

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

Appeal of Shaw-Dupont Citizens Alliance,
Inc.

Appeal No. 18568

DISTRICT OF COLUMBIA'S PRE-HEARING STATEMENT

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs (“Appellee” or “DCRA”), by and through undersigned counsel, respectfully submits its pre-hearing statement in opposition to the March 28, 2013 appeal filed by the Appellant, Shaw-Dupont Citizens Alliance, Inc (“SDCA”). DCRA filed a Motion to Dismiss in this matter and also joins the Motion to Dismiss filed by the Intervenor, Al’s Marketplace. The Board must grant Intervenor and the District’s motions and dismiss the appeal as untimely. Should the Board decide to hear the merits of the case, the evidence is clear that the Zoning Administrator is properly applying the regulations at issue. The appeal alleges that DCRA’s Zoning Administrator, Matthew LeGrant, erred in his email dated February 11, 2013, in which he articulated his interpretation of Title 11, Sections 1900.1 and 1901.6 of the District of Columbia Municipal Regulations. The appeal must be dismissed because the Zoning Administrator has correctly interpreted 11 DCMR §1901.6 and 11 DCMR §1900.1.

I. BACKGROUND

On February 11, 2013, the Zoning Administrator, responded to an email from the attorney for Appellant, German Jiminez (“Mr. Jiminez”). In the email, Mr. Jiminez requested the Zoning Administrator to explain how he interpreted the application of 11 DCMR §1901.6 to

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the Uptown ARTS Overlay District (“ARTS Overlay District”). The Zoning Administrator responded that his longstanding interpretation of the regulation was that the restriction only applies to the frontages along 14th and U Street, NW and did not include any frontage along any other street, including T Street, N.W., where the subject property will be located. The email dated February 11, 2013, capped a lengthy email discussion between Mr. Jiminez and the Zoning Administrator regarding the tavern which will operate at 1346 T Street, N.W. and Mr. Jiminez’s disagreement with how the Zoning Administrator currently and has historically interpreted the application of 11 DCMR §1901.6. In response to the Zoning Administrator’s February 11, 2013 explanation, SDCA filed the instant appeal.

II. SUMMARY OF ISSUES

SDCA appeals to the Board to compel DCRA to enforce the zoning regulations as SDCA interprets them. Specifically, SDCA requests that the Board order DCRA to interpret 11 DCMR §1900.1 to include the Source Theater Company as a drinking establishment since it possesses a license to sell alcohol. Appellant further argues that pursuant to 11 DCMR §1901.6, the linear frontage measurements for the Source Theater Company should be included in the calculation of 50% frontage restriction on eating/drinking establishments. Appellant purports that the inclusion of the Source Theater Company’s linear frontage maximizes the amount of frontage allowed pursuant to 11 DCMR §1901.6, thereby precluding any other drinking establishments in the Uptown Arts Overlay District, specifically, the tavern scheduled to open at 1346 T Street, NW.

III. ARGUMENT

A. THE APPEAL MUST BE DISMISSED DUE TO TIMELINESS AND LACK OF STANDING.

The District of Columbia and Intervenor have filed motions to dismiss the appeal based upon timeliness and Appellant’s lack of standing. The District hereby incorporates the

arguments advanced in its Motion to Dismiss filed on June 11, 2013 and in the Intervenor's Motion to Dismiss, filed on May 8, 2013.

