



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.: 18568

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

Motion/Request to:

- | | |
|---|--|
| ☐ Amend the Relief Sought | ☐ Reopen a Hearing (before decision) |
| ☐ Waive Posting / Affidavit of Posting Requirement | ☒ Dismiss on the Merits |
| ☐ Waive Notice Requirement to Shorten Period of Time Case is
Advertised in the <i>DC Register</i> | ☐ Postpone |
| ☐ Accept a Proffered Expert Witness | ☐ Continue |
| ☐ Allow Non-Authorized Representative to Perform Cross-
Examination | ☐ Correct a Transcript |
| ☐ Reopen the Record | ☐ Waive the following Time Deadline (i.e. 14-day filing deadline):
_____ |
| | ☐ 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 8 day of May, 2013

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: 

Print Name: **Scott H. Rome, Esq**

Firm/Organization: **The Veritas Law Firm**

Address: **1225 19th Street NW, Suite #320, Washington, DC 20036**

Phone No.: **(202) 686-7600** E-Mail: **srome@theveritaslawfirm.com**

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: **Al's Market, LLC**

Address: **1346 T Street, NW, Washington, DC 20009**

Phone No.: **(202) 744-9307** E-Mail: **roseprevite@gmail.com**

Board of Zoning Adjustment
District of Columbia
CASE NO. 18568
EXHIBIT NO. 30

May 8, 2013

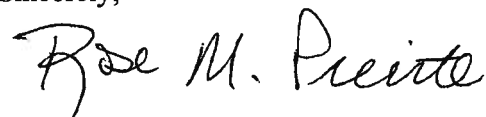
Board of Zoning Adjustment
District of Columbia Office of Zoning
441 4th Street, N.W., Suite 200S
Washington, D.C. 20001

Re: Appeal No. 18568

Dear Board:

I authorize the attorneys of the Veritas Law Firm to act as the authorized agent of Al's Market, LLC in filing any requests or motions before the Board of Zoning Adjustment. Any questions or concerns regarding Al's Market, LLC's intervention in the above referenced matter should be directed to Scott H. Rome or Stephen J. Whelan.

Sincerely,

A handwritten signature in black ink that reads "Rose M. Previte". The signature is written in a cursive, flowing style.

Rose Previte
Managing Member, Al's Market, LLC

Before the

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 18568

MOTION TO DISMISS

Points and Authorities

COMES NOW, Al's Market, LLC, Intervenor to the above-captioned Appeal, and moves the Board of Zoning Adjustment ("BZA") to dismiss this Appeal.

Background

On March 28, 2013, Shaw Dupont Citizens Alliance, Inc. (SDCA) filed its Appeal of the "Administrative Decision of DCRA in its Interpretation of 11 DCMR Sections 1901.6 and 1900.1 for 1346 T Street, NW, Washington D.C. 20009." As is evident from the words of its Appeal, SDCA is requesting that the BZA change its "interpretations" of the aforementioned code sections, but does not specify precisely what order or administrative decision it claims to be aggrieved by.

The first "interpretation" with which SDCA is apparently concerned is "the definition of a drinking establishment pursuant to 1901.6 of the Zoning Regulations." SDCA seeks to appeal this interpretation, despite the fact that this particular Regulation was adopted on February 23, 1990 and most recently amended on May 20, 2011. Section 1900.1, also adopted on February 23, 1990 and most recently amended on May 20, 2011, and the recent "interpretation" of it, is the second provision which SDCA seeks to appeal.

