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May 23, 2000

BY HAND

Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W.
Suite 210-S
Washington, D.C. 20001

Re: BZA Appeal No. 16533; Response to Disclosure of Information in Chairperson's Letter of May 10, 2000

Dear Members of the Board:

This letter is written on behalf of Intervenor, Forest Hills L.L.C., to respond to items 3 and 4 as identified in the Chairperson's letter of May 10, 2000. No information or argument bearing upon the substance of the appeal is proffered or contained in this letter.

Intervenor has carefully reviewed both the letter dated April 28, 2000, of George R. Clark, an Appellant in the appeal, and the letter dated May 10, 2000, from the Chairperson. The letter from Mr. Clark requested the Chair of the BZA to recuse herself from further participation on the appeal. Since the same issues that apply to the Chair also apply to Board Member Carol Mitten, the request for recusal must apply to both. Based upon an examination of the information furnished in the two letters, we agree with Mr. Clarke's request and believe that the Chair and Mrs. Mitten must recuse themselves from further participation in any aspect of the appeal.

Based upon the two cited letters and the record to date, the following facts stated in the seven numbered paragraphs are not in dispute:

1. The meeting held in the Zoning Administrator's office on April 25, 2000 between Michael Johnson, the Zoning Administrator, and two members of the Board of Zoning Adjustment, the quasi-judicial body considering the above-referenced appeal, was an *ex parte* meeting since other parties to the appeal were not notified or represented.

2. While Mr. Johnson did not appear as a witness in the above-referenced appeal, he is the Zoning Administrator, and the Zoning Administrator is a party to the above-referenced appeal.

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CASE NO.16533
EXHIBIT NO.47

3. The meeting was requested by Mr. Johnson because of his concern about the Board's oral decision in the above-referenced appeal regarding 4512 28th Street, N.W., with respect to any immediate action that the DCRA might have been ordered to take and his concern about improving the permitting process.

4. At the meeting there was a general discussion of "Zoning Regulations which needed to be considered for amendment," in the context of the instant appeal and the interpretation of "finished grade," as related to Fairfax County regulations. (Emphasis added.)

5. There was also a general discussion, again following on and in the context of the appeal, concerning the permitting process and "the need for . . . improving the enforcement of the Board's orders." (Emphasis added.)

6. When asked whether the Board had ordered specific remedies or instructions to DCRA relating to 4512 28th Street, Ms. Mitten and Mrs. Reid advised that the Board had not ordered "specific" remedies or provided "specific" instructions with respect to the course of action to be taken after the appeal hearing.

7. Finally, Mr. Johnson was told that the final order would be written with the assistance of the Office of Corporation Counsel and "would clearly state the Board's order."

Following the meeting, on May 11, 2000, Forest Hills L.L.C. was served with a stop work order by the Building Inspector. On May 16, 2000, the Zoning Administrator filed a Motion with this Board for Expedited Consideration of An Order Staying Further Construction Pending the Board of Zoning Adjustment's Final Decision. Additionally, Intervenor filed with this Board on May 8, 2000, a request that the Board reopen the record and require further hearing on designated issues as provided in 11 DCMR §3124.2.

In light of the above undisputed facts, Intervenor concludes that the basis and genesis for the meeting on April 25, 2000, was to discuss the nature and scope of the Board's oral vote on April 18, 2000, in the above-referenced appeal. The fact that the Board members discussed "needed" amendments to the Zoning Regulations and furnished a copy of Fairfax County regulations in the context of the subject appeal could reasonably cause the Zoning Administrator to believe that the present regulations or interpretation thereof were deemed by the Board to be either illegal or inappropriate. The fact that there was discussion about the permitting process and improving the "enforcement" of the Board's orders could also reasonably lead the Zoning Administrator to believe that his enforcement to date was lacking and that the Board would like further action.

