

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

2011 SEP 12 PM 1:55

RECEIVED
D.C. OFFICE OF ZONING

Appeal of Certificate of Occupancy)
Nos. 1001838 and 1002471)
Issued to Stadium Group LLC for)
2127 Queens Chapel Road NE)
Appealed by Ward 5 Improvement Assoc.)

Appeal No. 18114

MOTION IN LIMINE TO EXCLUDE IRRELEVANT EVIDENCE

Appellant, the Ward 5 Improvement Association, respectfully moves this Board to exclude evidence of the procedures used by the Zoning Administrator in granting Certificate of Occupancy No. 1101152 issued on June 24, 2011 because such evidence is irrelevant to any matter currently before the Board.

This Board has scheduled a hearing for September 20, 2011 at which it will hear evidence limited to the procedures used by the Zoning Administrator in granting Certificate of Occupancy No. 1101152. Such evidence is currently irrelevant because Certificate No. 1101152 is not currently before the Board.

The test for whether or not evidence is relevant is straightforward: evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Ev. 401.

Here, since Certificate No. 1101152 is not before this Board, no evidence regarding the grant of that certificate is relevant to Appellant’s appeal of the certificates that *are* before the Board (Certificates No. 1001838 and 1002471).

On July 6, 2011, Appellant moved this Board to amend its appeal to include Certificate of Occupancy No. 1101152, but the Board has not yet ruled on Appellant’s Motion. As a result, the grant of Certificate No. 1101152 is not before this Board and any evidence regarding that certificate of occupancy is not relevant.

If, however, this Board grants Appellant’s motion to amend its appeal to include Certificate of Occupancy No. 1101152, then evidence regarding the grant of that certificate is relevant.

It is important to state that if the Board grants Appellant’s motion to amend, the Board cannot limit evidence only to the procedures used by the Zoning Administrator in granting Certificate of Occupancy No. 1101152. The Board must allow *all* evidence relevant to the grant of that certificate, including whether or not the Zoning Administrator made *substantive*—not just procedural—errors in granting the certificate.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18114
EXHIBIT NO. 40

Board of Zoning Adjustment
District of Columbia
CASE NO.18114
EXHIBIT NO.40

This case is currently in an awkward procedural posture. If the Board hears evidence regarding the grant of a certificate that is not properly before the Board, all parties will be prejudiced on appeal, no matter what decision the Board makes. The appeals court will be unable to determine what role the evidence on a certificate that was not properly before the Board played in the Board's final decision. The appeals court will be compelled to remand the case to the Board for rehearing.

The Board has at least two options. First, the Board can grant this Motion in Limine and refuse to hear evidence regarding Certificate No. 1101152. If the Board chooses this path, the Board will then be free to decide the two motions pending before it: Appellant's Motion to Amend and Intervenor's Motion to Dismiss. Second, the Board can grant Appellant's pending motion to amend its appeal to include Certificate of Occupancy No. 1101152. If the Board chooses this path, Appellant's Motion in Limine is moot and the procedural awkwardness is removed: the Board can hear evidence on Certificate No. 1101152.

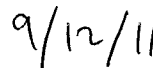
Appellant takes this opportunity to remind the Board that Appellant has raised two grounds for its appeal. See, e.g. Appellant's Closing Argument at 1; Appellant's Supplemental Filing Pursuant to Board Order at 1. The Board has mostly limited its discussion to the question of whether or not the Zoning Administrator erred *procedurally* in granting the various certificates of occupancy to Stadium. The Board, however, has not discussed Appellant's *substantive* claim that Stadium Club is a Sexually Oriented Business Establishment ("SOBE") as defined by 11 DCMR § 199.1 and as interpreted by the Board in *In re California Steak House*. As a SOBE, Stadium is not entitled to a non-SOBE certificate of occupancy.

Whatever the Board's final decision, the Board must rule on both grounds advanced by Appellant. *Kalorama Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 934 A.2d 393 (D.C. 2007) (holding that the BZA must make "a finding of fact on each material contested issue of fact").

Respectfully submitted,



Don Padou
President, Ward 5 Improvement Association



Date

CERTIFICATE OF SERVICE

On September 12, 2011 I mailed a copy of this motion and all attachments via first class mail, postage prepaid, to Jay Surabian, counsel for DCRA, and Stephen O'Brien, counsel for Stadium Group LLC at:

Jay Surabian
Department of Consumer and Regulatory Affairs
Office of the General Counsel
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024

and

Stephen O'Brien
Mallios & O'Brien
2600 Virginia Avenue, N.W., Suite 1112
Washington, D.C. 20037



Abigail Padou

9/12/11

Date