The substance of the SDCA's Appeal centers around the fact that the Source Theatre, located at 1835 14th Street, is classified as a "Legitimate Theatre" pursuant to Section 199 of the Zoning Regulations. SDCA feels that the Source Theatre has been improperly categorized,

because the theatre happens to offer alcoholic beverages to its theatre patrons. SDCA has then conveniently instituted this Appeal, based on email inquiries made to members of the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) asking those members to reconsider the classification of the Source Theatre. Despite the fact that the Appeal itself makes scant mention of the Intervenor, or of 1346 T Street (hereinafter the “Property”), and instead deals almost exclusively with the Source Theatre, the Appeal challenges the zoning classification granted to the Property. While Intervenor has struggled to parse the Appeal for its actual basis for seeking to prevent Intervenor from obtaining a Class “C” license¹, Intervenor now seeks a dismissal of the Instant appeal for the lack of timeliness and standing, as discussed below.

Timeliness

According to § 3112.2(b) of the Zoning Regulations of the District of Columbia, an appeal shall be filed “within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.” In the instant case, Appellant, SDCA alleges that the administrative decisions upon which it appeals were made on February 6, 2013 and March 8, 2013.

After reviewing the Appeal, it becomes clear that the “decisions” which SDCA refers to are actually mere email correspondences between German Jimenez, a member of SDCA, and two employees of DCRA, namely Matthew Le Grant and Rohan Reid. In these emails, the discussion focuses on the amount of frontage on 14th Street NW that is currently occupied by eating and drinking establishments, and some apparent misunderstandings related to how certain establishments are, or should be, classified. The emails do not specifically mention Al’s Market,

¹ Notice of Public Hearing for Intervenor’s License from the Alcohol Beverage Regulation Administration was issued on December 21, 2012, and is attached as Exhibit A.

LLC, or the Property, rather the determination of how establishments on 14th Street are classified forms the basis of SDCA's Appeal. These discussions are tangentially relevant to Al's Market, only because Al's Market plans to open a tavern located at 1346 T Street, and SDCA believes, wrongly, that the analysis discussed in the emails is germane to Al's Market's right to use the property in this manner.

SDCA's Appeal is untimely, however, because it was filed far later than sixty days from the date that the administrative decision *actually* complained of was made. In fact, the administrative decision that SCDA now complains of and upon which this Appeal is based, was made over nine years ago, when the use for the property was established by issuance of a Certificate of Occupancy to Kalechristos N. Jima and Fetawork B. Reta ("Jima and Reta"). The Certificate of Occupancy for Jima and Reta is attached as Exhibit B.

On January 7, 2004, the Certificate that DCRA issued to Jima and Reta was a "new C/O" and approved the Property for building use as a tavern. Whether or not SCDA had actual notice of the administrative decision when it was made, it reasonably should have, as Jima and Reta opened Café Collage in early 2005 and operated as a tavern for over six years. In addition, prior to Café Collage's opening, the Alcohol Beverage Regulation Administration (ABRA) gave public notice of a hearing, to be held before the Alcohol Beverage Control Board on January 19, 2005, at 10:00 a.m. where objectors were entitled to be heard. Notice of the hearing was published in the District of Columbia Register, which must be deemed sufficient notice to any interested parties. The Notice of hearing is attached as Exhibit C.

On January 26, 2009, the owner of the Property, Talley R. Holmes, Jr., took over the use, and was issued a Certificate of Occupancy in his name, pursuant to an ownership change, but continued to operate the Property as Café Collage tavern. Given that the Certificate of

Occupancy was passed pursuant to this ownership change, no inspection was necessary according to District of Columbia Municipal Regulation, Title 11, §3202.8, which reads:

any use that is authorized by a certificate of occupancy may be established and *continued* pursuant to the terms of the certificate and the provisions of this title in effect on the date that the certificate is issued, subject to the following conditions:

- (a) The use shall be designated on the certificate of occupancy in terms of a use classification that is established by this title;
- (b) The use shall be established within six (6) months of the date on which the certificate is issued; and
- (c) Any amendment of the use authorized by the certificate shall comply with the provisions of this title in effect on the date that the certificate is amended. (emphasis added)

As this regulation indicates, once a certificate of occupancy is established, it *continues* as a matter of right in the event of an ownership change, provided that all provisions of §3202.8 are complied with.

