

Before the

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:)
Shaw Dupont Citizens Alliance for the)
Administrative Decision of DCRA in its)
Interpretation of 11 DCMR Sections 1901.6 and 1900.1)
for 1346 T Street, NW, Washington DC 20009)
Lot 0088, Square 238)

Statement of the Appellant

Shaw Dupont Citizens Alliance (hereinafter “SDCA” or the "Appellant") hereby requests that the Board of Zoning Adjustment GRANT the Appeal from the Department of Consumer and Regulatory Affairs' interpretations of Section 1901.6 of Title 11 of the District of Columbia Municipal Regulations (hereinafter referred to as the "Zoning Regulations") such that:

- (1) the definition of a drinking establishment pursuant to Section 1901.6 of the Zoning Regulations includes an establishment that sell alcoholic beverages with an Alcohol Beverage Control ("ABC") License;
- (2) once the linear foot frontage measurement limitation calculation for a square has been reached as set forth in Section 1901.6 of the Zoning Regulations, the use limitation applies to squares and portions of squares in the 14th and U Street, NW area, as provided in Sections 1901.6 and 1900.1 of the Zoning Regulations.

SUMMARY OF APPEAL

The Department of Consumer and Regulatory Affairs (“DCRA”) erred in two interpretations of Section 1901.6 of the Zoning Regulations:

First, DCRA erred in its interpretation that the definition of a drinking establishment pursuant to Section 1901.6 of the Zoning Regulations excludes an establishment with an ABC License that sells alcoholic beverages.

Second, DCRA erred in its interpretation that once the linear foot frontage measurement limitation calculation for a square has been reached as set forth in Section 1901.6 of the Zoning Regulations, the use limitation excludes portions of squares in the 14th and U Street, NW area, as provided in Sections 1901.6 and 1900.1 the Zoning Regulations.

DISCUSSION

By way of background, the property which is subject to this appeal is located in the Uptown Arts-Mixed Use (ARTS) Overlay District ("Arts District") at 1346 T Street, N.W., Washington DC 20009 (Lot 0088, Square 238) (hereinafter referred to as the "Subject Property"¹). The Subject Property is zoned as C-3-A/Arts District and is a historic row house in the Greater U Street Historic District².

DCRA's erroneous interpretations of 11 DCMR Section 1901.6 for the Subject Property arose in connection with A1's Market, LLC's³ ("Proposed Lessee") application ABRA-91140 with the District of Columbia Alcoholic Beverage Control Board ("ABC Board") for a new class CT license for premises located at the Subject Property.

Interpretation # 1

On March 8, 2013, after initially concluding⁴ that the linear foot frontage measurement limitation calculation for Square 238 had been reached as set forth in Section 1901.6 of the Zoning Regulations, DCRA changed its conclusion with respect to the linear foot frontage measurement limitation calculation for Square 238 because of a measurement error that was discovered upon review and because of DCRA's exclusion of the linear foot frontage of Source Theater⁵⁶⁷ located at 1835 14th Street, N.W., Square 238, Lots 33 and 34 as a drinking establishment notwithstanding Source Theater's ABC License No. 79281, Class DX⁸. DCRA's rationale for excluding the linear foot frontage measurement of Lots 33 and 34 for Square 238 is that the Source Theater Company is a Legitimate Theater pursuant to Section 199 of the Zoning Regulations.⁹

DCRA's conclusion that Source Theater is not a drinking establishment pursuant to Section 1901.6 of the Zoning Regulations since it is a Legitimate Theater¹⁰ is incorrect. Specifically,

¹ The Property owner is Talley R Holmes Jr., with a listed address of 1345 T Street N.W., Washington, DC 20009-4438

² See Greater U Street Historic District Map as Attachment 1.

³ A1's Market, LLC is the proposed lessee of 1346 T Street, NW Washington DC 20009

⁴ See e-mail correspondence with DCRA dated March 11, 2013 as Attachment 2.

⁵ 1835 14th Street, N.W., Square 238, Lots 33 and 34 is zoned C-3-A/Arts District. See Attachment 2.1 and 2.2.

⁶ Source Theatre's linear foot frontage on 14th Street, NW is significantly greater than 4.4 feet.

