



BEFORE THE ZONING COMMISSION AND
BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA



FORM 150 – MOTION / REQUEST

Before completing this form, please review the instructions on the reverse side. Print or type all information unless otherwise indicated. All information must be completely filled out.

CASE NO.: 18460

Motion/Request of: ☐ Applicant ☐ Petitioner ☒ Appellant ☐ Party ☐ Intervenor ☐ Other _____

Motion/Request to:

- | | |
|---|--|
| <input type="checkbox"/> Amend the Relief Sought | <input type="checkbox"/> Reopen a Hearing (before decision) |
| <input type="checkbox"/> Waive Posting / Affidavit of Posting Requirement | <input type="checkbox"/> Dismiss on the Merits |
| <input type="checkbox"/> Waive Notice Requirement to Shorten Period of Time Case is
Advertised in the <i>DC Register</i> | <input type="checkbox"/> Postpone |
| <input type="checkbox"/> Accept a Proffered Expert Witness | <input type="checkbox"/> Continue |
| <input type="checkbox"/> Allow Non-Authorized Representative to Perform Cross-
Examination | <input checked="" type="checkbox"/> Waive the following Time Deadline (i.e. 14-day filing deadline):
14-day filing deadline |
| <input type="checkbox"/> Reopen the Record | <input type="checkbox"/> Other: _____ |

Points and Authorities:

On a separate sheet of 8 1/2" x 11" paper, state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion or request, including relevant references to the Zoning Regulations or Map.

CERTIFICATE OF SERVICE

I hereby certify that on this 16 th day of October Month, 2011

I served a copy of the foregoing Motion or Request to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of

Planning in the above-referenced ZC or BZA case via: ☐ Mailed letter ☒ Hand delivery ☐ E-Mail ☐ Other _____

Signature: Michael Kroopnick

Print Name: Michael Kroopnick

Firm/Organization: Law Office of G. Macy Nelson, LLC

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To be notified of hearing and decision: (Maker of Motion/Request or Authorized Agent)

In the event an authorized agent files a Motion or Request on behalf of the Maker of the Motion or Request, a letter signed by the Maker of the Motion or Request authorizing the agent to act on his/her behalf shall accompany the notice of application, petition, or appeal.

Print Name:

Address:

Phone No.:

E-Mail:

Board of Zoning Adjustment
District of Columbia
CASE NO. 18460
EXHIBIT NO. 27

Motion to Waive the 14-day Filing Deadline

Appellants submit this Motion to Waive the 14-day Filing Deadline in order to file their Opposition to Missouri Avenue Development Partners', LLC ("Missouri") and the District of Columbia Department of Consumer and Regulatory Affairs' ("DCRA") Motions to Dismiss because Missouri and DCRA did not file their Motions until after the 14-day filing deadline passed on October 2, 2012. Missouri filed their Motion to Dismiss on October 8, 2012 and DCRA filed their Motion to Dismiss on October 11, 2012. A copy of Appellant's Opposition is attached.

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Appeal of Ginia Avery, et al.

Appeal No. 18460

* * * * *

Appellants' Opposition to Missouri's and DCRA's Motion to Dismiss

Appellants submit this Opposition to Missouri Avenue Development Partners', LLC ("Missouri") and the District of Columbia Department of Consumer and Regulatory Affairs' ("DCRA") Motion to Dismiss, and state the following in support thereof:

ARGUMENT

I. The BZA has jurisdiction over this matter.

Whether the Board of Zoning Adjustment ("BZA") has jurisdiction to consider the legal adequacy of Large Tract Review ("LTR") for the proposed Walmart at 5929 Georgia Avenue, NW in Ward 4 ("proposed Walmart") is a question of first impression. Neither the BZA nor the DC Court of Appeals has considered this issue. However, the most logical interpretation of the DC Code and the BZA's authority is that jurisdiction resides with the BZA to consider this appeal. The BZA has jurisdiction to hear appeals concerning the issuance of a building permit, and the issuance of a building permit is illegal unless the Inspector of Buildings determines that this permit complies with all of the zoning regulations. LTR is best understood as a zoning regulation. Therefore, the legal sufficiency of LTR is an issue that the Inspector of Buildings must determine prior to issuing a building permit, and the BZA has appellate jurisdiction over decisions by the

Inspector of Buildings. Appellants more fully discuss the rationale for the BZA's jurisdiction over this matter in their Memorandum in Support of Appeal and incorporate by reference Section I of their Memorandum. *See* Memorandum in Support of Appeal at pp. 1-2.

