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

Appeal of Richardson Place Neighborhood Association BZA Appeal 19441

DCRA'S MOTION TO STRIKE APPELLANT'S RESPONSE TO DCRA SUBMISSION AS EXPLICITLY PROHIBITED BY THE BOARD

DCRA hereby moves to Strike Appellant's Response to DCRA's Submission ("**Appellant's Response**") as explicitly prohibited by the Chair of the Board when he requested additional information from DCRA.

The Chair repeatedly and explicitly stated that the record was closed except for DCRA to submit the information requested by the Chair. The Chair explicitly rejected the Secretary's query if parties should reply to DCRA's submission, instead prohibiting any responses and then confirmed that the record was closed to all but DCRA, and then only to respond to the Chair's specific request, as is made clear by the following excerpt from the transcript of the March 22 hearing (pages 436-8, highlighting added):

[p. 436]
CHAIRPERSON HILL: A May 10th decision. And I'm sorry, there was some information that I wanted back from DCRA.
MR. MOY: Yeah, which --
CHAIRPERSON HILL: Giving us enough time to look at it, and I don't have a calendar in front of me so if you could --
MR. MOY: No, I do, I do, I do, I do.
CHAIRPERSON HILL: -- give me a date for --
MR. MOY: I do. Okay. Let's see, if that's -- I don't know if there's anything else, but May 10th. Give Board sufficient time. Since it's that far out.
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CHAIRPERSON HILL: Is like the 5th fine? May 5th?
MR. MOY: I was going to say, maybe Monday, May 1st.
CHAIRPERSON HILL: Okay.
MR. MOY: If there's ample time for --
CHAIRPERSON HILL: May 1st.
MR. MOY: -- all the parties, because you'll have all of April.
CHAIRPERSON HILL: Okay. May 1st. All right, great.
MR. FREEMAN: The responses? When you said enough time.

MR. MOY: Oh, well, I --
CHAIRPERSON HILL: No, no, no, no, I just want -- the record is closed except for what I wanted from DCRA, unless the Board has other things. I just want to know what information the Zoning Administrator had when he was reviewing the certificate of occupancy. Okay. So, May 1st. Okay.
Well, thank you all very much. And you have a question?
MR. FREEMAN: Question. Are you looking for proposed orders or are you --
MR. MOY: It's findings of fact, conclusions
[p. 438]
of law.
CHAIRPERSON HILL: If anyone wants to submit findings of fact and conclusions of law, you're welcome to.
MS. GLAZER: Just want to point out, Mr. Chair, if you do require that you have to take into consideration when the transcript would be available. That was an issue recently on an appeal.
MR. FREEMAN: If you want it, we'll do it. If not --
CHAIRPERSON HILL: I don't need any more information. I've got a lot of information. But, that's why I just got confused for a second. I thought you were actually helping me, but I don't think so. So, okay. So, I'm back to the beginning.
So, please get that information by the 1st of May, and then we're going to go ahead and do decision making on the 10th. Okay?
MR. FREEMAN: So, the record is closed, only for what they're [DCRA] going to submit. Okay.
CHAIRPERSON HILL: Exactly. Any other questions from anybody?

Appellant knew of this explicit prohibition by the Chair of any submissions other than the information the Chair requested from DCRA not only because of Appellant's participation in the hearing, but also as Appellant had read this transcript, as indicated in his reply. Indeed, in his Reply, Appellant cites not only to this transcript, but also to the very portion of the transcript in which the Chair explicitly rejected granting replies to DCRA's submission.[1] Yet Appellant chose to ignore this specific instruction – and while Appellant emphasized he was not an attorney at the hearing, he is surely familiar with the basics of legal processes and practice in his capacity as the Director of Communications for the Institute of Justice, the self-described "National Law Firm for Liberty".[2]

Appellant already bent the Chair's explicit closing of the record by filing a letter from Councilmember Todd after the record was closed, even though Appellant had more than four months before the record was closed to file a letter from the Councilmember from the filing of

[1] BZA Appeal 19441, Exhibit 42 (Appellant's Response to DCRA's Submission), first paragraph.
[2] http://ij.org/staff/j-justin-wilson/; http://ij.org/about-us/.

Appellant's appeal. DCRA did not object to including Councilmember Todd's letter in the record on principle, as DCRA respects the inclusion of an elected official's viewpoint. In this case, however, Appellant not only sought the Councilmember's view long after the filing of the appeal and after the hearing and closing of the record, but also used the Councilmember's status to expand on an argument only raised at the hearing (the affidavit executed by Common ("**Common's Affidavit**"), the Owner's tenant and property manager[3]), which seems to contravene at least the spirit of the regulations regarding the closing of the record. Yet at least Appellant in that situation requested that the Board reopen the record. Appellant now directly disregards both the Chair's explicit instructions and the specific provisions of the Zoning Regulations by filing this Response.

Appellant's assertion of right to respond is inapposite

In his Response, Appellant seeks to insert into the record further legal argument with additional case law that was not raised at the hearing or in Appellant's filings, effectively relitigating the hearing that has already been closed. As a result DCRA and the Owner have had insufficient time to prepare a response, especially given the short time frame before the decision scheduled on Wednesday, May 10, let alone provide the Board with time to review the responses by DCRA and the Owner.