This interpretation is echoed by District of Columbia Municipal Regulation, Title 12, §110.1.2, which states, “[f]or changes in ownership structure, land, or parts with an existing valid certificate of occupancy, a new certificate of occupancy *shall be issued* in the name of the new owner, *without reinspection*, provided there is no change in the use or increase in occupancy load” (emphasis added). Neither of the quoted regulations provide for any determination to take place, but rather the language in both sections makes clear that the certificate is issued as a matter of right.

In the case of Café Collage, §3202.8(a) was complied with, as the “tavern” use, which was originally granted in 2004, is established by Title 11, and is designated on both Jima and Reta’s Certificate of Occupancy, and Talley R. Holmes’ Certificate of Occupancy, attached hereto as Exhibit D. Furthermore, Café Collage established its use as a tavern within six months, pursuant to §3202.8(b), and operated as such for several years. Finally, the Certificate was never amended, so §3202.8(c) is not relevant to this inquiry.

Similarly then, as no subsequent use has been established for the Property, Al's Market has the right to continue the use by filing for reissuance of a Certificate of Occupancy in its name, without further determination or inspection as discussed above.

By filing this Appeal, SDCA is effectively arguing that the time to file an appeal should be restarted each time an interested party has a conversation, or email exchange, with someone capable of making an "administrative decision" under to § 3112.2(b). The Board of Zoning Adjustment has already considered and rejected such a position.

In Basken v. Dist. of Columbia Bd. of Zoning Adjustment, 946 A.2d 356, 368 (D.C. 2008), the Court considered the appeal of the issuance of a Certificate of Occupancy. Despite the fact that the issuance of a Certificate of Occupancy is generally an "administrative decision" subject to appeal according to 3112.2(b), the Court of Appeals determined that issuance was not appealable in that instance. *Id.* The Court's rationale was that the Certificate "represented neither a new decision on [the] issue nor the present petitioners' earliest notice of the decision." *Id.* at 368. The Court further opined that just because the argument could be made that a "decision" occurred, if there was no *new* decision on the issue, there was no right of appeal. *Id.* To grant a right of appeal each time a determination was made, "no property owner could ever have assurance that a building project would not be stopped in its tracks at the last minute." *Id.*

The instant Appeal is clearly analogous to the situation in Basken, and should be similarly dismissed. In the instant Appeal, there have been a multitude of actual "administrative decisions" which were made, and a multitude of instances of notice to SDCA, which could arguably have been subject to appeal by the SDCA. SDCA and its members could have had notice of the fact that 1346 T Street was an establishment which was permitted to operate as an eating and drinking establishment as far back as 2004, when Café Collage was first granted its

Certificate of Occupancy. Furthermore, there were various events, including the public hearing noticed for January 19, 2005, the Notice of Public Hearing posted on December 21, 2012 for Al's Market's application for a liquor license, and Al's Market's presentation of its plan for the space at 1346 T Street to SDCA on January 17, 2013, upon which SDCA could have theoretically based its appeal on.

While Intervenor is not suggesting that each of these aforementioned events constituted an appealable decision, such an inquiry is irrelevant because SDCA failed to file an appeal within sixty (60) days of any of them. Instead, SDCA attempted to create a new decision, by emailing members of DCRA and asking for their interpretation of certain Zoning Regulations. To permit SDCA to move forward with this Appeal would allow potentially aggrieved parties to circumvent the timeliness requirement for filing appeals, as parties could effectively "re-start" the sixty (60) day period merely by asking for an interpretation of any administrative decision.

Standing

In addition, SDCA's Appeal should be dismissed because SDCA has not properly alleged that it has standing to bring this Appeal. In order to pursue an appeal before the BZA, an appellant must allege that an error by an administrative officer or body in carrying out or enforcing the Zoning Regulations has caused him *particular damage*. See D.C. Official Code § 6-641.07(g) (1) (2001), *supra*, and 11 DCMR 3112.2. Title 11 DCMR 3112.2 provides that "[a]ny person aggrieved by an order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, may file a timely appeal with the Board."

