

**DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT**

**Appeal No. 19550  
(In re 1125 7<sup>th</sup> St. NE)**

**MEMORANDUM OF ANC 6C  
IN OPPOSITION TO THE MOTIONS OF DCRA  
TO FURTHER CONTINUE THE HEARING OF THIS APPEAL  
AND TO INCORPORATE BY REFERENCE THE REVISED PERMIT**

ANC 6C submits this memorandum in opposition to the twin motions filed by DCRA on April 23. As discussed below, these motions suffer from several fatal defects, including disregard of the express provisions of the Zoning Regulations; disregard of the Board’s prior instructions; mischaracterization of the substantial prejudice ANC 6C and Intervenor Kevin Cummins would suffer from granting the motions; significant overstatement of the harm to DCRA from denial of the motions; and contradictory statements about the legal effect of the revised permit on the appeal of the original permit. The Board should summarily deny both motions.

**PROCEDURAL HISTORY**

ANC 6C filed the present appeal of permit B1706219 (“Original Permit”) on May 30, 2017. On July 24, the Board set the public hearing for September 13; at the request of ANC 6C, the Board approved a short postponement to October 4 to accommodate the personal travel schedule of the ANC’s representative. ANC 6C filed its original pre-hearing statement (case exhibit 20) on September 7, well in advance of the 21-day advance deadline imposed by 11 DCMR Y § 302.16.

DCRA filed a series of motions thereafter to delay the hearing:

- on September 28, to postpone until November 15;
- on November 13, to postpone until January 24, 2018; and
- on January 19, 2018, to postpone until May 9, the current hearing date.

In granting the most recent adjournment motion at the Board’s January 24, 2018 meeting, Chairman Hill stated on the record, “there won’t be another continuance, okay? ... [W]e’re going to move forward with this on May 9<sup>th</sup>, one way or the other, ***whatever happens.***” See Tab A, Transcript Excerpt from Jan. 24, 2018 (emphasis added).

Again complying with section Y 302.16, ANC 6C timely filed its revised pre-hearing statement on the afternoon of April 18. Slightly more than two hours later, counsel for Atlas Squared, LLC (“Property Owner”) advised ANC 6C’s representative that DCRA had issued permit B1805207 (“Revised Permit”).

## ANALYSIS

### **I. THE BOARD SHOULD DENY DCRA’S MOTION TO “INCORPORATE BY REFERENCE” THE REVISED PERMIT**

DCRA’s motion to “incorporate [the Revised Permit] by reference” should be denied for multiple reasons.

#### **A. The Motion Ignores the Text of the Zoning Regulations**

The Revised Permit is, to state the obvious, an entirely new permit. Under 11 DCMR Y section 302.2, ANC 6C (or any other party) has 60 days to

- gather relevant evidence such as permit drawings and DCRA zoning reviewer computations or other notes;
- review those documents and analyze them for non-compliance with the text of the Zoning Regulations; and
- prepare, assemble, and submit an initial appeal filing.

DCRA’s Motion to Incorporate ignores this well-established timeline. Instead, with no citation to any provision of the Zoning Regulations, DCRA seeks to short-circuit that process with an eleventh-hour maneuver urging that a newly issued permit be litigated on the merits a few weeks from today. Implicit in this motion, and in the companion Motion to Continue, is the expectation that ANC 6C will, no later than May 2, not only conduct all of the steps above to gather and analyze the relevant documents, but also file a complete pre-hearing statement setting forth detailed legal and factual analysis.

The Board has soundly rejected this type of procedural corner-cutting in the past. For example, in BZA 19410 & 19412—twin appeals of a permit—DCRA reversed course one day before the scheduled hearing date and issued a Notice of Intent to Revoke. The property owner responded by filing a so-called “cross-appeal” that same day. *See* BZA 19410 case exhibit 34.

At oral argument last year, the Board—in close consultation with the OAG attorney in attendance—rejected that attempted filing. As Chairman Hill remarked on the record, there is no regulation authorizing or prohibiting cross-appeals, but “there are procedures for the appeal” with specific requirements for the form and content. *See* Tab B, BZA 19410 Transcript Excerpt from Apr. 5, 2017 at p. 76.

The appeal now before the Board presents an even stronger case for insisting on scrupulous adherence to the Zoning Regulations. As reflected in the BZA 19410 transcript, there would have been no practical harm to the appellants: the revocation had no effect on the legal issues in dispute, and the chief effect of the “cross-appeal” would have been to shift the burden of proof on those same issues to the property owner. The Board nevertheless insisted that the formalities of section Y 302 be observed.

