

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

Appeal of Shaw-Dupont Citizens Alliance

Appeal No. 18568

DISTRICT OF COLUMBIA'S MOTION TO DISMISS

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully joins in Intervenor, Al's Market Place's Motion to Dismiss the appeal filed by the Appellant, Shaw-Dupont Citizens Alliance ("SDCA") on March 28, 2013. In its appeal, SDCA asks the Board to order DCRA to expand its interpretation of the definition of a drinking establishment under 11 DCMR §1901.6 to include any establishment that possesses an ABC license and also, to expand the application of 11 DCMR § 1900.1 to encompass linear square footage that is not currently included as 14th and U Street, NW frontage in the Arts Overlay District.

SDCA contends that the purpose of its appeal is to compel the Zoning Commission to enforce the zoning regulations as SDCA interprets them; however, it is clear that the true purpose of SDCA's appeal is to prevent Intervenor, Al's Market, from proceeding with its plans to open a tavern at 1346 T Street, NW. In filing this appeal, Appellant seeks to have the Board of Zoning Adjustment classify the Source Theater as a "drinking establishment", which would, pursuant to 11 DCMR §1901.6, maximize the number of eating/drinking establishments permitted in this particular Arts Overlay. Appellant believes that the impact of reaching the

maximum number of drinking establishments in this Arts Overlay would preclude AI's Market from opening and operating a drinking establishment.

The glaring problem with Appellant's appeal is that it is untimely for two reasons: (1) The Source Theater Company obtained its certificate of occupancy on January 21, 2009; therefore, any challenges to its designation as a theater should have been raised within 60 days of the issuance of the certificate of occupancy or when Appellant reasonably should have had notice or knowledge of the decision to issue the certificate of occupancy; (2) Intervenor obtained its original Certificate of Occupancy on January 7, 2004; therefore, any challenges to the certificate of occupancy should have been raised within 60 days of the decision to issue the certificate of occupancy or when Appellant reasonably should have had notice or knowledge of the decision to issue the certificate of occupancy. Finally, we assert that Appellant does not have standing because it has fallen woefully short of demonstrating that it has been aggrieved by the issuances of the certificates of occupancy for the Intervenor or the Source Theater Company.

ARGUMENT

1. *The Source Theater obtained its Certificate of Occupancy in January of 2009 and therefore, Appellant should have challenged its designation as theater within 60 days of the issuance of the certificate of occupancy or when Appellant reasonably should have had notice or knowledge of the decision.*

Appellant argues that the Source Theater Company should be classified as a 'drinking establishment' for purposes of 11 DCMR §1901.6 because it possesses a liquor license. The Source Theater Company is a non-profit business and its primary purpose is to provide space for visual and performing artists. The Source Theater Company obtained Certificate of Occupancy Number CO0900890 on January 21, 2009. *See Exhibit A.* Therefore, the decision to issue the Source Theater Company a certificate of occupancy was issued at least four years ago. Pursuant to Title 11 of the District of Columbia Municipal Regulations, Section 3112.2(a), "any person

aggrieved by an order, requirement, decision, determination, or refusal made by an administrative officer or body may file a *timely* appeal. . . .”[Emphasis added]. Such an appeal shall be filed within 60 days from the date the person appealing the decision had notice or knowledge of the decision or reasonably should have had notice or knowledge of the decision, whichever is earlier. *See Id.* Therefore, an appeal cannot be properly brought more than 4 years after the decision to issue certificate of occupancy. There existed ample opportunity to appeal the decision to issue the certificate of occupancy within the 60 day period authorized by the District of Columbia Municipal Regulations. However, neither Appellant nor its individual members chose to take such action. It is only now, years later, that Appellant has determined that the decision to issue this certificate of occupancy somehow conflicts with the objectives of the newly formed SDCA. One can only imagine the lack of order which would unfold if every newly formed citizens association or interest group were permitted at any time to challenge the certificates of occupancy issued to the multitude of businesses authorized to operate within the District. Allowing appeals to be filed under such circumstances would create uncertainty, instability and confusion within the business community, as certificates of occupancy could be challenged at any time ad infinitum. Here, Appellant waited over four years after the certificate of occupancy was issued to the Source Theater Company to file an appeal. Simply put, the SDCA is just too late. Accordingly, the Board must dismiss this appeal as untimely.

