DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

RLA Revitalization Corp.
applicant

v. BZA Application #17232

Kelsey Temple Church of God in Christ, *et al.*
intervenors

MOTION TO DISMISS RLA APPLICATION BECAUSE OF *EX PARTE* COMMUNICATIONS IN VIOLATION OF LAW

Kelsey Temple Church of God in Christ ("Kelsey Temple Church") and the Temple Church Building & Economic Development Corporation ("TCBEDC") ask this Board to deny the application sought in this case by RLA Revitalization Corporation ("RLA"), and Kelsey Temple Church and TCBEDC also ask that this Board dismiss the application with prejudice. The two intervenors, Kelsey Temple Church and TCBEDC, make this motion for the following reasons.

Introduction

According to the District of Columbia, its government-created RLA has an "exclusive rights agreement with Grid Properties, Inc.,"[1] ("Grid") and by this agreement Grid monopolizes the right to construct a proposed "2.25 F[loor] A[rea] R[atio]" DC USA Mall of "approximately 486,789"

[1] **Andrew Altman,** *Memorandum: BZA Application No. 17232* (D.C. Office of Planning)(Nov. 9, 2004), p. 1; *see* **EXHIBIT NO. 27** (BZA Case File No. 17232).

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CASE NO. 17232
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square feet[2] in the block encircled by 14th and Irving Streets, Hiatt Place, and Park Road, N.W. As this Board knows, RLA filed an application for a variance and an exception on the DC USA Mall project, but RLA did so merely as the agent acting "on behalf of Grid".[3] In other words, although RLA filed the application before this Board, Grid has always been the true "applicant" or the real party in interest.

In fact, Grid has on "several" occasions privately represented its interests in this case. For example, since at least November 16, 2004, Grid has during "several conversations" met with Mr. Geoff Griffis, the chairperson of this Board.[4] Grid made these communications in private meetings and by telephone through its president, Mr. Drew Greenwald.[5] Moreover, an associate director of the District of Columbia Department of Transportation ("DDOT"), a Mr. Douglas Noble, also participated in these "conversations" with Mr. Griffis. However, Messrs. Griffis, Greenwald, and

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[2] **Altman** (Nov. 9, 2004), p. 2; *see* **EXHIBIT NO. 27** (BZA Case File No. 17232).
[3] **Altman** (Nov. 9, 2004), p. 1; *see* **EXHIBIT NO. 27** (BZA Case File No. 17232).
[4] **Douglas E. Noble**, *Letter to Geoff Griffis & Drew Greenwald: Summary of December 16 Discussions Regarding Grid/DC USA* (Dec. 20, 2004), p. 1 (attached **Exhibit #1**).
[5] **Noble** (Dec. 20, 2004), p. 1.

Noble never invited intervenors Kelsey Temple Church and TCBEDC to participate in these private discussions.[6]

In fact, neither the Board nor Mr. Griffis informed the public about these conversations.[7] Nor did they provide Kelsey Temple Church or TCBEDC with prior notice about these meetings.[8] Hence, the two intervenors had no opportunity whatever to participate in these discussions, to rebut the arguments and the proof presented by Messrs. Greenwald and Noble in these private meetings, or to cross-examine Greenwald or Noble about the subject matter of their communications with Mr. Griffis. Not surprisingly, Kelsey Temple Church and TCBEDC never consented to these private meetings with Chairperson Griffis.[9] In a word, these discussions constituted *ex parte* communications. As a consequence, these communications violated local law.[10]

The illegitimacy of these communications appears to be strikingly apparent since Kelsey Temple Church and TCBEDC will never have a meaningful opportunity to participate in the present in the Griffis-Greenwald-Noble *ex parte*

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[6] *See generally* **Noble** (Dec. 20, 2004).

[7] **Thomas Ruffin,** *Declaration about Failure to Provide Notice of Ex Parte Communications with BZA Board Chairperson* (Jan. 3, 2005)(attached **Exhibit #2**).

[8] **Ruffin** (Jan. 3, 2004).

[9] **Ruffin** (Jan. 3, 2004).

[10] **11 DCMR 3105.2; M.B.E. Incorporated v. Minority Business Opportunity Comm.**, 485 A.2d 152, 160 (D.C. 1984); *compare* **11 DCMR 3023** (prohibition against *ex parte* communications with District of Columbia Zoning Commission).

discussions, and as a result the intervenors will never be able to participate in these Board hearings with full knowledge of what the *ex parte* communications addressed. After all, Kelsey Temple Church and TCBEDC will never know in truth what arguments and proof Greenwald and Noble presented to Mr. Griffis. In fact, the *ex parte* nature of these private discussions offered no protection against the chairperson hearing information that in a Board hearing would be inadmissible under either the **D.C. Code, section 2-509(b),**[11] or **11 DCMR 3117.3(k).**[12]

In fact, while local law requires that a formal transcript record the content of these and other Board meetings,[13] the Board has never made any attempt to file a transcript of these *ex parte* proceedings. In other words, while Mr. Noble filed a letter purporting to memorialize some of what the participants agreed to,[14] the record will never show what Messrs. Griffis, Greenwald, and Noble actually said and agreed to but that Noble never recorded in his letter. In light of the apparent and the real unfairness of these *ex parte* communications, Kelsey Temple

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[11] **D.C. Code, section 2-509(b)** ("the Mayor and every agency shall exclude irrelevant, immaterial, and unduly repetitious evidence" in "contested cases").
[12] **11 DCMR 3117.3(k)** ("The presiding officer … shall have the authority to … exclude unduly repetitious or irrelevant testimony").
[13] *See* **11 DCMR 3117.7** through **3117.10.**
[14] **Noble** (Dec. 20, 2004).