⁷ The owner of the property is The Cultural Development Corporation of the District of Columbia with a stated address at 916 G Street N.W., Washington, DC 20001-4571

⁸ Alcohol beverages may be sold every day of the week between the hours 12 pm and 12 am. See a copy of ABC License as Attachment 2.3.

⁹ See email correspondence with DCRA dated March 11, 2013 as Attachment 2.

¹⁰ Section 199 of Zoning Regulations defines a Legitimate Theater as a building, or a part of a building, that is designed and used for the presentation of live plays and other forms of dramatic performance. The facility typically has a stage or other performing area plus tiers of seats for the audience, or other arrangements for the audience to sit or stand to view the performance. (39 DCR 8328)

DCRA's conclusion is incorrect because the characterization of Source Theater as a Legitimate Theater does not preclude the characterization of Source Theater as drinking establishment within the meaning of Section 1901.6 of the Zoning Regulations as it is a more restrictive use characterization pursuant to Section 1900.3 of the Zoning Regulations.

Section 1900.3 of the Zoning Regulations provides that "the ARTS Overlay District and the underlying zoning shall constitute the Zoning Regulations for the geographic area identified in § 1900.1" and that "where there are conflicts between this chapter and the underlying zoning, the more restrictive regulations shall govern." Section 1900.1 of the Zoning Regulations identifies Square 238 and portions thereof as being in the Arts District area. Accordingly, since Source Theater is in Square 238 and portions thereof in the Arts District area, the Source Theater's characterization as drinking establishment should govern as it is the more restrictive use characterization in the instant case.

When describing the amendment to Section 1901.6, the Zoning Commission for the District of Columbia (the "Commission") in its Notice of Final Rule making and Z.C. Order No. 10-17 clarified its intent by stating, in part, the following:

Because the term "eating and drinking establishment" could be interpreted as only encompassing establishments that sell both food and alcoholic beverages, the introductory text of § 1901.6 was amended to separately refer to eating establishments, drinking establishments, and eating and drinking establishment, which thereafter are referred to collectively as "eating/drinking establishments."

Thus, because Source Theater is an establishment¹¹ that sells alcoholic beverages as evidenced by its ABC License No. 79281, Class DX, by its very definition Source Theater is a drinking establishment within the meaning of Section 1901.6 of the Zoning Regulations. Accordingly, DCRA must include the linear foot frontage of Source Theater when determining the linear foot frontage measurement limitation calculation for Square 238.

Interpretation # 2

On February 6, 2013, in response to an inquiry dated February 1, 2013, regarding the application of Sections 1901.6 and 1900.1 of the Zoning Regulations with respect to the Property, Matthew Le Grant, the Zoning Administrator for DCRA, concluded the following¹²:

I have had a chance to review the attachments that you submitted as well as review the applicable zoning regulations. My longstanding interpretation is that the zoning provision that limits the street frontage for eating establishments in the Uptown Arts-Mixed Use (ARTS) Overlay District, 11 DCMR 1901.6, applies only to the frontages along 14th and U Street NW street frontages, and does not include frontages along any other street. The relevant sub-section (a) reads:

¹¹ Establishment is defined pursuant to the DC Official Code Section 25-101 (21) as a business entity operating at a specific location.

¹² See email correspondence with DCRA dated February 6, 2013 as Attachment 3.

No portion of an eating/drinking establishment located on the ground floor is permitted to occupy more than fifty percent (50%) of the linear frontage of each individual square, as *set forth below*: [emphasis added in *italics*]

The Section continues with a table listing the affected squares by the two columns for 14th and U Streets, and does not list any other street. I conclude, and my understanding from conversations with the authors of this provision from the Office of Planning, is that no other streets would be subject to the limits of the amount of street frontage for eating establishments.

DCRA (and the Office of Planning) erred in its interpretation that once the linear foot frontage measurement limitation calculation for a square has been reached as set forth in Section 1901.6 of the Zoning Regulations, the use limitation excludes squares and portions of squares in the 14th and U Street, NW area, as provided in Sections 1901.6 and 1900.1 the Zoning Regulations.

Specifically, in its interpretation, DCRA is incorrectly conflating (a) the measurement limitation calculation as measured by 14th, NW and U Street NW linear foot frontage and (b) the application of the use limitation to the identified squares and portions thereof in the Arts District area once the measurement limitation calculation has been established for a particular square.

