

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18568 of Shaw-Dupont Citizens Alliance, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the Department of Consumer and Regulatory Affairs' ("DCRA") interpretation of § 1901.6 allegedly pertaining to a drinking establishment in the ARTS/C-3-A District at premises 1346 T Street, N.W., (Square 238, Lot 88).¹

HEARING DATE: June 18, 2013

DECISION DATE: June 18, 2013

ORDER DISMISSING APPEAL

This appeal was filed on March 28, 2013 by Shaw-Dupont Citizens Alliance, Inc. ("SDCA" or "Appellant"). The Appellant challenges two DCRA interpretations of 11 DCMR § 1901.6 contained in emails that Appellant claims allowed for the resumption of a tavern use at 1346 T Street, N.W. ("the Subject Property") by its lessee, Al's Market.

On May 9, 2013, Al's Market filed a Motion to Dismiss the appeal as an untimely attack on the 2004 certificate of occupancy that first authorized a tavern use on the Subject Property. (Exhibit 30.) The motion also argued that the Appellant lacked standing. On June 13, 2013, DCRA filed a Motion to Dismiss essentially making the same arguments. (Exhibit 38.)

In its opposition to the motions, the Appellant for the first time asserted that the DCRA interpretations led to the erroneous issuance of an ownership change certificate of occupancy for the Subject Property in February 2013. (Exhibits 33, 35, and 39.) However, the Appellant never requested permission to amend the appeal to encompass that DCRA action.

Following a public hearing on June 18, 2013, the Board of Zoning Adjustment ("Board") voted to dismiss the appeal as untimely.²

¹ The caption has been changed to reflect the nature of this appeal as determined by the Board. The original caption referred to the appeal as being from a DCRA decision to allow a drinking establishment at the address. As will be explained, the interpretations complained of, which took the form of emails, never mentioned the address and did not clear the way for the issuance of a certificate of occupancy permitting such a use.

² The Board also voted to deny the motions to dismiss on the issue of standing, finding that the Appellant exists in part to respond to issues arising from the establishment or resumption of neighborhood business.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing.

By memoranda dated March 29, 2013, the Office of Zoning (“OZ”) provided notice of the appeal to the Zoning Administrator (“ZA”), at DCRA; Advisory Neighborhood Commission (“ANC”) 1B, the ANC Single Member District Commissioner 1B-12; the Office of Planning; and the Councilmember for Ward 1. Pursuant to 11 DCMR § 3112.14, on April 12, 2013, OZ mailed letters providing notice of the hearing to the Appellant, the owner and lessee of the Subject Property, the ZA and ANC 1B. Notice was also published in the *D.C. Register* on April 12, 2013.

Parties

The parties in this appeal were the Appellant SDCA, the Appellee DCRA, the lessee Al’s Market, and ANC 1B, which is the ANC for the area within which the property that is the subject of the appeal is located. All four were automatic parties to the appeal pursuant to the definition of the term “Party,” as set forth in 11 DCMR § 3199.1.³

ANC Report

By a letter dated June 11, 2013 (Exhibit 44), ANC 1B submitted a written report in which the ANC noted that at its properly noticed regularly scheduled meeting of June 6, 2013, and with a quorum present, it unanimously voted to express its full support for Compass Rose, which the Board understands to be the name proposed for the tavern. The ANC stated its belief that the business “satisfied all legal requirements to operate” and noted that a prior certificate of occupancy for an eating and drinking establishment had previously been issued for the Subject Property. The report also concluded that it would be “unfair to challenge the restaurant use now, several years after an eating and drinking business was first opened there.”

FINDINGS OF FACT

1. The Subject Property is located at 1345 T Street, N.W. and is mapped in the C-3-A District and the ARTS Overlay District (“Overlay”).
2. The Subject Property is located in Square 238. That Square also includes properties that front on 14th Street, N.W.
3. Certificate of Occupancy (“C of O”) No. CO68314 was issued on January 7, 2004 to Kalechristo N. Jima and Fetawork B Reta, who were then the owners of the Subject Property. (Exhibit 38 C.) The C of O “type” was indicated as “new”, the description of the approved use indicated “tavern”, and the expiration date was “none”.

³ It was therefore unnecessary for Al’s Market to move to intervene. (Exhibit 29.)

