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Board of Zoning Adjustment
441 4th Street N.W.
Suite 441
Washington, D.C. 20001

Dear Board of Zoning Adjustment::

The Institute for Public Representation ("IPR")[1] submits this letter to the Board of Zoning Adjustment ("BZA" or "Board") on behalf of our client, the Near Northeast Task Force ("NNTF"). NNTF requests the Board's permission to intervene in an appeal, Docket No. 16239, filed by LG Industries. LG Industries ("LGI") is appealing the Zoning Review Branch's decision denying the facility's application for a Certificate of Occupancy ("C of O") to operate a solid waste transfer facility at 1140 Third Street N.E. In accordance with DCMR tit. xi §3315.12, - Sic - 3112.15 NNTF is a neighborhood group with a "specific interest that will be affected" by the agency's action on LGI's appeal. NNTF's first-hand knowledge of the facility's impact is vital to the Board's evaluation of the Zoning Review Branch's decision. Although the date for this appeal has not yet been set, we believe that informing the Board of NNTF's interest at this time will facilitate the Board's decision at the impending hearing.

[1] IPR is a public interest law firm established at the Georgetown University Law Center in 1971. The institute provides legal services for groups and individuals who would otherwise be unable to obtain effective representation.

BZA
Case No. 16239
Exhibit No. 22

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Board of Zoning Adjustment
District of Columbia
CASE NO.16239
EXHIBIT NO.22

In 1994, LGI began operating a solid waste transfer facility in the Uline neighborhood of Northeast Washington, D.C. The neighborhood is primarily composed of residential and small commercial properties. The facility operates in the old Uline Arena, which was once used for concerts and other community events, and is situated directly across the street from residential properties. NNTF is a group of citizens owning or renting residential and commercial properties across the street from and within the blocks immediately surrounding LGI's solid waste transfer facility. The group formed specifically to combat the harms LGI has imposed on the neighborhood.

LGI accepts large quantities of commercial and apartment building wet waste, transported to the facility by private haulers. Once brought to the facility, recyclables are separated out and the remainder of the waste is placed onto larger trucks and transported to landfills for ultimate disposal. LGI currently operates under an existing C of O and an interim solid waste permit. Pursuant to regulations adopted by the Department of Consumer and Regulatory Affairs in December 1996, LGI must obtain a new C of O as a condition of obtaining a final permit. The Zoning Review Branch denied LGI's application for the new C of O, and LGI now appeals that decision.

The intense odors of waste emanating from LGI's facility have provoked significant health problems for NNTF's members, including headaches, nausea and even vomiting. During the summer heat, these odors are intensified to the point where NNTF's members are forced to remain in their homes, and are unable to open their windows. LGI's operations have also produced a serious increase in the number of rats in the neighborhood, which continuously invade NNTF's members' properties. It is well documented that rats are disease vectors and pose a threat to human health. Furthermore, noise from the large diesel trucks transporting trash to the facility begins at 4 o'clock in the morning and continues well into the evening, causing sleeplessness among members of NNTF. Vibrations from both the heavy hauling trucks and the larger tractor-trailers, traveling illegally down restricted streets, have also caused physical damage to the neighborhood's infrastructure and many residences. Roads and trees have sustained damage. The foundations of members' homes have cracked. Property values in the area have declined, and a number of owners have been unable to sell their homes due to the facility's presence. In sum, as a result of LGI's operations in their community, NNTF's residents have been unable to use or enjoy their properties fully and are faced with significant health problems. We believe that these injuries warrant NNTF's intervention in the upcoming appeal.

BZA Regulations Governing Intervention

The BZA regulations state:

> At the time of hearing and for good cause shown, the Board may permit persons who have a specific right or interest that will be affected by action on the appeal to intervene in the appeal for such general or limited purpose as the board may specify.

DCMR tit. xi § 3315.12

SIC - 3312-05

The BZA regulations offer no guidance as to the requisite "specific right or interest" necessary to qualify for intervention. However, the Board has frequently permitted groups and individuals with interests similar to NNTF's to intervene in proceedings before the BZA.[2] These cases indicate that, in the past, the BZA has perceived interests similar to NNTF's as sufficient to permit intervention under the BZA regulations, and, accordingly, the Board should allow NNTF to participate in LGI's upcoming appeal.