II. Intervenor obtained its original Certificate of Occupancy in 2004; therefore, Appellant should have raised any challenges to the issuance of the certificate of occupancy within 60 days of the issuance of the certificate of occupancy or when Appellant reasonably should have had notice or knowledge of the decision to issue the certificate of occupancy

Intervenor obtained Certificate of Occupancy Number on January 7, 2004. *See Exhibit B.* Similar to the argument advanced regarding the Source Theater Company, many years have passed since the certificate of occupancy was issued. Appellant has waited at least nine and a

half years to appeal the decision to issue Intervenor's certificate of occupancy and as such, Appellant's appeal is now time barred. Timeliness is a jurisdictional issue. When an appeal is not timely filed, the Board lacks jurisdiction to hear it. *See Economides v. D.C. Bd. of Zoning Adjustment*, 954 A.2d 427, 434-435 (D.C. 2008). Under 11 DCMR § 3112.2(a), an appeal of a decision concerning the Zoning Regulations must be filed within sixty days from the date the person "reasonably should have had notice or knowledge of the decision complained of." In this case, the decision to grant Al's Market, LLC certificate of occupancy occurred in January 2004. Although the property was sold to a new owner in 2009, the new owner had the previous certificate of occupancy for a tavern transferred into his name and continued to operate the property as a tavern. Therefore, not only was the decision to issue the certificate of occupancy issued nine years ago, but also, this location has generally operated in Appellant's community since 2004 which served as additional notice of DCRA's decision and contradicts any potential claim of the presence of "exceptional circumstances" that would warrant an extension of the filing deadline in this case.

The crux of this case is that Appellant recognizes it is too late to challenge the issuance of the certificates of occupancy to Al's Market LLC and the Source Theater so instead, has adopted a "backdoor" approach to addressing this issue. By filing the instant appeal, Appellant hopes to convince the Board that DCRA is improperly interpreting 11 DCMR §1901.6 and 11 DCMR §1900 and believes that this will essentially change the classification of the Source Theater Company to a drinking establishment and most importantly for Appellant's purposes, preclude Al's Market, LLC from opening a new tavern on 1346 T Street. However, it is clear from the record that that Appellant has filed this appeal far outside of the permitted timeframe and as such, the Board should dismiss this appeal in its entirety.

IV. Appellant Does Not Have Standing Because It Has Not Shown That It is an Aggrieved Party.

Appellant is also attempting to use the Zoning Administrator's email of February 11, 2013 to revive its opportunity to appeal; however, this email did not contain any new administrative "determinations" or "decisions" that could give rise to an appeal. In his February 11, 2013 email, the Zoning Administrator, Matthew LeGrant merely responded to an inquiry from German Xavier, regarding the Zoning Administrator's interpretation of the linear square footage included in 11 DCMR 1901.6. In that email the Zoning Administrator explained that he and the Office of Planning, which assisted in drafting the regulation, interpreted the frontages included in 11 DCMR §1901.6 to only include the frontages along 14th and U Street, NW and not the frontages along any other street, including T Street. In essence, the Zoning Administrator reaffirmed the Zoning Office's longstanding position on how 11 DCMR §1901.6 has always been applied. Nonetheless, Appellant is erroneously using this email as a basis for the appeal. Appellant taking an appeal from Director LeGrant's email is akin to a person calling the Department of Motor Vehicles, asking a question about a particular regulation and then after receiving an answer, filing an appeal because he or she disagrees with the Department of Motor Vehicle's explanation. In such an example, the caller is no more of an aggrieved party than Appellant is. Appellant has not shown or described any particular injury or set of circumstances which rise to the level of being aggrieved. Although Appellant has alluded to the *potential* impact of the operation of Intervenor's tavern, it has not provided any substantive evidence that it has been aggrieved thus far. To simply file an appeal based upon what might potentially happen in the future as opposed to what has already occurred undermines the intention of the zoning regulations.

