

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18522 of Washington Harbour Condominium Unit Owners' Association, pursuant to 11 DCMR § 3100, from a determination letter from the Zoning Administrator, Department of Consumer and Regulatory Affairs, issued November 7, 2012, authorizing construction, as a matter of right, of a new multifamily residential or inn development as an addition to an existing building located on split-zoned property in the W-2 and W-3 Zone District at 3050 K Street, N.W. (Square 1173, Lot 102).

HEARING DATE: April 30, 2013
DECISION DATE: April 30, 2013

ORDER DISMISSING APPEAL

Washington Harbour Condominium Unit Owners' Association ("Appellant") filed this appeal to the District of Columbia Board of Zoning Adjustment ("Board") on January 4, 2013. The Appellant is an association of owners of residential condominiums located in the mixed-use development at 3050 K Street, N.W. (Square 1173, Lot 102, the "Subject Property"). In addition to the residential condominiums owned by various members of the Appellant, the Subject Property also contains office and retail components, owned by RP MRP Washington Harbour, LLC ("RP MRP" or "Owner").

The Appeal challenges a letter from the Zoning Administrator ("ZA") issued November 7, 2012 relating to the Subject Property. The letter confirmed the Owner's conclusion that a hypothetical addition to the Subject Property would comply with the Zoning Regulations related to FAR, height, lot occupancy, inclusionary zoning, rear and side yards, courts, parking and loading, and roof structures.

Following a public hearing, the Board voted to dismiss the appeal without prejudice. A full discussion of the facts and law supporting this conclusion follows.

FINDINGS OF FACT

1. The Subject Property is located along the waterfront of the Potomac River in Georgetown. Immediately to the north of the Subject Property are K Street, N.W. (at ground level) and the elevated Whitehurst Freeway (at approximately 30 feet above ground level). Thirtieth Street,

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N.W., forms the eastern boundary of the Subject Property, the Potomac River forms the southern boundary of the Subject Property, and a District-owned park borders the Subject Property to the west.

2. The Subject Property is approximately 219,372 square feet. Approximately 68,005 square feet of the Subject Property are in the W-2 Zone District, and the remaining 151,367 square feet are in the W-3 Zone District.
3. The Owner sought a letter from ZA as to whether a hypothetical addition of approximately 70,500 square feet could be constructed on the Subject Property as a matter of right (the "Project"). The Project would contain either 88 new residential units or an inn of approximately 120 units, all of which would be in the W-2 Portion.
4. No building permit application had been filed for the Project.
5. The materials provided the ZA did not include the type of detailed construction documents that would be required for any subsequently filed building permit application by 12 DCMR A § 106 of the District of Columbia Construction Codes, including the documents specifically required for the determination of zoning compliance by § 106.1.12.
6. On November 7, 2012, the ZA issued a letter to the Owner's counsel in which he "concluded that the proposed project complies with the Zoning Regulations" related to FAR, height, lot occupancy, inclusionary zoning, rear and side yards, courts, parking and loading, and roof structures. (Exhibit No. 3. Attachment B.)
7. Letters of this kind are known as "reliance" or "determination" letters.
8. The letter contained no statement by the ZA promising to approve any subsequently submitted building permit application for the Project without further review.
9. During the hearing the ZA refuted the Appellant's suggestion that "that the mere issuance of a reliance letter will bind my office, my staff or myself," stating:

That is not going to happen. My staff is very clear that at the time a building permit application and plan set is submitted, even in the case where there was a prior determination letter, reliance letter issued, that application [gets] the same thorough vetting analysis ...

(Hearing Transcript of April 30, 2013, ("Tr."), at 246-247.)

10. The Appellant does not allege any error made by the ZA in the letter, but rather challenges it in the basis that it was "premature." (Tr. at 220.) The Appellant believed that if it did not file an appeal now, it would later be barred from appealing a building permit for the Project.

CONCLUSIONS OF LAW

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.) to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. (11 DCMR §§ 3100.2 and 3200.2.)

The Appellant appeals a Zoning Administrator's letter, but acknowledges that the letter contains no error. For this reasons alone the Board could properly dismiss the appeal. However, the Board will address the Appellant's concern that the this letter represented its only opportunity to appeal the determinations it contained pursuant to the Court of Appeals decision in *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008) as interpreted by the Board in *BZA Appeal No. 18300 of Lawrence and Kathleen Ausubel* (April 11, 2012).

In fact, consistent with the above-cited precedent, the Board concludes that the letter does not contain the ZA's final determination on the zoning compliance issues discussed. Therefore, the letter is neither appealable nor bars the Appellant from later appealing a final zoning decision on this project.

First the ZA was not "fully briefed on the owners proposal," *Ausubel* at 8. The Owner sought the letter prior to the filing of any building permit. There is no dispute that the materials provided the ZA did not remotely approach the level of detail that would be required as part of any subsequently filed building permit application for the Project. Second, the letter did not "clear[] the way for a permit, in this case a building permit." *Ausubel* at 7. The ZA emphatically stated that the letter had no binding effect upon him or his Office. Instead, all of the issues raised in the letter would be revisited and reconsidered if a building permit application were filed based upon the fuller information then available.

Because of the absence of these factors, the Board concludes that the ZA's letter did not contain any of the elements of finality that would permit it to be appealed or serve to bar a subsequent appeal of any such final administrative determination.¹ Therefore it is **ORDERED** that this appeal is **DISMISSED** without prejudice.

VOTE: **4-0-1** (Nicole C. Sorg, Lloyd J. Jordan, Jeffrey L. Hinkle, and Peter G.
May to Dismiss the appeal; S. Kathryn Allen not participating.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

¹ This could be any form of writing, whether a correspondence or the actual building permit, depending upon which gave Appellant the "earliest notice" of the ZA's final decision. *Basken*, 946 A.2d at 366.

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ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: December 13, 2013

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.