B. THE ZONING ADMINISTRATOR HAS PROPERLY INTERPRETED 11 DCMR §1901.6 and 11 DCMR § 1900.1.

It is the District's position that the regulations at issue are so clear and unambiguous as to not require the Board's interpretation. Application No. 171149 of Sidwell Friends School, quoting Draude v. D.C. Bd. of Zoning Adjustment, 527 A.2d 1242, 1247 (D.C. 1987) ("[t]he Board may interpret the meaning of the Zoning Regulations when their meaning is ambiguous or open-ended[.]"). However, should the Board of Zoning Adjustment determine that 11 DCMR §1901.6 and 11 DCMR §1900.1 warrant interpretation, certain principles apply. The responsibility for the administration and enforcement of the zoning regulations lies with the Zoning Administrator. See Application No. 16636 for Determination of Special Questions. Therefore, the Zoning Administrator, rather than the Board, makes decisions with respect to the interpretation and implementation of the zoning regulations. See Id. However, Board of Zoning Adjustment has final administrative responsibility to interpret zoning regulations. Murray v. District of Columbia Bd. of Zoning Adjustment, 572 A.2d 1055 (D.C. 1990). When interpreting a statute or regulation, the Board will first look to the language of the act, and when the language is unambiguous and does not produce an absurd result, the Board will not look beyond its plain meaning. Citizens Ass'n of Georgetown v. District of Columbia Bd. of Zoning Adjustment, 642 A.2d 125, 128 (D.C. 1994). The Board will not add language to a regulation, because "[t]o supply omissions transcends the judicial function." District of Columbia v. Brookstowne Community Development Co., 987 A.2d 442, 447 (D.C. 2010), quoting Allman v. Snyder, 888 A.2d 1161, 1169 (D.C. 2005). Further, the Board may not interpret the Zoning Regulations in a

way that effectively amends the regulations adopted by the Zoning Commission. See Taylor v. District of Columbia Bd. of Zoning Adjustment, 308 A.2d 230, 234 (D.C. 1973).

Appellant argues that the Zoning Administrator is improperly applying the ARTS Overlay District linear frontage restrictions pursuant to 11 DCMR §1900.1 and 11 DCMR §1901.6, the full text of which are set forth below:

1900.1 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.

...

1901.6 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:

14th 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.

Appellant argues that the linear frontage calculation should include 1346 T Street, NW because it is located within a portion of Square 238, which is listed as one of the squares subject to the 50% eating/drinking establishment restriction pursuant to 11 DCMR §1901.6. However, Appellant's interpretation of how the regulation should be applied contradicts the plain language and legislative history of the regulation. First, 11 DCMR §1900.1 clearly indicates that the 50% use limitation applies to squares and portions of squares in the *14th and U Streets, N.W.*, area, thereby very specifically defining the two streets which are subjected to the limitation. 11 DCMR §1901.6 then proceeds to detail exactly which parts of the 14th and U Street, N.W. area are covered by the restriction and consistent with the parameters outlined in 11 DCMR 1900.1 (14th and U Street, N.W.), lists those squares or parts of squares to which the 50% requirement

applies, notably all along the 14th and U Street corridor. Of note, is that 11 DCMR 1900.1 does not explicitly name any other street, other than 14th and U Street, NW. The regulation does not state that the restriction applies to the “T Street area” or the “14th and T Street area” or any other generic description that would logically lead one to conclude that the subject property at 1346 T Street, NW is included in the area to which the restriction applies. One need only look to the legislative history of 11 DCMR 1901.6, together with the historical application of the regulation to confirm that the current 50% limitation on eating/drinking establishments is being properly interpreted by the Zoning Administrator. In 2010, the Zoning Commission, pursuant to the authority set forth in Section 1 of the Zoning Act of 1938, amended 11 DCMR §1901.6 to amend the regulation so that instead of calculating the 25% restriction based upon the aggregate total of eating/drinking establishments on 14th and U Street, NW, converted to increasing the percentage from 25% to 50% and applying the eating/drinking establishments linear frontage restriction by square. Commenting on the amendment, the Zoning Commission stated:

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.¹ [Emphasis Added].