In *Economides v. District of Columbia Bd. Of Zoning*, 954 A.2d 427 (D.C. 1980), the Court discussed the issue of standing and concluded that the appellant in the case had standing because he was negatively impacted by a structure which obstructed the view from the front of his house for several months out of the year. In *Gotto v. District of Columbia Bd. Of Zoning Adjustment*, 423 A.2d 917 (D.C. 1980), the Court of Appeal ruled that the owner of a property adjacent to the rear yard of the subject property which had erected a gas-fired kiln was aggrieved within the meaning of the zoning regulations. In both *Gotto* and *Economides* it is significant to note that the complained of activity caused specific and detailed injury, leading the appellants to contend that they had been aggrieved. Here, Intervenor has not yet begun operating the new tavern. On Appellant's Form 125, required for filing an appeal before the Board, where Appellant is asked to describe the current use of the subject property at 1346 T Street, NW, Appellant indicates, "none, historic row house." See Exhibit C. Therefore, even Appellant acknowledges that no business is currently operating 1346 T Street and as such, no damage has resulted and therefore, Appellant cannot be aggrieved. Simply disagreeing with an agency's interpretation of its own regulations does not provide a party standing to file an appeal. One must suffer some sort of injury or damage as a result and none has occurred here. The purpose of the zoning rules is to provide aggrieved parties an avenue to address their concerns. See 11 DCMR §3112.2. It is not intended for the purpose of allowing every person possessing any alleged interest in the operation or future operation of a business, to bombard the Zoning Administrator with letters and emails in hopes of creating an appealable issue. Such a loose application of the requirements for standing would exponentially increase the pool of litigants eligible to file appeals before the Board of Zoning, which would not only create a tremendous burden for this Board but also, is inapposite to the intention of the regulation.

CONCLUSION

In this case, Appellant is asking the Board to order DCRA to expand its interpretation of the definition of a drinking establishment under 11 DCMR §1901.6 to include any establishment that possesses an ABC license and also, to expand the application of 11 DCMR § 1900.1 to encompass linear square footage that is not currently included as 14th and U Street, NW frontage, the result of which would interfere with the rights of two businesses which have been operating under certificate of occupancies since 2009 and 2004 respectively. If the Board permits this appeal to move forward, it risks generating endless litigation from any person who does not want an existing business to continue to operate. Additionally, permitting Appellant to pursue this untimely appeal creates uncertainty and a lack of reliability among businesses and their patrons.

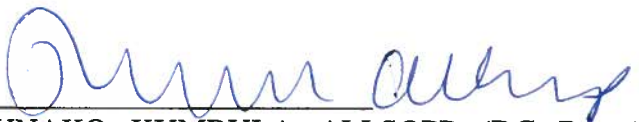
For these reasons, the appeal must be dismissed.

Respectfully Submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

MELINDA M. BOLLING
General Counsel

JUNE 11, 2013

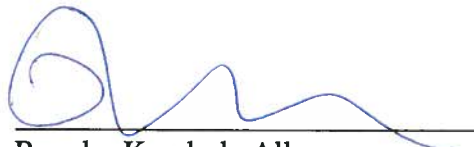

RUNAKO KUMBULA ALLSOPP (DC Bar #
483006)
Assistant Attorney General
Department Of Consumer And
Regulatory Affairs
Office of the General Counsel
1100 4th Street, SW, 5th Floor
Washington, DC 20024
(202) 442-8199 (office)
(202) 442-9447 (fax)
runako.allsopp@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by email and/or first class mail, this 14th day of June 2013, to the following:

Scott H. Rome
Stephan J. Whelan
125 19th Street, NW
Suite 320
Washington, DC 20036

German Xavier Jiminez, Esq.
100 Tysons Blvd
McClean, VA 22102


Runako Kumbula Allsopp

Department of Consumer and Regulatory Affairs

Permit Operations Division
 941 North Capitol Street NE Room 2100
 Washington DC 20002
 Tel (202) 442 - 4589 Fax (202) 442 - 4862
 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. CO0900890