Church and TCBEDC ask this Board to dismiss and to deny the application filed in this case by RLA for the real party in interest, Grid Properties, Inc.

ANALYSIS

In the **D.C. Code, section 2-509(b)**, the statute declared that, in this case, "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".[15] In fact, the rules governing these and other "contested" hearings convened by this Board made clear that "each party may appear at a hearing to offer evidence and [to] cross-examine witnesses",[16] and that "evidence shall be taken in conformity with" the **D.C. Code, section 2-509(b)**.[17]

These rules as applied to contested agency hearings differed sharply from the procedures employed in agency rulemaking[18] where *ex parte* communications would not be so strictly prohibited.[19] As a matter of fact, the case law regarding *ex parte* communications in contested agency

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[15] **D.C. Code, section 2-509(b).**
[16] **11 DCMR 3119.3.**
[17] **11 DCMR 3119.4.**
[18] **Citizens Ass'n of Georgetown v. D.C. Zoning Commission,** 392 A.2d 1027, 1038 (D.C. 1978).
[19] **Citizens Ass'n of Georgetown,** 392 A.2d at 1039 ("Because this was a rulemaking, therefore quasi-legislative in character, all the restraints of the DCAPA and the full range of due process protections necessary to an adversary adjudication are not applicable").

adjudications mandated that "such a communication should be made part of the record -- and the parties given an opportunity to respond to it -- whenever it is relevant to the facts of the case and [to] the statutory criteria to be applied".[20] Quite frankly, the court in **M.B.E. Incorporated v. Minority Business Opportunity Commission**[21] held that, when a contested hearing results in a judgment against a party, the judgment must be reversed if "it is theoretically possible" that the judgment resulted at least in part from *ex parte* communications.[22]

In this regard, local regulations absolutely prohibited the *ex parte* meetings that took place in this case. In the clearest of terms, District regulations required that "all meetings and hearings of the Board [of Zoning Adjustment] shall be open to the public".[23] These rules added that the Board and its members shall "hold conferences on the issues *with the consent of the parties*".[24] As a clear standard that at least implicitly applied to this Board, the District of Columbia Zoning Commission wholly bars *ex parte* meetings in contested

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[20] **M.B.E. Incorporated,** 485 A.2d at 160.
[21] **M.B.E. Incorporated,** 485 A.2d 152 (D.C. 1984).
[22] **M.B.E. Incorporated,** 485 A.2d at 160.
[23] **11 DCMR 3105.2.**
[24] **11 DCMR 3117.3(d)** (emphasis mine).

cases.[25] Indeed, this rule asserted that "all members of the Commission shall be prohibited from receiving or participating in any *ex parte* communication relevant to the merits of the proceeding".[26]

These rules set a procedural standard that the chairperson and this Board violated. In that light, the *ex parte* discussions violated not only local law but also fifth amendment due process. After all, in **Zinermon v. Burch**,[27] the Supreme Court held that a state's failure to comply with its own statutory procedural rights could be actionable as a violation of constitutional due process.[28] In other words, if local statutes and regulations promised protection against *ex parte* communications in these contested hearings, then fifth amendment due process requires that the District of Columbia honor that promise.[29]

That never happened in this case. On the contrary, the chairperson of this prominent Board, along with an associate director of DDOT and a captain of American enterprise, violated procedural protections against *ex parte* discussions and meetings. That seems odd in light of

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[25] **11 DCMR 3023.**
[26] **11 DCMR 3023.1.**
[27] **Zinermon v. Burch**, 494 U.S. 113, 124-127, 110 S.Ct. 975, 982-84, 108 L.Ed.2d 100, 113-14 (1990).
[28] **Zinermon**, 494 U.S. at 138-39.
[29] **Zinermon**, 494 U.S. at 124-27, 133-39; *see* **Summers v. Utah**, 927 F.2d 1165, 1169-70 (10th Cir. 1991).

the serious problems that arise from this and other violations of due process. To be sure, lawyers have been suspended from the practice of law for violating certain prohibitions against *ex parte* communications.[30] At the end of the day, the practice should not be tolerated in this case.

WHEREFORE, the intervenors ask this Board to render a final decision denying the RLA application for a variance and for an exception and also dismissing this case with prejudice because of the *ex parte* communications in these proceedings.

Respectfully submitted,

Thomas Ruffin, Jr. #370817
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[30] *See* **In re Seanor**, 738 A.2d 282 (D.C. 1999)(*per curiam*).