Here, by contrast, the Revised Permit presents entirely new legal issues. As just one example, the Zoning Commission recently amended the regulations for RF zones to prohibit rear additions, such as the one contemplated here, that extend more than 10 feet past the rear wall of any adjacent dwelling. *See* 11 DCMR E § 205.4. Moreover, the Commission also adopted a vesting rule grandfathering certain applications, but only where the application is “not substantially changed after filing.” 11 DCMR A § 301.14. Thus, addressing even this one issue will entail comparison of the Original Permit application *in toto* to the Revised Permit application. As explained in the next section, ANC 6C does not have all the relevant documents and is thus in no position at present to litigate this issue.

Thus, hearing an appeal on the Revised Permit in an orderly manner, applying the clear timelines prescribed by regulation, is no mere formality. On the contrary, doing so is essential to avoiding unfair prejudice to ANC 6C and the Intervenor.

**B. Granting The Motion Would Seriously and Unjustifiably Prejudice ANC 6C’s Interests**

DCRA makes the audacious assertion that “[t]he parties would not be prejudiced by the Board granting this motion [to incorporate].” *See* Motion to Incorporate at p. 1. The Board should reject this false and self-serving claim.

Holding a hearing on the Revised Permit in the next few weeks—and thus demanding that ANC 6C file its pre-hearing statement in a matter of days—would substantially and unfairly prejudice our rights for several reasons.

**Access to essential documents.** ANC 6C does not yet have a complete set of the DCRA-approved and -stamped plans and drawings supporting the Revised Permit. Although DCRA is required by statute to make all such records available to the public online at no cost, *see* D.C. Official Code § 2-536(a)(8A),<sup>1</sup> the agency is not now (and has never been) in compliance.<sup>2</sup>

Counsel for the Property Owner graciously provided a partial set (38 of 59 sheets) of stamped drawings, but ANC 6C has not yet received a full stamped set.<sup>3</sup> Similarly, despite a prompt and explicit request to DCRA attorney Anna Kaprelova in an April 18 telephone conversation, ANC 6C has not received any computations or worksheets used by the agency’s zoning reviewers in their analysis of the Revised Permit application.

**Inadequate time to prepare.** As discussed above, ANC 6C is entitled to 60 days simply to file an *initial* statement of appeal, with additional time thereafter to prepare a pre-hearing statement offering more detailed discussion and analysis. DCRA’s attempted end-run around the

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<sup>1</sup> Available at <https://code.dccouncil.us/dc/council/code/sections/2-536.html>.

<sup>2</sup> In a formal 2016 opinion letter, the Director of the District’s Office of Open Government detailed DCRA’s noncompliance. *See* [https://www.open-dc.gov/sites/default/files/OOG%20002\\_1.29.16%20AO\\_Redacted.pdf](https://www.open-dc.gov/sites/default/files/OOG%20002_1.29.16%20AO_Redacted.pdf).

<sup>3</sup> Counsel for the Property Owner also provided a larger compilation of unstamped drawings.

regulations would compress that entire process to a handful of days. Setting aside the legal impermissibility of this approach (as discussed above in Part I.A), forcing this accelerated schedule on ANC 6C and the Intervenor would be palpably unfair.

C. The Motion Fails to Explain, and at Times Affirmatively Misstates, the Effect of the Revised Permit

Finally, the Motion to Incorporate makes factual and legal claims bearing directly on the substance of the pending appeal without providing any support for those claims.

ANC 6C has no objection to the Board taking notice of the Revised Permit's issuance. DCRA could have introduced the Revised Permit as an attachment to its pre-hearing filing (or even to a motion to dismiss) without seeking permission from the Board. In reality, DCRA's motion seeks not merely to "incorporate" the permit; instead it attempts to declare this appeal resolved by fiat.

DCRA's motion asserts conclusorily that the Revised Permit

- "resolves" all three issues presented in ANC 6C's revised pre-hearing statement;
- "no longer authorizes the construction at the Property in the same manner found in the [Original] Permit"; and
- "addresses and moots all issues raised in this appeal."

Contrary to DCRA's breezy claims, the Revised Permit on its face does nothing to dispel the objections presented in this appeal. The underlying evidence—the latest permit application forms, plat, plans, and drawings against which DCRA's argument could be tested—is nowhere to be found in DCRA's submission. It is pure conjecture that the Revised Permit resolves the issues in the current appeal.

The fundamental defects in DCRA's assumptions do not stop there. DCRA claims in one place that the Revised Permit moots this appeal. (By contrast, the accompanying Motion to Continue hedges on this point, stating merely that "[t]he Revised Permit *may* moot the issues raised on appeal." DCRA Motion to Continue at p. 1 (emphasis added).) Yet DCRA has failed to answer a key question that bears directly on this issue.

As Tab A to DCRA's motions shows, on April 19 ANC 6C asked DCRA whether "the permit holder's entitlement to build under [the Original Permit's] terms—as opposed to those of [the Revised Permit]—has ended." To put the question another way: does the Property Owner now have discretion to construct under either the Original Permit or the Revised Permit? Or has the Original Permit been entirely superseded?