Date 01/21/2009

Address of Use		Zipcode	Zone	Ward	Square	Suffix	Lot
1835 14TH ST NW				1	0238		0033
Description of Occupancy							
THEATER 150 SEATS SALE OF PRE-PACKAGED FOODS BEER AND WINE FIRST FLOOR, SECOND FLOOR							
Permission is Hereby Granted To		Trading As		Floor(s) Occupied		PERMIT FEE	
The Cultural Development Corporation				1 THRU SEC		\$84.76	
Previous Use(s)		Approved Use(1)		Approved Use(2)			
Other (Specify)		Other (Specify)					
Type of Occupancy	BZA Number	Occupied Sq Footage		Occupant Load			
Use Change		7441					
Conditions/ Restrictions							
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							

Department of Consumer and Regulatory Affairs

Permit Operations Division

941 North Capitol Street NE Room 2100

Washington DC 20002

Tel. (202) 442-4889 Fax (202) 442-4862

TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9857

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							
0001011 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		Permit Clerk		Expiration Date			
Nda K Argo		Stacie Williams					
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 SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557							

Department of Consumer and Regulatory Affairs
 Building and Land Department - Building Division
 801 North Capitol Street, 10th Floor
 Washington, D.C. 20001
 (202) 462-4470 Fax (202) 462-4465

Government
 of the District
 of Columbia
 BLADPH

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: 1346 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 & PETAWORK
 B. RITA**

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 premises 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

[Handwritten Signature]

FILE COPY

Exhibit C



BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA



FORM 125 - APPEAL

Before completing this form, please review the instructions on the reverse side.
Print or type all information unless otherwise indicated.

Pursuant to §§ 3100 and 3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken from the

administrative decision of: **MATTHEW LEGRANT, ZONING ADMIN. DCRA; Robert Reid, OFFICE OF Z.A.**

made on **2/6/2013 and 3/8/2013** that states **see Attached Detail STATEMENT regarding**
interpretation of drinking establishment and application of use limitation as
defined in 11 DCMR §§ 1901.6 and 1900.1.

Address(es) of Affected Premises	Square(s)	Lot(s)	Zone Districts
1346 T ST. NW, Washington DC 20009	238	0088	C-3-A/ARTS DISTRICT

Present use of Property: **NONE, HISTORIC ROW HOUSE**

Proposed use of Property: **TAVERN**

Name of Owner of Property: **TAILEY R Holmes Jr.**

Address: **1345 T ST NW WASHINGTON DC 20009**

Phone No(s): **202 387 1649**

Fax No.:

E-Mail:

Name of Lessee: **A1'S MARKET, LLC**

Address: **1346 T ST NW WASHINGTON DC 20009**

Phone No(s): **202 744 9307**

Fax No.:

E-Mail:

106cprevite@gmail.com

Name of Appellant, if other than Owner: **SHAW DUPONT CITIZENS ALLIANCE, INC.**

Address: **P.O. BOX 73153, WASHINGTON DC 20056**

Phone No(s): **202 683 7322**

Fax No.:

E-Mail:

Joan.Stirling@comcast.net

I/We certify that the above information is true and correct to the best of my/our knowledge, information and belief. Any person(s) using a fictitious name or address and/or knowingly making any false statement on this appeal is in violation of D.C. Law and subject to a fine of not more than \$1,000 or 180 days imprisonment or both. (D.C. Official Code § 22-2405)

Date: **3/28/2013**

Signature of Appellant

German J. Jimenez

Waiver of Fee - Status of Appellant

☐ ANC ☐ DC Government Agency ☐ NCPA ☒ Citizens' Association/Association created for civic purposes that is not for profit

To be notified of hearing and decision (Appellant or Authorized Agent*):

Name: **German XAVIER JIMENEZ**

Address: **1800 Tysons BLVD, McLean VA 22102**

Phone No(s): **202 412 1995**

Fax No.:

E-Mail:

german.xavier.jimenez@gmail.com

This appeal is filed by the agent of the Appellant, Form 125 - Appeal shall be accompanied by a letter signed by the Appellant authorizing the agent to act on its behalf in this appeal.

ON THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

EXHIBIT NO. 1

15-06-05