Federal Case Law: Standing to Seek Judicial Review of Agency Decision Shows Interest

In the absence of any guidance in the BZA's regulations or D.C. case law, assistance is offered by federal case law discussing intervention under similar federal regulations.[3] The federal courts commonly hold that a person "entitled to judicial review of an agency action clearly qualifies as an interested person who normally may intervene" in the agency proceeding.[4] Because NNTF would have standing to seek judicial review of the BZA's action on LGI's appeal, it has a "specific . . . interest" for purposes of intervention in the agency proceeding.

To show standing to challenge an agency action, a person must show (1) an injury in fact caused by the agency action and redressable by a favorable appeal outcome, (2) an interest sought to be protected arguably falling within the zone of interests protected by the statute, and (3) no direct statutory preclusion of judicial review.[5] NNTF meets each standing requirement, and thus has the requisite interest to intervene in the BZA hearing on LGI's appeal.

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[2] *See e.g., Davidson v. District of Columbia Board of Zoning Adjustment*, 617 A.2d 997 (D.C. 1992) (owner of property who held permit at issue intervened in neighboring property owner's BZA appeal of permit); *Beins v. District of Columbia Board of Zoning Adjustment*, 575 A.2d 122 (D.C. 1980) (same); *Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment*, 411 A.2d 959 (D.C. 1979) (potential contractors of property at issue and neighborhood groups representing nearby property owners); *Marjorie Webster Junior College, Inc. v. District of Columbia Board of Zoning Adjustment*, 309 A.2d 314 (D.C. 1973) (area residents, through citizens' organizations); *Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516 (D.C. 1973) (citizen's association challenging grant of special exception).

[3] These cases analyze intervention in federal agency proceedings under the general provisions of the federal Administrative Procedure Act (APA), and, by analogy, the D.C. Administrative Procedure Act (DCAPA), which is substantially modeled after the federal statute. *Pendleton v. District of Columbia Bd. of Elections & Ethics*, 449 A.2d 301, 305 (D.C. 1982).

[4] *See e.g., Nichols v. Asbestos Workers Local Pension Plan*, 835 F.2d 881, 896 (D.C. Cir. 1987); *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 732 (D.C. Cir. 1980); *Fort Pierce Utilities Authority v. Department of Energy*, 5-3 F.Supp. 1014, 1018 (D.D.C. 1980). Some courts also suggest that a person with standing to seek judicial review actually has a right to intervene in the agency action. The courts reason that participation at the agency level is necessary to ensure that the person can obtain effective judicial review. Unless the person is permitted to intervene in the agency proceeding, the record may be incomplete and judicial review may not be effective. *National Welfare Rights Organization*, 429 F.2d at 736; *Fort Pierce*, 503 F.Supp. at 1019.

[5] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). *See also Lee v. District of Columbia Board of Appeals and Review*, 423 A.2d 210, 216 (D.C. 1980) (applying standing analysis under the D.C. Administrative Procedure Act)

To demonstrate an injury in fact a person need not allege a substantial injury, but the injury must be "one the petitioners have suffered or are in immediate danger of suffering."[6] Courts have also found this requirement satisfied provided the individual seeking review has a "personal stake in the outcome of the suit."[7] The alleged injury must be "real, perceptible, concrete, specific and immediate. . . ."[8] Finally, the "injury in fact" must be caused by the agency action and redressable by a favorable outcome on the appeal.[9]

The resident members of NNTF will suffer an "injury in fact" if the BZA approves the C of O, as a direct result of LGI's continued use of the property for a solid waste transfer facility. The members reside as close as one block from a malodorous solid waste facility. The pervasive odors have already prompted nausea and vomiting; rats presently invade properties in increased numbers; and the noise and vibrations of the trucks have caused physical damage to private and community property. Property values have declined and property owners have been unable to sell their homes as a result of LGI's presence so close to a residential area. NNTF thus has a personal stake in the outcome of LGI's appeal. The individual members of NNTF will suffer ongoing health problems and property damage if the C of O is approved and LGI is permitted to continue operating the transfer facility. NNTF's injuries are, therefore, real, identifiable injuries which are already occurring and will continue to occur if LGI is granted a C of O.

