

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

Appeal of 2101 Connecticut Avenue
Cooperative Apartments, Inc.

Appeal Nos. 18539 and 18540
(unconsolidated)

DISTRICT OF COLUMBIA'S OPPOSITION TO MOTION TO STAY

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully submits its opposition to the request for a stay made by Appellant.

BACKGROUND

On February 4, 2013, Appellant filed Appeal nos. 18539 and 18540 with the Board. Appellant is appealing two determinations letters that were issued by DCRA's Zoning Administrator pertaining to a proposed development at 2012 and 2014 Kalorama Rd., NW (the "Properties"). The determination letters, which were issued on December 5, 2012, memorialize a meeting the Zoning Administrator had with the architect for the Developer of the Properties and his conclusions based on the information presented to him.

In Appeal nos. 18539 (concerning the 2014 Property) and 18540 (concerning the 2012 Property), Appellant raises numerous objections about the determination letters. The Board has scheduled a hearing on the merits of the appeals for April 30, 2013.

Appellant has asked the Board to "stay the issuance of any and all permits for the pendency of this Appeal." In other words, Appellant is asking the Board to order DCRA to not

issue any permits for the Properties until the Board has made a decision. This request must be denied by the Board as it has no authority to the grant the type of stay that Appellant is requesting.

DISCUSSION

The Board Has No Authority To Grant The Requested Relief

Appellant is asking the Board to restrain DCRA from processing or issuing permits before the Board has made a decision on the merits. This type of relief is injunctive relief, which the Board cannot grant. The authority to grant injunctive relief is vested with the courts. *See District of Columbia v. Green*, 806 A.2d 216 (D.C. 2002).

The Board's authority is set forth by statute in the Zoning Act and the Zoning Regulations. Neither of which grants the Board any authority to grant injunctive relief. *See* D.C. Code § 6-641.07; 11 DCMR § 3100. An administrative body like the Board, "is a creature of statute and may not act in excess of its statutory authority." *President and Directors of Georgetown College v. D.C. Bd. of Zoning Adjustment*, et al., 837 A.2d 58, 68 (2003) *quoting Dist. Intown Props., Ltd. v. D.C. Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373, 1379 (D.C.1996). "When [the legislature] passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Id. quoting Stark v. Wickard*, 321 U.S. 288, 309 & n. 22 (1944).

The District "or any neighboring property owner who would be specially damaged" by a zoning violation may seek injunctive relief, but from Superior Court, not the Board. *See* D.C. Code § 6-641.09.

The only instance where the Board can exercise any authority over DCRA's ability to issue or not issue a permit is when such order is "necessary to carry out its decision." *See* D.C.

Code § 6-641.07(g)(4). Of course, that provision is only applicable when the Board has made a decision and it has not done so yet in this case. A decision by the Board can only be made after a hearing and must be in writing. *See* 11 DCMR §§ 3117.2, 3125.3. Therefore, the Appellant's request for injunctive relief in advance of the hearing is impermissible.

The only case cited by Appellant in support of its motion is Kuflom v. D.C. Bureau of Motor Vehicle Services, 543 A.2d 340 (D.C. 1988). The stay at issue in that case, was a stay requested by a taxi driver in a drivers' license revocation proceeding pending before an administrative law judge. The taxi driver asked the judge to stay that case while he resolved some alleged moving violations, which had formed the basis of the revocation, in another proceeding. There is no analogy to be drawn between Kuflom and this case. No one disputes that the Board has the authority to stay the matter currently pending before it; however, the Board does not have the authority to prevent another agency from performing its governmental functions.

The Requested Relief Is Overreaching And Unnecessary

Appellant's request that DCRA not process or issue "any and all" permits is both overbroad and overreaching, but is also entirely unnecessary.

The request concerning "any and all" permits is again far beyond the Board's jurisdiction. The Board's authority is limited to the Zoning Regulations. Accordingly, the issuance of some permits, like the interior demolition permit the Developer has obtained (Permit no. D1300147), cannot be appealed to the Board. *See Appeal no. 18429 of Larry Heyman* (February 21, 2012) (Board finding no jurisdiction over appeal concerning interior renovations).

Further, the Zoning Administrator's determination letters do not authorize any construction to take place, nor are they a substitute for the zoning review that will take place

when the applications for building permits are processed by DCRA. Even when a zoning determination letter has been written, the building plans for that project are still reviewed for zoning compliance. Naturally, many changes to the plans can be made from the time the letter is written to the time that plans are submitted. Thus, the letters are only meaningful in the context of the information reviewed by the Zoning Administrator at the time the letters were written. If changes to the plans are made, the letters may very well become irrelevant.

Based on the information provided by Appellant, it seems likely that some changes will be made. In support of its Motion to Stay, Appellant points out that the Historic Preservation Review Board (HPRB) has expressed concerns about the design and has required the Developer to revise its plans. As a part of the Kalorama Triangle Historic District, the Developer must obtain approval of the HPRB to obtain the required building permits. Any changes that the Developer makes in order to obtain HPRB approval, would also have to be reviewed by the Office of the Zoning Administrator for zoning compliance.

Accordingly, it's both illogical and unnecessary for the Board to issue a stay, so that the parties to this case can litigate the content of the letters, when the Developer may be required to make changes to its plans.

For these reasons, the Board must deny the Motion to Stay.

Respectfully Submitted,

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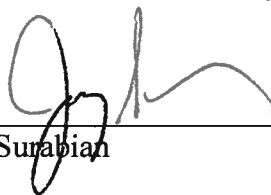
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by email or first class mail, this 26 day of February 2013, to the following:

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