Section 1900.1 of the Zoning Regulations provides that "The Uptown Arts-Mixed Use (ARTS) Overlay District is applied to the Commercial and Mixed Use Districts in the following squares and portions of squares in the 14th and U Streets, N.W., area: 202 through 211, 234 through 242, N242, 272, 273, 274, 303, 304, 305, 331, 332, 333, 358 through 361, 393, 416, 440, 441, and the portions of squares 2875 and 2877 that are south of V Street. "

Of particular importance, Section 1900.1 establishes that the Arts District is applied to Square 238 and portions of Square 238 that is in the 14th Street, NW area, along with other squares specifically identified. When reviewing the DC Zoning report and map¹³, it is clear that while the Subject Property faces T Street, NW, the Subject Property is within the Arts District area. Accordingly, the Arts District is applied to the Subject Property unless it is found in a square or portion thereof that is specifically and expressly excluded.

Section 1901.6 of the Zoning Regulations states the following:

Eating establishments, drinking establishments, or eating and drinking establishments ("eating/drinking establishments") shall be subject to the following limitations:

- (a) No portion of an eating/drinking establishment located on the ground floor is permitted to occupy more than fifty percent (50%) of the linear frontage of each individual square, as set forth below:

¹³ See Zoning Report of Subject Property (Lot 0088, Square 238) dated February 1, 2013 as Attachment 4.

14 th Street, N.W.		U Street, N.W.	
Square	Frontage (feet)	Square	Frontage (feet)
202	222.5	204	305.3
203	310.0	205	618.0
204	320.0	236	523.4
205	430.6	237	538.5
206	399.8	273	225.3
207	450.1	274	340.9
208	400.0	304	192.2
209	380.0	305	186.0
210	203.5	332	189.7
211	304.2	333	187.7
234	253.1	359	96.8
235	310.0	360	230.4
236	320.0	361	251.7
237	380.0		
238	450.0		
239	200.0		
240	391.0		
241	450.0		
242	363.1		
242N	154.5		

- (b) An eating/drinking establishment not located on the ground (street) level of a building shall not count towards the fifty percent (50%) limit; and
- (c) An entrance to an eating/drinking establishment that is not located on the ground (street) level shall not count towards the fifty percent (50%) limit.

Upon examination of the table set forth above in Section 1901.6(a) of the Zoning Regulations, it is clear that while certain squares and portions thereof are in the Arts District area as provided in Section 1900.1, certain squares and portions thereof are not subject to the use limitation of 1901.6 of the Zoning Regulations because they are not included in the table identifying the squares or portions thereof that are subject to the use limitation of Section 1901.6 of the Zoning Regulations. Specifically, the squares and portions thereof that are included in the Arts District

area but that are excluded from the use limitation of Section 1901.6 of the Zoning Regulations because these squares are not fronting 14th and U Streets, N.W. are the following squares:

272, 303, 331, 358, 393, 416, 440, 441, 2875, and 2877.

Accordingly, since Square 238 is not excluded from the table as set forth in Section 1901.6(a) of the Zoning Regulation ("Section 1901.6(a) Table"), Square 238 and portions thereof in the Arts District area (as provided in Section 1900.1 of the Zoning Regulations) are subject to the use limitation for eating/drinking establishments as described in Section 1901.6. Stated differently, the use limitation found in Section 1901.6 of the Zoning Regulation is applied to the Subject Property by reason of Section 1900.1 of the Zoning Regulations because the Subject Property is within Square 238 and portions thereof in the Arts District area.

Once the measurement limitation calculation set forth in the Section 1901.6(a) Table has been met, it is clear that the statutory language provides that no portion of the linear frontage of an individual square may be used as an eating/drinking establishment. The controversy regarding the interpretation arises because of the measurement limitation calculation for a particular square is established for administrative ease purposes by looking at the linear foot frontage of 14th Street, NW and U Street, N.W. for the squares and portions thereof that front 14th Street, N.W. or U Street, NW. However, the use limitation for the linear frontage of a square or portion thereof is no where limited to 14th Street N.W. linear frontage or U Street linear frontage.¹⁴¹⁵ On the contrary, Section 1900.1 read in conjunction with Section 1901.6 makes clear that the use limitation is applied to squares and portions thereof in the Arts District area that are identified on the Section 1901.6(a) Table.