Additionally, NNTF satisfies the causation prong of the standing requirements. The BZA's decision granting LGI a C of O would allow LGI to continue operating the solid waste transfer facility. LGI's facility would continue emanating odors and attracting rats and trucks to the neighborhood, thereby harming NNTF's members. The agency's decision would, therefore, have the direct result of continuing the harms presently injuring NNTF's members. Finally, a favorable outcome in the courts, *i.e.* denial of LGI's C of O application, would redress NNTF's injuries. LGI cannot legally operate the transfer facility without a C of O. Closure of the facility would undoubtedly eliminate the ongoing odors, rodents and truck noise associated with the facility, thereby remedying NNTF's injuries.

The second element of standing requires the petitioner to demonstrate that the alleged interest arguably falls within the zone of interests protected by the statute in question. This requirement may be satisfied by showing that the person seeking intervention is an intended beneficiary of the statute in question.[10] Likewise, a potential intervenor's interest may satisfy this

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[6] *Lee*, 423 A.2d at 217.

[7] *National Welfare Rights Organization*, 429 F.2d at 734.

[8] *Lee*, 423 A.2d at 217.

[9] *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-561.

[10] *National Welfare Rights Organization*, 429 F.2d at 735.

prong if the applicable statute was designed to promote such an interest.[11] NNTF's interest is within the zone of interests protected by the statutory and regulatory requirements that a business apply for and obtain a C of O prior to operation. Such regulations were designed to promote the health and safety of neighboring properties and property owners. Because its members live in close proximity to the offending transfer facility, NNTF is the intended beneficiary of health and safety regulations as applied to LGI.

Finally, in order to obtain standing, there must be no statutory provision expressly denying judicial review.[12] This requirement is satisfied provided that there is no explicit denial of review. It is not necessary that a statutory provision expressly permit judicial review.[13] No statute expressly precludes NNTF from seeking judicial review of the BZA's action. Rather, the D.C. Administrative Procedure Act explicitly confers upon aggrieved individuals the right to seek review of agency action in a contested case.[14]

Conclusion

Similar to intervenors in prior BZA proceedings, NNTF will be directly affected by the BZA's decision to uphold or overturn the DCRA's denial of LGI's application for a C of O, and should, therefore, be permitted to intervene. In the event that the DCRA's decision is reversed and LGI is granted a C of O, NNTF's members will suffer ongoing damage to health and property. NNTF's participation in the hearing is, therefore, necessary to ensure that all issues and evidence are fully presented to the Board.

Furthermore, because NNTF would have standing to challenge the BZA's action on LGI's appeal in court, NNTF also has the requisite "specific...interest" necessary under DCMR tit. xi § 3315.12, and should be permitted to intervene in the agency proceeding. Absent intervention, NNTF will have no opportunity to put forth evidence and legal arguments supporting the Zoning Review Branch's denial of LGI's C of O. Thus, if NNTF were to seek judicial review of the Board's decision on LGI's appeal, the record of the agency proceeding would be incomplete and review ineffective.

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[11] *Fort Pierce Utilities Authority*, 503 F.Supp at 1019-1020.

[12] *Lee*, 423 A.2d at 216. *See also, Fort Pierce Utilities Authority*, 503 F.Supp. at 1020.

[13] *Fort Pierce Utilities Authority*, 503 F.Supp. at 1020.

[14] D.C. Code. § 1-1510.

We hope that the Board considers the vital role NNTF can play in LGI's upcoming appeal. NNTF has first hand knowledge of the facility which the Zoning Review Branch lacks, making its participation an invaluable tool to the BZA decision-making process. Should NNTF be allowed to intervene, NNTF will be able to present testimony and other evidence of the impact of the facility on the neighboring community, as described in this letter. We believe that this information is crucial to an informed decision. Thank you for your attention to this matter. Please feel free to contact Alma Lowry at 662-9549 if the Board would like any further explanation or information.

Sincerely,

Hope Babcock
Associate Director

Alma Lowry
Staff Attorney

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