SDCA's Appeal is completely devoid of any reference to, or mention of, any harm suffered. Before reaching the merits of an Appeal, and before even reaching the question of

whether an appeal is time-barred, it must be determined whether the Appellant has standing in the first place. See Economides v. Dist. of Columbia Bd. of Zoning Adjustment, 954 A.2d 427, 434 (D.C. 2008). Whether SDCA has standing or not, it cannot be argued that SCDA has properly alleged standing, as its Appeal fails to mention standing, or to allege any particular damage.

Conclusion

For the reasons stated in this Motion, Intervenor Al's Market, LLC respectfully requests that SDCA's Appeal be dismissed with prejudice, for failure to file within the applicable time period as prescribed by § 3112.2(b) of the Zoning Regulations of the District of Columbia, and for failure to properly alleged standing.

Respectfully submitted,

AL'S MARKET, LLC
BY COUNSEL



Scott H. Rome, Esq. [476677]
Stephen J. Whelan, Esq. [1010351]
1225 19th Street, NW, Suite 320
Washington, DC 20036
Phone: (202) 686-7600
Counsel for Intervenor, Al's Market, LLC

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION**NOTICE OF PUBLIC HEARING**

Posting Date: December 21, 2012

Petition Date: February 4, 2013

Hearing Date: February 19, 2013

License No.: ABRA-091140

Licensee: Al's Market, LLC

Trade Name: Street

License Class: Retailer's Class "C" Tavern

Address: 1346 T Street, N.W.

Contact: Andrew Kline, 202-686-7600

WARD 1

ANC1B

SMD 1B02

Notice is hereby given that this applicant has applied for a license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such license on the hearing date at 10:00 am, 2000 14th Street, N.W., 400 South, Washington, DC 20009. Petition and/or request to appear before the Board must be filed on or before the petition date.

NATURE OF OPERATION

New Tavern, serving international street cuisine. Occasional live entertainment and DJ. Occupancy load is 99. Sidewalk Café with 15 seats. Summer Garden with 14 seats.

HOURS OF OPERATION

Sunday through Thursday 7 am – 2am, Friday and Saturday 7 am – 3 am

HOURS OF SALES/SERVICE/CONSUMPTION

Sunday through Thursday 8 am – 2am, Friday and Saturday 8 am – 3 am

HOURS OF OPERATION OF SUMMER GARDEN/SIDEWALK

Sunday through Thursday 7 am – 1 am, Friday and Saturday 7 am – 2 am

HOURS OF SALES/SERVICE/CONSUMPTION OF SUMMER GARDEN/SIDEWALK CAFE

Sunday through Thursday 8 am – 1am, Friday and Saturday 8 am – 2 am

HOURS OF ENTERTAINMENT INSIDE

Sunday through Thursday 6 pm – 2am, Friday and Saturday 6 pm – 3 am

HOURS OF ENTERTAINMENT SUMMER GARDEN/SIDEWALK

Sunday through Thursday 6 pm – 1am, Friday and Saturday 6 pm – 2 am

EXHIBIT

B

Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
441 North Capitol Street NE, Room 2100
Washington, D.C. 20002
Tel: (202) 442-4470 Fax: (202) 442-4465

Government
of the District
of Columbia
BLR/BA

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.