Nevertheless, Missouri and DCRA ("Appellees") argue that jurisdiction resides with the Zoning Commission because Appellants argue in part that the proposed Walmart violates the policies of the District Elements of the Comprehensive Plan for the National Capital as applied to this site. Appellees' reliance on *Tenley & Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 341 (D.C. 1988) and *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1034 (D.C. 1995) to support their argument is misplaced. These cases stand for the proposition that the Zoning Commission is the proper forum to address a conflict with a zoning regulation and the Comprehensive Plan where the appellant seeks "a zoning change." *Tenley & Cleveland Park Emergency Committee*, 550 A.2d at 341 (emphasis added). Unlike the appellants in those cases, the Appellants here do not seek a zoning change. Nor do they dispute that the zoning assigned to the site of the proposed Walmart is in conflict with the policies of the Comprehensive Plan for this site.¹

¹ Appellants mistakenly stated in their September 10, 2012 letter to the BZA that "Appellants are not challenging any zoning regulations in this appeal." Appellants meant to state that they are not challenging any zoning (i.e., the type of permitted uses on this site, such as residential or commercial development) assigned to the site of the proposed Walmart. Appellants have of course challenged the LTR for this development as a zoning regulation to which the proposed Walmart is subject. *See* Memorandum in Support of Appeal at pp. 1-2. The Appellants apologize to the BZA for any confusion this may have caused.

On the other hand, Appellants do argue that the LTR for the proposed Walmart was not legally sufficient. To support their position, Appellants argue in part that the proposed Walmart -- unlike the zoning assigned to this site -- violates the policies of the Comprehensive Plan for this site. *See Memorandum in Support of Appeal* at pp. 2-5. But Appellants do not limit their argument to these violations of the Comprehensive Plan since they also argue that LTR fails because Missouri did not adequately minimize traffic and neighborhood impacts that will result from the proposed Walmart. And rather than seeking to change the zoning assigned to this site, the only relief that the Appellants seek is that the building permit is rescinded until the Inspector of Buildings determines that the goals of LTR are met for the proposed Walmart.

The proper forum for the Appellant's grievances is the BZA.

II. The Appellants have standing to file their appeal before the BZA.

Appellants have standing to file their appeal of the building permit with the BZA because they have alleged a grievance against the Inspector of Buildings for issuing building permit B1202925. "Appeals to the Board of Adjustment may be taken by any person aggrieved . . . by any decision of the Inspector of Buildings granting or refusing a building permit." § 6-641.07(f) of the DC Code. As Missouri correctly notes, "Neither the statutes nor the implementing regulations articulate a standard for an 'aggrieved' appellant." Missouri's Motion to Dismiss at p. 4. As a result, any individual who alleges a grievance, such as the Appellants, may file an appeal with the BZA.

Still, Missouri urges the BZA to follow the rule that Appellants demonstrate "damage greater than that suffered by the general public." Appellants also meet this

standard. In contrast to the general public, Appellants William Washington, Ginia Avery, Willie Baker, and Edna Thomas all live in Ward 4 and shop near the proposed Walmart, which will adversely affect their commuting and shopping options. Among these Appellants, William Washington is especially adversely affected because he lives within 200 feet of the proposed Walmart, thereby impacting not only his parking and commuting options, but also his preference for the Safeway a few blocks away at 6500 Piney Branch Road.

Missouri's argument that Appellants lack standing is without merit.

CONCLUSION

For the reasons stated above, Appellants respectfully request that the BZA reject Missouri's and DCRA's Motion to Dismiss.

Respectfully Submitted,



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Certificate of Service

I hereby certify that on this 16th day of October, the foregoing Opposition was hand-delivered to the following:

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