4. The Subject Property was subsequently sold to Talley R. Holmes.
5. Although not required by the Zoning Regulations, § A 110.1 of the District of Columbia Construction Codes requires that a replacement certificate of occupancy must be issued when the ownership of property changes.
6. Therefore on January 26, 2009, Certificate of Occupancy No. CO091011 was issued to Talley R. Holmes. (Exhibit 38-B.) The description of occupancy was identified as “tavern”, the type of occupancy was identified as “ownership change”, and the expiration date was left blank.
7. At some point in time the business ceased operations.
8. Subsection 1901.6 establishes limits on eating establishments, drinking establishments, and eating and drinking establishment (“Eating/Drinking Establishments”) within the ARTS Overlay.
9. Prior to its amendment on August 20, 2010, § 1901.6 provided that Eating/Drinking Establishments “shall occupy no more than twenty five percent of the linear foot frontage within the ARTS Overlay District, as measured along the lots fronting 14th Street and U Street, N.W.”
10. According to the Notice of Final Rulemaking for the 2010 amendments, the adopted rule changed “the 25% overlay-wide cap to a 50% cap that is applied to each individual Overlay square fronting 14th or U Streets, N.W. and clarifies that this limit applies only to ground floor frontage. The street frontages to be used in this calculation are listed in a chart.”
11. The chart, which is appended to § 1901.6 lists each square in the ARTS Overlay with frontage on 14th Street or U Street and as to each square indicates the number of feet of such frontage.
12. For Square 238, the chart indicates that there are 450.1 feet of frontage on 14th Street, N.W., which means that the limitation on Eating/Drinking Establishments is triggered when the ground floors of such uses occupy at least 225 feet of the portion of Square 238 that fronts 14th Street.
13. At some point prior to February 1, 2013, SDCA became aware of a proposal to resume the Eating/Drinking Establishment use at the Subject Property.
14. Mr. German Jimenez, the Chair of the Appellant’s Zoning Committee, concluded that § 1901.6, as amended, precluded the resumption of the use based upon his belief that:
 - a. At least 225 feet of the portion of Square 238 that fronted 14th Street was occupied by Eating/Drinking Establishment; and

- b. As a result of the limit having been reached, no new Eating/Drinking Establishments were allowed on any portion of Square 238 that was mapped within the ARTS Overlay, including those portions that did not front 14th Street.
15. As to whether the 14th Street frontage limitation for Square 238 had been exceeded, Mr. Roland Reid, a Program Analyst within DCRA's Office of the Zoning Administrator first indicated in an email to Mr. Jimenez dated March 5, 2013 that "there is zero linear frontage remaining for eating and/or drinking establishment for Square 238." (Exhibit 4, Emphasis Supplied.)
16. On March 5, 2013, Mr. Jimenez replied by stating that this was his understanding as well, but that "it would be good to have this information for purposes of ... an interpretation case with BZA regarding square 238."
17. Mr. Reid provided the information in an email dated March 8, 2013, but instead of showing zero street frontage available, the supplied chart showed 4.4 feet left.
18. In a March 9th email response, Mr. Jimenez questioned why the Source Theater was not included within the list of existing Eating/Drinking Establishments, noting that the theater held Alcoholic Beverage Regulation Administration license #79281, Class DM and therefore should be viewed as a drinking establishment.
19. On March 11, Mr. Reid emailed his response, which stated in part:

According to the Zoning Regulations the Source Theater is classified as a Legitimate Theater ... with accessory sale of pre-packaged foods, beer and wine. It is also described as such on the certificate of occupancy. Its primary use is not an eating/drinking establishment and therefore the street frontage it occupies is not included in the inventory for eating/drinking establishments on 14th St, NW.
20. As to the geographic scope of the Overlay's limitation on Eating/Drinking Establishments, Mr. Jimenez sought to convince the Zoning Administrator that the limitation applied to all Overlay-mapped properties within a square in which the 50% cap had been exceeded.
21. In an email to the Zoning Administrator dated February 1, 2013, Mr. Jimenez refers to an earlier conversation between the two, during which the ZA apparently stated his belief that the Overlay's limitation, once triggered, only applied to the portion of the square that fronted 14th or U Street. The email sought to convince the ZA of SDCA's broader view. (Exhibit 10, page 2.)
22. The Zoning Administrator responded in an email dated February 6, 2013, affirming his "longstanding interpretation ... that the zoning provision that limits the street frontage for eating establishments in the Uptown Arts-Mixed Use (ARTS) Overlay District, 11 DCMR

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1901.6, applies only to the frontages along 14th and U Street NW street frontages, and does not include frontages along any other street.”

23. None of the emails from or to Mr. Jimenez mentioned the Subject Property.
24. The Appellant filed its appeal of the February 6th and March 11th emails on March 28, 2013.
25. Although no exhibit was presented, the Appellant subsequently claimed that on February 20, 2013, Certificate of Occupancy No. CO1301182 was issued for the Subject Property due to an ownership change.