What followed these discussions is also of concern to Intervenor. Contrary to the vigorous defense of the rulings up to that time by the Office of Zoning Administrator, as shown in the record and as part of the testimony before the Board, a stop work order was issued and a Motion by the Zoning Administrator was filed to stay the very construction that his office had approved – all on the basis of an oral vote and discussion with absolutely no specific guidance as to how the rulings were in error, either orally or in writing. Under these circumstances, it is impossible to know the impact of the Board members' visit to the Zoning Administrator about this appeal. The extent of pressure felt by the Zoning Administrator to do something more could have been exacerbated by tone, inflection, body language or circumstances of the discussion. The appeal had already teetered into the uncomfortable realm of politics as evidenced by correspondence with the D.C. Council. It is, indeed, unfortunate that any communication concerning what the Board had or had not done on April 18, 2000, at its public meeting was not handled through staff, as it ordinarily would and should have been.

We believe that it is necessary for the Board to hold a public hearing to allow the Board members to hear from the Zoning Administrator about the meeting and its effect on actions that have been taken by the Department of Consumer and Regulatory Affairs, and to allow the parties to cross-examine the Zoning Administrator. It may also be necessary for the Board to hear from the Administrator of the Building and Land Regulation Administration, as well as the Director of the Department. When conflict issues have been considered by the Board, the District of Columbia Court of Appeals has indicated that a hearing is appropriate for a determination on the conflict issue. See *Brown v. Board of Zoning Adjustment*, 413 A.2d 1276 (D.C. App. 1980), affirmed en banc, 486 A.2d 37 (D.C. App. 1984).

The essential problem is that the unnecessary visit from two Board members to the Zoning Administrator and the specific discussion about the outcome of the case and the questions raised about enforcement and "need" for amendments to the Zoning Regulations (1) created an atmosphere in which the Zoning Administrator could have felt pressure to proceed with the extraordinary actions of a stop work order and a Motion for Stay[1] and (2) have the likely effect of fixing positions of the Board members in the case at least with regard to enforcement and application of the regulations, both of which are prejudicial to Intervenor.

This is not a case where an Order has been issued which has become final, but rather is a case where there are pending Motions before the Board relating specifically to enforcement and interpretation of the Regulations. Under such circumstances, Intervenor has no choice in order to assure basic fairness and due process but to request that the two

[1] Such a Motion has never been filed before.

BZA members who participated in the ex parte meeting with the Zoning Administrator recuse themselves from any further participation in this appeal including reviewing for approval and issuing a final order. Such recusal would also apply to Intervenor's request for the Board to reopen the record pursuant to 11 DCMR §3124.2 (which relates to the existing Zoning Regulations and the interpretations thereof) and Corporation Counsel's motion on behalf of the Zoning Administrator, for expedited consideration of an order staying further construction pending the Board of Zoning Adjustment's final decision.

Intervenor has no adequate way of retroactively determining the impact of the discussions with the Zoning Administrator on the decisionmaking considerations of the two Board members. Intervenor respectfully calls to the Board's attention the provisions of Title 6, Chapter 18, which requires an employee (including members of the Board of Zoning Adjustment) to avoid action, whether or not specifically prohibited by that Chapter, which might result in or create the appearance of impropriety or giving preferential treatment to any person or losing complete independence or impartiality. See 6 DCMR §1800.1 and §1803.

There is no question but that the discussions with the Zoning Administrator were outside the normal chain of communication and could be construed as extraordinary actions by reason of timing and subject matter. Intervenor does not question the integrity of the Board members, but the potential impact and prejudice to Intervenor in the processes now pending before the Board of Zoning Adjustment can only be avoided through recusal of the two Board members who participated in the *ex parte* meeting and discussions.

Conclusion

For the foregoing reasons, Intervenor most respectfully requests that the Board members who met with the Zoning Administrator in the *ex parte* meeting on April 25, 2000, recuse themselves from any further participation in Appeal No. 16533.

Respectfully submitted,

Whayne S. Quin

Steven E. Sher
Director of Zoning Services

Wilkes Artis
Chartered

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing Response to Disclosure of Information was served upon the parties to BZA Appeal No. 16533 by providing a copy by hand, this 23rd day of May, 2000, to:

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