

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**
441 4th Street, N.W.
Washington D.C. 20001

Appeal of Ginia Avery et al.

Appeal No. 18460

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DISTRICT OF COLUMBIA'S MOTION TO DISMISS

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA”), by and through undersigned counsel, hereby joins the Motion to Dismiss filed by Missouri Avenue Development Partners, LLC (“Missouri”) and submits its own Motion to Dismiss the appeal filed by Ginia Avery et al. (“Appellants”). The basis of the motion is that Appellants have not alleged any zoning error that would confer jurisdiction to this Board.

Appellants filed the instant appeal on August 10, 2012. The appeal challenges DCRA’s decision on June 13, 2012 to issue Building Permit no. B1202925 to Missouri (“the June 13th permit”). That permit authorized construction of a new retail building at 5929 Georgia Ave., NW (“the Property”), which will be used as a Wal-Mart store.

In their appeal, Appellants allege that DCRA erred in issuing the June 13th permit because they believe that the proposed Wal-Mart store does not conform to the goals of the District’s Comprehensive Plan. Specifically, Appellants believe that the proposed Wal-Mart will not be “pedestrian-oriented” and that it will have an adverse economic impact on smaller, local businesses.

The proposed Wal-Mart is an entirely matter-of-right project. Appellants' do not dispute this fact in their appeal. Their appeal does not allege that the June 13th permit or the proposed construction violate any provision of the Zoning Regulations. Appellants' counsel makes that point clear in his September 10th letter to the Board stating, "Appellants are not challenging any zoning regulations in this appeal." Nevertheless, they claim that DCRA issued the June 13th permit "illegally."

The Board's jurisdiction is specifically limited to allegations of error in "the administration or enforcement of the Zoning Regulations." See 11 DCMR § 3100.2; DC Official Code § 6-641.07(f) (emphasis added). For this reason the Board has dismissed appeals of building permits that do not allege any error with respect to the Zoning Regulations. See e.g. *Appeal no. 18154 of Capitol Hill Restoration Society* (April 14, 2011) (appeal alleged error with respect to the application of the Fair Housing Act).

The Comprehensive Plan is not a part of the Zoning Regulations, nor was it adopted under the Zoning Act. Accordingly, the D.C. Court of Appeals has held that the Board does not have jurisdiction over the Comprehensive Plan. The *French and Tenley and Cleveland Park* cases cited by Missouri are on-point. Both of those cases explain that neither the Board nor DCRA's Zoning Administrator have the power to implement the Comprehensive Plan. *Tenley & Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 341 (D.C. 1988). The Zoning Commission has the responsibility to assure that the Zoning Regulations it creates are consistent with the Comprehensive Plan. *Tenley & Cleveland Park Emergency Committee*, 550 A.2d at 341. "The Board's limited function is to assure that the regulations adopted by the Zoning Commission are followed [.]" *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1034 (D.C. 1995). The Zoning Administrator's

function “is limited to enforcing and certifying occupancy regulations.” *Tenley & Cleveland Park Emergency Committee*, 550 A.2d at 341 n.22.

In light of this case law, the Board has ruled that it would be an error for the Zoning Administrator to ignore the provisions of the Zoning Regulations and reject an application based solely “upon his perception of inconsistency with a Comprehensive Plan Policy.” *See Appeal no. 18108 of Advisory Neighborhood Commission 3C* (July 5, 2011) at p. 7.

DCRA made no error in issuing the June 13th permit. The proposed construction fully complies with the provisions of the Zoning Regulations and Appellants have not disputed that. Appellants’ insistence that the permit should be revoked based solely upon their interpretation of the Comprehensive Plan is contrary to the controlling Court of Appeals cases, which have made clear that enforcing the Comprehensive Plan is not within the jurisdiction of the Board or DCRA.

Accordingly, the Board must dismiss this appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

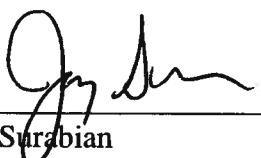
I hereby certify that a copy of the foregoing filing was served by email, this 14 day of October 2012, to the following:

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