Hill. *Appeal No. 16404* at 1. The appeal concerned the use of a residence for business purposes. *Id.* The Board had no trouble finding that opposing the grant of a permit was related to CHRS' purpose. *Appeal No. 16404* at 5.

Here, the purpose of the Association is to improve Ward 5. Members of the group have had considerable success. Most recently, Mr. Padou has been the lead protestant for more than 50 residents opposing the creation of a red light district in Ward 5.² Abigail Padou Decl. ¶ 6.

The practice of the Zoning Administrator to grant a Certificate of Occupancy to a sexually oriented strip club in Ward 5 without requiring a public hearing or a variance is detrimental to the quality of life of Ward 5 residents and businesses. It has been a drain on Association members' time and energy to protest and appeal the nascent and exceedingly unwelcome red light district being created by the Zoning Administrator in Ward 5.

² There is another strip club already operating in Ward 5 around the corner from Stadium's strip club: Skylark Lounge at 1943 New York Ave NE. The Alcoholic Beverage Control Board has approved two other strip club licenses for Ward 5: Club AKA 555 and Edge Wet. All four of these licenses are located in the same neighborhood between New York Ave. NE and Bladensburg Road NE and are creating a red light district.

The Association has standing in its own right to *appeal* the grant of a non-SOBE Certificate of Occupancy to a strip club.

The District's motion to dismiss the Association's appeal for lack of standing must be denied because the Association has both associational standing and standing in its own right.

B. Stadium's Motion to Dismiss

Stadium moves for dismissal of the Association's appeal, contending that the Association is not an entity and, therefore, lacks standing to bring an appeal. Stadium Mot. to Dismiss at 1. Stadium supports its contention by attaching a certificate from the Corporations Division of the Department of Consumer and Regulatory Affairs (DCRA) signed by the "Superintendent of Corporations" and certifying that the Association has not filed with the Corporations Division.

Stadium's motion is without merit. The Board should not be surprised that the Corporations Division of DCRA does not have a record of the Association because the Association is not a corporation and has never held itself out as a corporation. As the Association made clear in its appeal, the Association is an unincorporated association formed pursuant to DC Code § 29-971. The Association is not required to file anything with DCRA. DC Code § 29-971. Indeed, DCRA *would not accept* a filing from the Association.³

DC Code § 29-971.07 recognizes the right of unincorporated associations to sue. The Board's own regulations recognize the same right and provide that unincorporated associations formed for a civil purpose are exempt from the normal filing fee. 11 DCMR

³ Abigail Padou sought to file with DCRA, the Office of Tax and Revenue, and the Recorder of Deeds, but the agencies emphatically rejected any filing. Abigail Padou Decl. ¶ 5.

§ 3180.1(e)(3). As shown above, numerous associations have had standing to appeal before the Board.

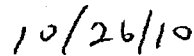
The Association is an entity entitled to sue under DC statute and the Board's rules. Therefore, Stadium's motion to dismiss must be denied.

CONCLUSION

For the foregoing reasons, Appellant respectfully asks the Board to deny the District's and Stadium's motions to dismiss for lack of standing.



Don Padou
President
Ward 5 Improvement Association
1335 Lawrence Street NE
Washington, D.C. 20017



Date

CERTIFICATE OF SERVICE

I emailed a copy of this Brief and with all attachments to Jay Surabian, counsel for the District of Columbia. I also emailed and a copy of this Brief and all attachments to Stephen O'Brien, counsel to Stadium Group LLC.



Don Padou



Date

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Re: Appeal of Certificate of Occupancy Nos. 1001838 and 1002471 issued to Stadium Group LLC for 2127 Queens Chapel Road NE.

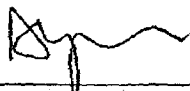
BZA Appeal No. 18114

DECLARATION OF ABIGAIL PADOU

I declare under penalty of perjury that the following is true and accurate to the best of my belief. The following is based on my personal knowledge.

1. I, Abigail Padou, am a resident of Washington DC who owns and resides at 1335 Lawrence St NE. I am over 21 years of age.
2. I am a member and the secretary of the Ward 5 Improvement Association.
3. The First Christ Apostolic Church is a member of the Ward 5 Improvement Association. The Church is located at 2130 24th Place NE and abuts the Stadium Club at the rear.
4. Camilla and Herbert Faulkner are members of the Ward 5 Improvement Association. Mr. and Mrs. Faulkner own and reside approximately 1,000 feet from the Stadium Club.
5. I sought to file notice of the formation of the Ward 5 Improvement Association with the DC Department of Consumer and Regulatory Affairs, the DC Office of Tax and Revenue (Wayne Nickum, Senior Auditor), and the DC Recorder of Deeds (Ida Williams, Deputy Recorder of Deeds). All three agencies told me that they did not accept filings from unincorporated associations.

6. Don Padou represents a group of more than 50 people as the lead protestant before the Alcoholic Beverage Control Board regarding liquor licenses for the following strip clubs: Stadium Group LLC t/a Stadium Club and AKA, Inc., t/a Club AKA 555.



Abigail Padou
1335 Lawrence St NE
Washington DC 20017
(202) 832-4038

10/26/10

date