Therefore, in a clear and unambiguous fashion, the Zoning Commission described exactly the area to which the amendment would apply. From the Zoning Commission’s Order, it is obviously apparent that the purpose of the amendment was to increase the percentage of linear frontage permitted for eating/drinking establishments and authorize a new method of calculating linear frontage measurements. However, the Zoning Commission makes absolutely no mention of any changes which would have expanded the application of the regulation to additional streets outside of 14th and U Street, N.W. That is because previously, 11 DCMR 1901.6 only applied to

¹ Zoning Commission Order No. 10-07 (July 29, 2010).

the frontage on 14th and U Streets, NW² and after the regulation was amended, it still only applies to frontage on 14th and U Streets, NW – it was only the percentage restriction and the calculation method that changed. This Board, in Appeal No. 17850 of JGB/14th & S LLC, also indicated that it understood the restriction to apply in the same manner as the Zoning Administrator and when analyzing whether the previous 25% limit had been reached, acknowledged that there existed “a restriction on the amount of space that can be devoted to eating and drinking establishments on *lots fronting on 14th Street or U Street.*” Id. at p. 11. Consistent with its previous interpretation, the Board should re-affirm in this case that 11 DCMR §1901.6 applies only to the linear frontage along 14th Street and U Street, NW and does not include T Street, NW.

Appellant also argues that the Zoning Administrator’s interpretation and application results in a disproportionate number of eating/drinking establishments in parts of the ARTS Overlay District that are not on either 14th or U Street, thereby aggrieving SDCA. However, this is a natural consequence of how 11 DCMR §1901.6 was applied and further, the result was explicitly acknowledged by the Zoning Commission. See Zoning Commission Order No. 10-07, p. 3. Under the previous 25% cap, the Zoning Commission noted that some individual blocks were well in excess of the 25% limit on eating/drinking establishments, since the limit is not measured on a block by block basis. See Id. Similarly, under the amended regulation, there still may be varying numbers of eating/drinking establishments in the Arts Overlay District. Those streets which happen to abut the squares on 14th and U Street, N.W. that are listed in 11 DCMR §1901.6 naturally may have a greater likelihood of housing fewer eating/drinking establishments. However, this in no way aggrieves Appellant because the Zoning Administrator’s current

² Prior to the 2010 amendment to 11 DCMR § 1901.6, the regulation provided that eating and drinking establishments “shall occupy no more than twenty-five percent (25%) of the linear foot frontage within the ARTS Overlay District, as measured along the lots fronting on *14th and U Street, N.W.* “

interpretation and application of 1 DCMR 1901.6 does not frustrate or conflict with the purpose of the ARTS Overlay District, which is described in 11 DCMR §1900.2 as follows:

1900.2 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.

Appellant has not and cannot point to any objective set forth in 11 DCMR 1900.2 that has been undermined by the Zoning Administrator's interpretation of 11 DCMR 1901.6. Additionally Appellant cannot state that the regulation is being applied erroneously when the Zoning Commission anticipated this result and has acknowledged the potential for the application of 11 DCMR §1901.6 to impact each individual block differently.

C. THE SOURCE THEATER IS NOT A DRINKING ESTABLISHMENT.

The Source Theater Company is located at 1835 14th Street, NW, within the ARTS Overlay District. Appellant argues that the Source Theater Company should be classified as a drinking establishment because it possesses an ABC license. Appellant further argues that 11 DCMR § 1900.3 states that when there are conflicting zoning regulations, the more restrictive regulation governs. See Appellant's Appeal, p. 3. Appellant argues that the classification as a drinking establishment is more restrictive than a classification as a theater and therefore, since the Source Theater qualifies as both, it should be governed by the laws pertaining to the most restrictive classification, which is as a drinking establishment. See Id. As such, Appellant contends that the Source Theater Company should be included in the Zoning Administrator's calculations for determining whether the linear frontage for eating/drinking establishments maximum has been reached for Square 238. 11 DCMR 199.1 defines a "legitimate theater" as:

Legitimate Theater -- 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)

According to its website, the purpose of the Source Theater Company is to showcase visual and performance art. A cursory overview of advertised scheduled events at the Source Theater demonstrates that it fulfills the objectives of its certificate of occupancy for a theater. For example, currently, from June 7 until June 30, 2013, the Source Theater Company is holding the "2013 Source Festival" featuring six 10-minute plays. See Exhibit A. The Source Theater Company also possesses a license to serve alcoholic beverages and in fact, does serve alcohol. However, for purposes of issuing a certificate of occupancy, the space occupied by a business is classified according to its primary purpose, which in the case of the Source Theater Company is to serve as a theater. It is not uncommon for a business space to serve a primary function but

incidentally use the same space for another type of secondary activity. What is more, the zoning regulations actually anticipate this hybrid use of space and do not require a business to relinquish its original identity as reflected in its certificate of occupancy. For example, 11 DCMR § 199.1, the description of a ‘fast food establishment’ states:

A proposed or existing establishment meeting this definition shall not be deemed to constitute any other use permitted under the authority of these regulations, except that a restaurant, grocery store, movie theater, or other use providing carryout service that is clearly subordinate to its principal use shall not be deemed a fast-food establishment.