DCRA has never replied to this important question, and does nothing in its motions to clarify the point. If the answer is that the Original Permit structure may still be built, the Revised Permit does nothing to moot this appeal.

## II. THE BOARD SHOULD DENY DCRA'S MOTION TO CONTINUE THE HEARING ON THE MERITS

DCRA's Motion to Continue is remarkably brazen. ANC 6C filed its appeal nearly 11 months ago, giving both DCRA and the Property Owner specific notice of the grounds for appeal.<sup>4</sup> In addition, ANC 6C filed a lengthy pre-hearing statement nearly eight months ago, offering a full explanation of our objections to the Original Permit.<sup>5</sup>

Since then, DCRA has requested and obtained three separate continuances, delaying the hearing from October 2017 to its present May 9, 2018 date. In the face of these recurring postponements, Chairman Hill stated clearly at our last appearance, on January 24, "there won't be another continuance." Tab A.

DCRA's claim that "[i]f a continuance were not granted, DCRA would be severely prejudiced," Motion to Continue at p. 1, is therefore meritless. It is even more remarkable when, in the same breath, DCRA purports to offer Appellant "an additional seven days from service of this motion to file an amended pre-hearing statement addressing the Revised Permit." For the reasons laid out in Parts I.A and I.B above, ANC 6C declines this cynical offer of false generosity.<sup>6</sup> The Board should do likewise.

We respectfully suggest that DCRA needs to make a choice in the next week from among three options:

1. **Move to dismiss for mootness.** If DCRA takes the position, as discussed in Part I.C above, that the Property Owner no longer enjoys the option of building under the Original Permit, it should move to dismiss the present appeal as moot. If the Board grants that motion, ANC 6C would then be free to file a new appeal of the Revised Permit and proceed in an orderly manner under the explicit rules set out in 11 DCMR subtitle Y.
2. **Admit error.** If the appeal is not moot and DCRA concedes error in issuing the Original Permit, the case should go to a hearing on May 9 where the Property Owner may attempt to prove otherwise. (If, as in BZA 19410 and 19412, DCRA

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<sup>4</sup> As a practical matter, the Property Owner had even more advance notice. Appellant's Planning, Zoning, and Economic Development Committee had this potential appeal as an agenda item for its public meeting on May 3, 2017. Counsel for the Property Owner attended the meeting and had an opportunity to hear and respond to the committee's concerns.

<sup>5</sup> Our revised pre-hearing statement of April 18 differs from the first almost entirely in its inclusion of an additional document not available earlier to ANC 6C. *See* Tab E to Revised Pre-Hearing Stmt. (case exhibit 35E). As this document is *DCRA's own internal zoning guidance*, the agency can hardly claim to be unfamiliar with its contents or to need additional weeks to understand its relevance.

<sup>6</sup> DCRA's offer of an additional seven days from service is especially meaningless given that the motions themselves are unlikely to be resolved within that timeframe. *See* 11 DCMR Y § 407.4 (granting parties seven days from service to file any opposition to a motion).

also issues a Notice of Intent to Revoke, the Property Owner may take an appeal from that decision.)

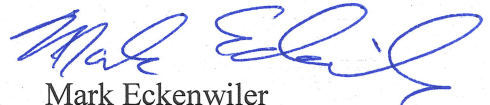
3. **Defend the Original Permit.** If the appeal is not moot and DCRA declines to admit error, it may defend against ANC 6C's appeal on May 9. The agency has known our arguments for months, and presumably gave serious thought to them in its consideration of the application for the Revised Permit. (DCRA implies as much in its conclusory statements that the Revised Permit "addresses" and "resolves" our grounds for appeal.)

Pursuing one of these options promptly would serve "the interest of judicial economy," Motion to Incorporate at p. 1, better than yet another delay in reaching the merits of this longstanding appeal.

### CONCLUSION

For all the reasons stated above, ANC 6C urges the Board to deny DCRA's Motion to Continue and Motion to Incorporate by Reference. In the event the Board does not deny the motions summarily, we respectfully request an opportunity to be heard in person.

Respectfully submitted,



Mark Eckenwiler  
Commissioner, ANC 6C04  
(as authorized representative  
for ANC 6C)

April 25, 2018

## **TABLE OF ATTACHMENTS**

- A. Excerpt of January 24, 2018 Hearing Transcript in BZA 19550
- B. Excerpt of April 5, 2017 Hearing Transcript in BZA 19410/19412

**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2018, I served a copy of ANC 6C's Memorandum in Opposition to DCRA's Motions to Incorporate by Reference and to Continue the Hearing in Appeal No. 19550, along with attachments, on the following persons by electronic mail:

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