Appellant asserts that he is "entitled" to file this response based on Section Y-408.9 of the Zoning Regulations. Yet Chapter 4 of Subtitle Y, in which that section is located, is titled "Pre-Hearing and Hearing Procedures: Applications". It is Chapter 5, instead, that governs those procedures for appeals – and specifically Section Y-506, which does not have a parallel provision to Section Y-408.9 cited by Appellant. Moreover, Appellant selectively, and misleadingly, quotes from D.C. Official Code 2-509, the D.C. Administrative Procedures Act cited by Section Y-408.9. Appellant first expanded the citation beyond Section Y-408.9's reference to D.C. Official Code 2-509(b) alone to also include 2-509(c) and (d), neither of which appears in Section Y-408.9. Appellant then wove a sentence from scattered phrases from these three separate subsections, mixing provisions that address the responsibilities of agency officials charged with making determinations based on the record with provisions governing the rights of participants in contested cases to present their viewpoint.

[3] BZA Appeal 19441, Exhibit 32H1 and 32H2 (Owner's Prehearing Statement, Tab H).

Even if D.C. Official Code 2-509(b) were to apply to this appeal, it does not provide Appellant with the opportunity to autonomously file a response introducing new assertions and legal authorities:

> (b) In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof. Any oral and any documentary evidence may be received, but the Mayor and every agency shall exclude irrelevant, immaterial, and unduly repetitious evidence. Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Where any decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary. [underscore added]

The last sentence of D.C. Official Code 2-509(b) provides that a party has a right to "timely request" to respond if the decision of an agency, here the ZA, "rests on official notice of a material fact not appearing in evidence in the record". The only facts included in DCRA's Submission that were not previously in the record of this appeal were the applications for the certificates of occupancy ("**CofOs**") for 410 and 412 Richardson Place, NW (the "**Properties**") and the timeline of review and approval of these CofOs, which was publicly available through DCRA's PIVS website. Yet Appellant did not challenge these specific facts (let alone request the opportunity to respond), which DCRA supplied only in response to the Board's request. Instead Appellant submitted new arguments and citations to legal authorities to allege that the ZA ignored Appellant's factual evidence proving that the Owner intended to use the Properties in violation of the two family flat use authorized by the Zoning Regulations for which the Owner applied and obtained CofOs.

Appellant's evidence submitted prior to ZA's approval of CofOs does not prove Appellant's allegations that Owner would fail to comply with Zoning Regulations

Appellant asserts that the ZA failed to consider the "factual evidence" provided by Appellant in this appeal. As DCRA stated in its Submission, the only evidence submitted by Appellants in the appeal at the time of approval of the CofOs for the Properties were the attachments to Appellant's Memorandum, Exhibits 9A through 9M. As detailed below, none of these presented "factual evidence" that contradicted the statements made in the applications for the CofOs that

the proposed use of the Properties would each be as a two-family flat, as defined in the Zoning Regulations:

- 9A – May 16, 2016 email chain – Included statement by Owner's representative that would comply with two-family flat use allowed by Zoning Regulations
- 9B – First page of drawings for B1214832 - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9C – BZA No. 17404 Jan 24 2016 Hearing Tr - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9D – BZA No. 17404 Feb 7 2016 Hearing Tr - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9E – Feb 2006 Withdrawal of Mondie Variance App - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9F – DC Sales Records – Showed ownership of 410 Richardson Place NW – No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9G – photos of site - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9H – Common Webpage – Testimonies of residents of properties in other cities operated by Common - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9I – Common Richardson Pl page – Announcement of intended opening of a residence by Common in DC - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9J – Technical.ly article – Announcement of intended opening of a residence by Common in DC, with vague descriptions of "co-living" in other cities - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats

- 9K – Curbed article – Announcement of intended opening of a residence by Common in DC - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9L – Washingtonian article – Announcement of intended opening of a residence by Common in DC - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9M – Statement of Appellant - No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats
- 9N – FHA Complaint – No specific factual evidence contradicting statement in applications for CofOs for the Properties that proposed use would be as two family flats

Appellant failed to meet its burden of proof

As DCRA stated in its Pre-Hearing Statement,[4] Section X-1101.2 of the Zoning Regulations provides that the Appellant has the burden of proof to provide evidence supporting Appellant's allegations. DCRA asserts that Appellant failed to provide evidence prior to the ZA's approval of the CofOs for the Properties to substantiate Appellant's allegations that the Properties would be operated in violation of the two family flat use allowed by the Zoning Regulations that was requested in the applications for the CofOs for the Properties.

Subsequent to the ZA's approval of the CofOs, Appellant submitted additional evidence in support of its appeal on March 1 and March 19.[5] Yet Appellant asserts that while he is entitled to submit new evidence for the Board to consider, DCRA and the Owner should not be allowed to do so – specifically Common's Affidavit executed on March 13.[6]

DCRA strenuously disagrees and notes that the CofOs challenged by Appellant are in the name of the Owner, which had already stated in its applications for the CofOs for the Properties that it would operate the Properties as two family flats, as allowed by the Zoning Regulations. Common's Affidavit reaffirmed the Owner's statements to the ZA that the use of the Properties would comply with the Zoning Regulations as two family flats – binding the Owner's tenant and property manager just as the Owner's statements on the applications for the CofOs for the Properties bound the Owner. DCRA asserts that the ZA's initial review and approval of the

[4] BZA Appeal 19441, Exhibit 33 (DCRA's Pre-Hearing Statement), at 3.
[5] BZA Appeal 19441, Exhibits 27, 29, 30, and 34A-E.
[6] BZA Appeal 19441, Exhibit 32H1 and 32H2 (Owner's Prehearing Statement, Tab H).

building permits, and CofOs, for the Properties, remain valid and compliant with the Zoning Regulations based on the representations made by the Owner and Common. Should the Owner or Common cease to comply with the Zoning Regulations, in violation of their representations, the ZA would take enforcement action, including revocation of the CofOs.

Conclusion

For the reasons stated above, DCRA respectfully requests that the Board grant DCRA's Motion to Strike Appellant's Response to DCRA's Submission.

Respectfully submitted,
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Date: 5/9/17

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May 2017, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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