By this definition, a place of business that uses its space for a purpose that is incidental to its primary use will not be re-categorized or supplementally categorized. Therefore, that the Source Theater Company incidentally sells liquor does not make it a drinking establishment anymore than a movie theater that incidentally sells hotdogs would be classified as a fast food establishment. *See Id.* Again, in the definition of a ‘food delivery service,’ the zoning regulations state it is, “a restaurant, prepared food shop, or fast food establishment, in which the *principal* use is production of prepared food for delivery to customers located off the business premises.” *See Id.* In anticipation that a business may engage in other activity that does not rise to the level of “principal use”, the regulations quantify the amount of food delivery service necessary to deem a business a ‘food delivery service’ (and therefore obligated to obtain a food delivery service certificate of occupancy) by stating that “[a]ny establishment that derives more than seventy-five percent (75%) of its sales from delivery orders will be considered a food delivery services in all cases.” *See Id.* Therefore, a business which devotes less than 75% of its space to food delivery will not be categorized as a food delivery service or subjected to any laws applicable to food delivery services. Finally, the zoning regulations define a restaurant as:

[A] place of business that does not meet the definition of a “fast food establishment” or “prepared food shop,” where food, drinks, or refreshments are prepared and sold to customers primarily for consumption on the premises. *Any facilities for carryout shall be clearly subordinate to the principal use of providing prepared foods for consumption on the premises.* [Emphasis added.]

See Id. So, the question here is what is the Source Theater Company’s primary purpose? All evidence indicates that its primary purpose is to serve as a theater which showcases a variety of art. The Source Theater Company’s website advertises the activities which take place at the venue and includes a schedule of upcoming events. There are, however, no advertisements for happy hours or drink specials, as one would find for a bar, cocktail lounge or nightclub.³ Appellant takes the large unfounded leap that because the theater possesses a liquor license that it is necessarily included as a drinking establishment under 11 DCMR 1901.6 but asserts no authority for this position. Because the Source Theater sometimes serves liquor at events does not suddenly convert it into a drinking establishment or a combination theater/drinking establishment. Appellant does not direct the Board or DCRA to any statute or regulation which mandates that the Source Theater be classified as a drinking establishment because no such authority exists. Most importantly, because such language is absent from the zoning regulations, this Board cannot take such action which would amend the zoning regulations or adopt an interpretation of the zoning regulations, which would require the Source Theater to be classified as a drinking establishment. District of Columbia v. Brookstowne Community Development Co., 987 A.2d 442, 447 (D.C. 2010), quoting Allman v. Snyder, 888 A.2d 1161, 1169 (D.C. 2005).

As the Court in Economides v. District of Columbia Bd. of Zoning, 954 A.2d 427 (2008) stated, “an agency’s interpretation of the regulations that govern it “must be accorded great

³ 11 DCMR §1711 indicates that a bar, lounge or nightclub is considered a ‘drinking place’ for zoning purposes.

weight and must be upheld unless it is plainly erroneous or inconsistent with the regulations.” (quoting Glenbrook Road Ass’n, supra 605 A.2d 22, at 30 (citing Levy v. District of Columbia Bd. of Zoning Adjustment, 570 A.2d 739, 748 (D.C. 2009)). What is more, when “the construction of an administrative regulation rather than a statute is an issue, deference is even more clearly in order.” 1330 Connecticut Ave., Inc. v. District of Columbia Zoning Comm’n, 669 A.2d 708, 714-15 (D.C. 1995). In this case, the regulations at issue and legislative history are clear. It is Appellant who misinterprets 11 DCMR §1900.1 and 11 DCMR §1901.6. For these reasons the Appeal should be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Pre-Hearing Statement was served by first class mail and email, this 14th day of June 2013, to the following:

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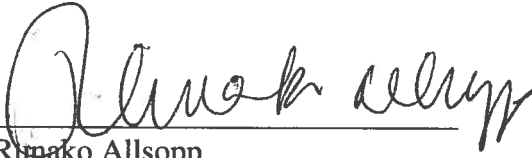

Runako Allsopp

Exhibit A

PERFORMING
ARTS

VISUAL
ARTS

VENUES
FOR RENT

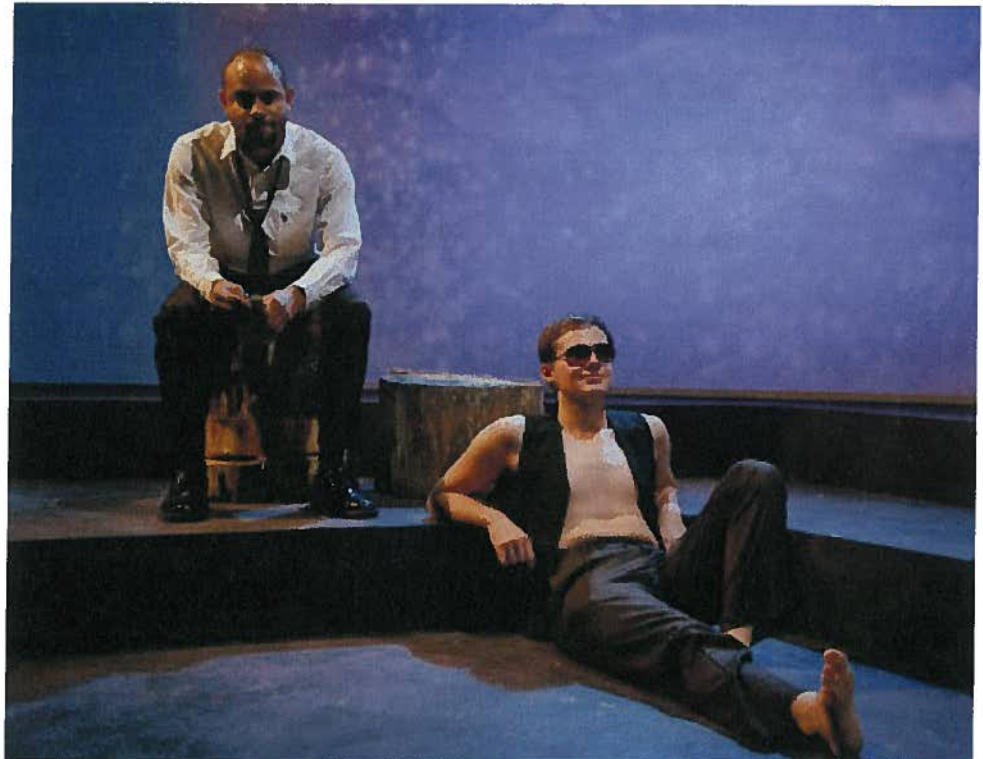
ARTIST
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2013 SOURCE FESTIVAL: IN THE MIDST, SIX 10-MINUTE PLAYS

Join CulturalDC for our [6th Annual Source Festival](#), June 7 - June 30 as 25 original works debuted for the stage. The Festival line-up includes three Full-Length Plays, 18 10-Minute Plays and three Artistic Blind Dates.

This year's 10-Minute Plays themes: In the Midst, On the Cusp and Afterward.

IN THE MIDST: [LAKE UNTERSEE](#), the full-length play that inspired this grouping, follows a young man in the midst of discovering exactly who he is. Each of these 10-Minute Play characters is in the middle of a crucial turning point in their lives.

Performances (click to purchase tickets):

[June 7, 8pm](#)

[June 11, 8pm](#)

[June 15, 1 pm](#)