Certificate of Service

I, Thomas Ruffin, Jr., certify that, on January 4, 2005, I mailed a copy of this motion to the offices of Norman M. Glasgow, Jr., Esquire, and Kyrus L. Freeman, Esquire.

Thomas Ruffin

Thomas Ruffin, Jr.

Exhibit #1

agreed to a 3 foot (3') reduction in travel lanes and lay-by as per OP/DDOT plans: i.e., 1 foot in each of two travel lanes (14' reduced to 13') and a 1 foot reduction in lay-by width from 8' to 7'.

2. Grid agreed to provide an additional 60-foot (3 car) lay-by north of the main entrance lay-by, with a "bumpout" in between the two lay-bys to allow for 16' minimum sidewalk. The exact location is to be determined.

3. All parties agreed that parking and loading in these two lay-bys, and customer assisted loading in the parking garage, is sufficient to allow for the removal of the lay-by on Park Rd. This allows for a minimum sidewalk width of fifteen feet eight inches (15'-8"). The appropriate turning radius into and out of the parking garage must be determined.

4. Along Irving Street, a 160-foot (8 car) left turn queue would be provided. OP and DDOT agreed to create "bumpouts" on both sides of the shopping center's vehicular exit on Irving Street. At the historic facades this will provide an eighteen foot (18'-0") wide sidewalk as measured from the face of the existing structure to the edge of the curb. Grid agreed to set that portion of the building adjoining the left turn queue to provide a sidewalk width of thirteen foot six inches (13'-6") from face of farthest edge of structure and/or swinging doors to the edge of the curb for the left turn queue. There would be a minimum 10' clear walkway, with the remainder to be used for a safety-promoting edge strip. The location and width of planting strips will vary. [DDOT continues to prefer 16' for this section, but will accept the 13'-6" described above with the 10'clear walkway.] The dimension of nine feet nine inches (9'-9") between the chamfered corner of the building and the ramp for the disabled at the northwest corner of the 14th and Irving Streets intersection is acceptable.

5. Along Hiatt Street, a twenty-eight foot (28') roadway would be provided, with two twelve (12') driving lanes separated by a one foot (1') painted divider. There would be a twelve foot (12') sidewalk on the east side of Hiatt Street as measured from the face of the building to the edge of the curb.

6. Grid will prepare new drawings reflecting these changes and present them to OP and DDOT for discussion, review and agreement. Grid will prepare new drawings incorporating these changes in BZA-review-level drawings, for presentation at the December 21, 2004 Board of Zoning Adjustment (BZA) hearing

DDOT notes that the optimum sidewalks, measured from the farthest projection of the building to the edge of curb, would be 16 feet on Hiatt Place and Irving Street, and 20 feet on 14th Street. As recently as the date of the applicant's pre-hearing statement, DDOT had preferred a minimum distance of 16 feet on 14th Street. Since both DDOT and the applicant have re-examined their designs and reached consensus on the minimum changes needed to ensure a safe pedestrian environment, efficient traffic flow and adequate space for the public realm.

With the incorporation of the above modifications to the DC USA site plan, DDOT requires no other revisions to the proposed design and is in support of Grid's application before the BZA.

Very truly yours,

Douglas E. Noble

Douglas E. Noble, P.E., PTOE
Associate Director

cc: Stephen Cochran
Michael Downie
Ken Laden
Ellen McCarthy
Jennifer Steingasser
Vivian Guerra
Alex Nyhan
Michael Jasso
Jennifer Budoff

Exhibit #2

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

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intervenors

DECLARATION ABOUT FAILURE TO PROVIDE NOTICE OF *EX PARTE* COMMUNICATIONS WITH BZA CHAIRPERSON

I, Thomas Ruffin, Jr., provide this declaration under penalty of perjury as permitted under **28 U.S.C., section 1746,** and I do so for the benefit of the District of Columbia Board of Zoning Adjustment:

(1) I am the lawyer for the intervenors, Kelsey Temple Church of God in Christ ("Kelsey Temple Church") and Temple Church Building & Economic Development Corporation ("TCBEDC");

(2) According to a December 20, 2004 letter from a Mr. Douglas Noble, an associate director of the District of Columbia Department of Transportation, Mr. Noble and Mr. Drew Greenwald of Grid Properties, Inc., had "several conversations" regarding this case with Chairperson Geoff Griffis of the District of Columbia Board of Zoning Adjustment;

(3) However, Messrs. Griffis, Noble, and Greenwald never provided prior notice either to my client or to me about these "conversations" or meetings;

(4) Also, the Board of Zoning Adjustment never provided prior notice either to my client or to me about these discussions or meetings; and

(5) In addition, neither my clients nor I consented to these meetings and discussions on the part of Messrs. Griffis, Greenwald, and Noble, and we have no plan to consent to these meetings on the part of Messrs. Griffis, Greenwald, and Noble.

WHEREFORE, I, Thomas Ruffin, Jr., provide this statement under penalty of perjury for the benefit of the District of Columbia Board of Zoning Adjustment, and I do so according to the best of my knowledge, information, and belief.

Respectfully submitted,

Thomas Ruffin

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