CO 68314

**THIS PERMIT IS VALID ONLY FOR THE PREMISES
OF THE PROJECT ADDRESS**

DATE : 1/7/2004

ADDRESS : 1348 T ST NW		FLOOR(S): BASEMENT FIRST		PERCLID : 0238 (square)		-0000-		0088 (sq)	
				WARD : 1		ZONE : C3A			
PERMISSION IS HEREBY GRANTED TO : SOLE PROPRIETOR : KALECHRISTOS N. JIMA & FETAWORK B. RETA					TRADING AS:				
APPROVED USES : OTHER - SEE DESCRIPTION					PREVIOUS USES : OTHER - SEE DESCRIPTION				
TYPE : NEW C/O		BZA NO. :		OCCUPIED SQ. FOOTAGE: 4,000		OCCUP. LOAD: 62		EXPIRATION DATE: NONE	
DESCRIPTION OF USE: TAVERN									
THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, VALID ONLY for the premise at the above address or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW certificate must be obtained.									
David A. Clark DIRECTOR				PERMIT CLERK: LEON PAUL					

FILE COPY

NOV 19 2004



READVERTISED

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
941 NORTH CAPITOL ST., NE, 7TH FLOOR, SUITE 7200
WASHINGTON, DC 20002
(202) 442-4423

HEARING DATE: JANUARY 19, 2005

NOVEMBER 19, 2004 NOTICE IS HEREBY GIVEN THAT THE FOLLOWING PERSONS HAVE APPLIED FOR A LICENSE UNDER THE D.C. ALCOHOLIC BEVERAGE CONTROL ACT, THAT THE OBJECTORS ARE ENTITLED TO BE HEARD BEFORE THE GRANTING OF SUCH LICENSE ON JANUARY 19, 2005 AT 10:00 A.M., 7TH FLOOR, SUITE 7200, 941 NORTH CAPITOL ST., N.E.

LICENSE NO. 71810, FETAWORK B. RETA & KALECHRISTOS N. JIMA
T/A CAFÉ COLLAGE RETAILER'S, CLASS "C" TAVERN, 1346 "T" STREET,
NW

WARD 1 ANC 1B02

NATURE OF OPERATION

NEW, TAVERN PROVIDING DELI TYPE FOOD COLD-CUTS COFFEE, TEA
NO ENTERTAINMENT, BACKGROUND MUSIC ONLY SIDEWALK CAFE

SALE AND SERVICE OF ALCOHOLIC BEVERAGES
SUNDAY THROUGH SATURDAY 5:00PM - 1:00AM

PETITION AND/OR REQUEST TO APPEAR BEFORE
THE BOARD MUST BE FILED ON OR BEFORE
JANUARY 4, 2005

Department of Consumer and Regulatory Affairs

Permit Operations Division
 941 North Capitol Street NE Room 2100
 Washington DC 20002

Tel. (202) 442 - 4569 Fax (202) 442 - 4562
 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557

C of O

CERTIFICATE OF OCCUPANCY

THIS PERMIT MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS OF WORK UNTIL
 WORK IS COMPLETED AND APPROVED

PERMIT NO. CO0901011

Date 01/26/2009

Address of Use		Zipcode	Zone	Ward	Square	Suffix	Lot
1346 T ST NW				1	0238		0088
Description of Occupancy							
TAVERN							
Permission is Hereby Granted To		Trading As		Floor(s) Occupied		PERMIT FEE	
Talley R Holmes Jr		CAFE COLLAGE		1ST BASE.		\$76.00	
Previous Use(s)		Approved Use(1)		Approved Use(2)			
Taverns - A-2		Taverns - A-2					
Type of Occupancy		BZA Number		Occupied Sq Footage		Occupant Load	
Ownership Change				4000		82	
Conditions/ Restrictions							
CO0901011 WORK IS COMPLETED AND APPROVED This Permit Expires if no Construction is Started Within 1 Year or if the Inspection is Over 1 Year. All Construction Done According To The Current Building Codes And Zoning Regulations. As a condition precedent to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all work authorized by this permit and to require any change in construction which may be necessary to ensure compliance with the permit and with all the applicable regulations of the District of Columbia. Work authorized under this Permit must start within one(1) year of the date appearing on this permit or the permit is automatically void. If work is started, any application for partial refund must be made within six months of the date appearing on this permit.							
Director Linda K Argo		Permit Clerk Stacie Williams		Expiration Date			
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557							