Accordingly, Section 1901.6(a) Table's purpose is twofold: (1) to identify squares and portions thereof in the Arts District area that are subject to the use limitation that front 14th and U Streets, N.W. and (2) to provide a measurement limitation calculation for each square identified. With respect to Square 238, the measurement limitation calculation is equal to 225 feet, which is 50 percent of the linear foot frontage as measured by 14th Street, N.W. for Square 238.

When describing the amendment to Section 1901.6 of the Zoning Regulations, the Commission in its Notice of Final Rule making and Z.C. Order No. 10-17¹⁶ clarified its intent by stating, in part, the following:

The amendment changes the 25% overlay wide cap to a 50 % cap that is applied to each individual Overlay square fronting 14th or U Street, N.W. and clarifies that this limit applies only to ground floor frontage. The street frontages used in this calculation are listed in the chart.

¹⁴ Section 199.1 of the Zoning Regulations defines street frontage as the property line where a lot abuts upon a street. When a lot abuts upon more than one (1) street, the owner shall have the option of selecting which is to be the front for purposes of determining street frontage.

¹⁵ The drafters of the Zoning Regulations could have specifically and unambiguously excluded streets, which it did not.

¹⁶ See Attachment 5.

The Commission in its Notice of Final Rule making and Z.C. Order No. 10-17 also references Advisory Neighborhood Commission ("ANC") 2F's Uptown Arts Overlay Review Committee Report^{17/1819} ("Committee Report"). The Committee Report²⁰ states the following:

In addition, it is essential that the area over which this provision is to be calculated be clarified. In the Committee's view, the most appropriate area over which this provision should be calculated is the linear frontage of these establishments per (zoning) "square" as defined in the current zoning regulations. This approach would have the significant advantages of:

1. Being easily able to be tracked and monitored by the Zoning Administrator (since the zoning square is a basic part of each lot's identifying address);
2. Spreading the benefits (and burdens) of restaurants, bars and like uses much more evenly and fairly throughout the ARTS District; and,
3. Almost certainly avoiding any situation of a de-facto moratorium on these uses arising within Arts Districts since, while one zoning square may have reached its limit, other zoning squares elsewhere in the district would almost certainly continue to have room under the limit to be able to accommodate eating and drinking establishments.

In ZC Case 10-07²¹, the Office of Planning states, in relevant part, the following:

D. Change the overlay-wide method of measurement to a calculation based on the frontage of each individual square. Currently, the measurement is for total frontage (2 miles) of all squares along both 14th and U Streets. As noted above, this can create difficulties in administering the regulations, and would lead to inequities in where restaurants could be located; a concentration in on small are results in an inability to establish any eating/drinking establishment by right anywhere else on the two corridors. Measuring on a square by square basis would better ensure that each square has the potential for a variety of uses, and that no part of 14th or U Street is limited from having restaurants.

E. Require that any additional eating/drinking establishment proposal, once the 50% limit on a square is achieved, would require a variance approval, rather than special exception approval permitted for other provisions of the ARTS Overlay.

¹⁷ Prior to its amendment, Section 1901.6 of the Zoning Regulations stated as follows "eating and drinking establishments shall occupy no more than twenty five (25%) of the linear foot frontage within the ARTS Overlay District, as measured along the lots fronting on 14th Street and U Street, N.W."

¹⁸ Prior to the amendment of Section 1901.6 of the Zoning Regulations, other streets (i.e., other than 14th Street, NW and U Street, NW) within the Arts District area were erroneously interpreted not to be subject to Section 1901.6. See page 3 of the memorandum dated May 28, 2010 from the DC Office of Planning as Attachment 6.

¹⁹ ANC 1B supported the report and recommendations of the ANC 2F Arts Overlay Committee. See Attachment 6.

²⁰ ANC 2F ARTS Overlay Committee Report. See Attachment 6.A.

²¹ See Attachment 6.