CONCLUSIONS OF LAW

The Board is authorized by section 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. An appeal must be filed within 60 days after the date the appellant “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.” 11 DCMR § 3112.2 (a). Although this deadline is a “claims processing rule” and therefore not jurisdictional in nature, *see Gatewood v. District of Columbia Water and Sewer Authority*, 82 A.3d 41 (2013) (WASA deadline to file appeal of water bill is non-jurisdictional), the failure to adhere to the rule will result in the dismissal of an appeal unless the 60-day deadline is extended under circumstances stated at 11 DCMR § 3112.2(d).

The Appellant claims to be appealing two decisions contained in emails dated February 6 and March 11 of 2013. The Board concludes that neither of these decisions can form the basis of any appeal and that the only decision relating to the tavern use on the Subject Property from which an appeal could have been taken was made on January 7, 2004 when Certificate of Occupancy (“C of O”) No. CO68314 was issued to Kalechristo N. Jima and Fetawork B Reta. It was this C of O that first authorized a tavern use on the Subject Property and no C of O has since been issued that amended that use or authorized a replacement use.

Neither the 2009 certificate of occupancy nor the two emails “represented ... a new decision on this issue.” *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 368 (2008). The 2009 certificate of occupancy only authorized an ownership change. The two emails merely responded to the Appellant’s assertion as to how the Overlay’s cap on Eating/Drinking Establishments should be computed and applied. Neither email “clearly signified a decision not to withhold a certificate of occupancy”, *Basken*, 946 A.2d at 370, and therefore cannot constitute the basis for an appeal. *See Appeal No. 18522 of Washington Harbour Condominium Unit Owners’ Association* (Non-binding ZA determination letter issued before building permit application may not be appealed). *Compare Appeal No. 18300 of Lawrence and Kathleen Ausubel* (2011) (Appellant’s could not wait to appeal building permit where ZA email clearly

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indicated permit would issue based upon resolution of zoning issue presented). In fact the emails complained of did not mention the Subject Property at all and therefore cannot plausibly be viewed as pertaining to it in any way.

Perhaps because of this the Appellant in its oppositions to the motions to dismiss first refers to a certificate of occupancy it claims was issued for the Subject Property in February of 2013. The pleadings suggest that the Certificate of Occupancy would not have been issued had DCRA interpreted § 1906.1 in the manner asserted by the Appellant. However, this certificate of occupancy, like the one issued in 2009, only acknowledged an ownership change and did not authorize any change to the actual tavern use.

The Board therefore concludes that the only decision authorizing a tavern use on the Subject Property was the Certificate of Occupancy issued on January 7, 2004. The Board understands that the Appellant does not claim to be challenging this C of O. Nevertheless that is the only zoning decision pertaining to the tavern use on the Subject Property for which an appeal could be filed. Clearly the 60-day period for filing such an appeal has long past and the Appellant has not argued that the deadline should be extended pursuant § 3112.2 (d). This appeal must therefore be dismissed as untimely.

The Board is required to give “great weight” to the issues and concerns raised in writing by the affected ANC. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)). In this appeal, the ANC report expressed its support for the business that would re-establish a tavern on the Subject Property and stated its view that the Appellant’s belated attack on the 2004 certificate of occupancy is unfair. Although neither statement is legally relevant to the Board’s determination of this Appeal, the Board concludes that its decision to dismiss the appeal is consistent with the sentiment stated in the ANC’s report.

Based on the findings of fact and having given great weight to the ANC 1B report, the Board concludes that the appeal filed by Shaw-Dupont Citizens Alliance, Inc. does not satisfy the requirements of timeliness set forth in § 3112.2. The Board must therefore find the filing of the appeal untimely. Accordingly, it is therefore **ORDERED** that the appeal is **DISMISSED**.⁴

VOTE: 3-0-2 (S. Kathryn Allen, Robert E. Miller, and Jeffrey L. Hinkle to Dismiss the appeal; Lloyd J. Jordan not present, not voting; one Board seat vacant.)

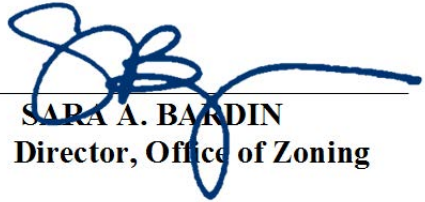
⁴ It is not necessary for the Board to reach the claims made in the Motions to Dismiss, that the Appeal is also an untimely attack on the Certificate of Occupancy issued to the Source Theater. Whether the Source Theater was properly included within DCRA’s computation of the applicable street frontage goes to the merits of the appeal, which the Board did not reach.

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BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

The majority of the Board members approved the issuance of *this* order.

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: February 25, 2014

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.