In the prior legislative history for the original language of Section 1901.6, the Commission in its Z.C. Order No. 632A²², states, in relevant part, the "Upton Overlay District II proposal included the following amendments to the Zoning Regulations and Map:...2. Adopt a limit on the number of eating and drinking establishments within the ARTS Overlay District." Z.C. Order No. 632A further provided as follows:

2. Adopt a limit on the number of eating and drinking establishments within the ARTS Overlay District, by adopting a new provision, to be designated 11 DCMR 1901.6 to read as follows:

1901.6 Eating and drinking establishments shall occupy no more than twenty-five percent (25%) of the linear frontage within the Overlay District, as measured along the lots fronting on 14th Street and U Street, N.W.

Again, there is no legislative history that indicates an intention to exclude areas from the Arts District's use limitation.

Based on the above, it is clear that once the linear foot frontage measurement calculation for a square has been reached as set forth in Section 1901.6(a) of the Zoning Regulations, the use limitation applies to squares and the portions of squares in the 14th and U Street, NW area, as provided in Sections 1901.6 and 1900.1 of the Zoning Regulations. Accordingly, the Subject Property use as an eating/drinking establishment must be limited pursuant to Sections 1901.6 and 1900.1 of the Zoning Regulations since the measurement limitation calculation for Square 238 has been met and the Subject Property is within Square 238 and the portion of Square 238 in the Arts District area.

Additionally, the Appellant's appeal of DCRA's interpretation should be granted for the additional reasons:

- (a) By not applying the use limitation as interpreted herein, there is effectively no eating/drinking use limitation for portions of squares (i.e., streets other than 14th Street, NW and U Street, NW) within the Arts District area in contradiction of the purpose and policy of the Arts District, which is intended, inter alia, to encourage a mix of uses²³ (e.g., 100 percent of T Street, NW frontage²⁴ within the Arts District area may be drinking

²² See Z.C. Order No 632-A as Attachment 6.1.

²³ Section 1900.2 of the Zoning Regulations states the purposes of the ARTS Overlay District are to: (a) Encourage a scale of development, a mixture of building uses, and other attributes such as safe and efficient conditions for pedestrian and vehicular movement, all of which will be as generally required by the Comprehensive Plan; (b) Require uses that encourage pedestrian activity, especially retail, entertainment, and residential uses; (c) Provide for an increased presence and integration of the arts and related cultural and arts-related support uses; (d) Expand the area's housing supply in a variety of rent and price ranges; (e) Expand business and job opportunities, and encourage development of residential and commercial buildings; (f) Strengthen the design character and identity of the area by means of physical design standards; (g) Encourage adaptive reuse of older buildings in the area and an attractive combination of new and old buildings; and (h) Foster eighteen (18) hour activity and increased public safety.

²⁴ Historic Row Houses on Lots 88, 89, 90, 91. See Attachment 7.

establishments despite over concentration of drinking establishments for Square 238 and portions thereof within the Arts District area);

- (b) the Proposed Lessee and property owner for the Subject Property are not precluded from requesting a variance from the eating/drinking use limitation in accordance with the Zoning Regulations; and
- (c) The Zoning Commission (and the D.C. Office of Planning) through its Zoning Regulation Review ("ZRR") process may amend the language of Sections 1901.6 and 1900.1 of the Zoning Regulations to specifically exclude squares and portions thereof in the Arts District areas if this were indeed its intent and viewed as desirable for all stakeholders.

REQUEST FOR RELIEF

The Appellant requests that the Board ORDER the Department of Consumer and Regulatory Affairs to interpret Sections 1901.6 and 1900.1 of the Zoning Regulations such that:

- (1) the definition of a drinking establishment pursuant to Section 1901.6 of the Zoning Regulations includes Source Theater since it sells alcoholic beverages pursuant to its ABC License No. 79281, and thus, the linear foot frontage of the Source Theater must be included in the linear foot frontage measurement limitation calculation for Square 238, thereby establishing the measurement limitation calculation of 50 percent has been reached for Square 238;
- (2) once the linear foot frontage measurement limitation calculation for a square has been reached as set forth in Section 1901.6 of the Zoning Regulations, the use limitation applies to squares and the portions of squares in the 14th and U Street, NW area, as provided in Sections 1901.6 and 1900.1 of the Zoning Regulations such that the Subject Property will be subject to the use limitation for Square 238 and portions thereof in the Arts District area.