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

OPPOSITION TO MOTION TO AMEND RLA REVITALIZATION CORPORATION APPLICATION

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Kelsey Temple Church of God in Christ ("Kelsey Temple Church") and the Temple Church Building & Economic Development Corporation ("TCBEDC") oppose the RLA Revitalization Corporation ("RLA") motion to amend its application in this case, and they do so for the following reasons.

Introduction

In about August 2004, the applicant, RLA, requested a variance from the off-street parking requirements in **11 DCMR 2101.1** and a special exception from the roof structure requirements in **11 DCMR 411**, and this application related to the proposed construction of a DC USA Mall at 14th Street and Park Road, N.W. On November 16, 2004, this Board permitted Kelsey Temple Church and TCBEDC to intervene in this case against RLA's application. More than a month later, on December 21, 2004, this Board held a contested hearing on the RLA application.

BZA
Case No. 17232
Exhibit No. 53

Board of Zoning Adjustment
District of Columbia
CASE NO. 17232
EXHIBIT NO. 53

At the hearing, RLA presented its case-in-chief or, rather, the "applicant's case". RLA introduced the testimony of a number of witnesses, including Kenneth Carlson from Clark Construction Group, Steven Sher from Holland & Knight, Michael Prifti from Bower, Lewis & Thrower, Drew Greenwald from Grid Properties, Inc., Jennifer Budoff from RLA Revitalization Corporation, and Lou Slade, the traffic consultant for RLA. These witnesses testified in favor of RLA's application for both a variance and a special exception in the proposed construction of the DC USA Mall. During this testimony in the RLA case-in-chief, this Board and the intervenors, Kelsey Temple Church and TCBEDC, cross-examined the applicant's witnesses. This portion of the proceedings lasted for more than four hours, from about 1:20 p.m. until about 5:30 p.m. Afterwards, RLA closed its case-in-chief and hence offered no further evidence on its request for a special exception on roof structures and on its request for a variance on off-street parking requirements.

Following the close of the applicant's case, this Board, through its chairperson, asked whether the District of Columbia Office of Planning, other government agencies, the Advisory Neighborhood Commission ("ANC") for 14th Street and Park Road, and others wanted to testify in the

proceedings. When the District of Columbia Office of Planning and the District of Columbia Department of Transportation indicated that they had testimony for the Board, and when no one responded for the ANC, the Board continued the proceedings until January 25, 2005. The Board scheduled government testimony and the intervenors' case-in-chief for this new date. In the meantime, at the hearing, RLA never asked the Board to reopen the applicant's case so that RLA could present additional evidence.

However, on December 22, 2004, RLA filed a letter purporting to amend "its application" and requesting that "the Board consider alternative parking relief".[1] RLA explained in its letter that

> The potential of utilizing attendant parking was raised by a Board member during the course of the hearing [on December 21, 2004], which lead [sic] the Applicant to focus on the relief necessary for the Board to approve such a parking program at the subject site. That relief would be as a special exception pursuant to **11 DCMR 2108** to reduce the amount of required parking spaces by no more than twenty-five percent (25%), and a variance from **section 2115.9** to permit attendant assisted parking in the C-3-A District. Using attendants, the Applicant can park approximately 1,250 cars on the

[1] **Norman M. Glasgow, Jr. & Kyrus L. Freeman,** *Letter: Amendment to the Application to Add Alternative Parking Relief* (BZA Application #17232)(Dec. 22, 2004), p. 1 (attached as **EXHIBIT #1**).

> two levels, which is a reduction of approximately twenty-two percent (22%) from the requirement of 1,599 [off-street parking] spaces.[2]

RLA closed its letter to this Board with the assertion that it "looked forward to proceeding with consideration by the Board on January 25, 2005, of this amended application".[3]

However, RLA never explained in its December 22 letter whether it expected, or needed, to present a new case-in-chief for its "amendment to the [original] application". This issue became important because the proposed amendment raised questions and factual elements not contemplated in the first application litigated by RLA in the contested hearing on December 21, 2004. In fact, the RLA letter never explained whether its "amended application" would withdraw the original RLA request for a parking variance and for a special exception on roof structures. Oddly enough, the "amended application" appears to be totally at odds with RLA's original application in this case. Yet, RLA, in its letter, never discussed the reasoning behind this disparity.

Also, RLA apparently ignored the consequences of closing its case-in-chief on December 21, 2004. In other words, after RLA closed its case-in-chief as the applicant,

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[2] **Glasgow & Freeman** (Dec. 22, 2004), p. 1.
[3] **Glasgow & Freeman** (Dec. 22, 2004), p. 2.

it closed out its opportunity to present any additional evidence besides "rebuttal" evidence before its "closing statement".[4] Hence, RLA closed out its opportunity to present evidence that would establish a *prima facie* case for a newly proposed variance for parking attendants and for a newly proposed special exception on off-street parking requirements. The RLA letter dated December 22 never explained how RLA proposed to present this evidence after RLA closed the applicant's case on December 21.

ANALYSIS

The proposed RLA "amendment to the [original] application" differs entirely from what RLA litigated before this Board for more than four hours on December 21, 2004. On December 21, when RLA presented and closed its case-in-chief, RLA claimed that, on the basis of evidence disputed by the intervenors, the Board should grant a variance on off-street parking requirements and a special exception on roof structures. On December 21, RLA claimed in fact that the evidence would establish that RLA deserved this particular variance and special exception for the DC USA Mall.

However, on December 22, when RLA filed its letter which disclosed an "amendment to the [original]

[4] **11 DCMR 3117.11(b)(1)-(7).**

application", RLA in effect withdrew its original application. The proposed amendment never mentions the original request for a special exception from the requirements of **11 DCMR 411** roof structures.[5] Hence, RLA clearly withdrew its application for a special exception regarding roof structures.

Also, the proposed amendment never mentions a variance from the requirements of **11 DCMR 2101.1** off-street parking spaces.[6] Rather than ask for a variance from this regulation, RLA discloses an interest in seeking a special exception. In fact, RLA absolutely abandons the request for a variance on off-street parking space requirements. In its place, RLA reveals that it plans to amend its application so as to ask for a variance not from off-street parking requirements, but rather "from **section 2115.9** to permit attendant assisted parking in the C-3-A District".[7] Without a doubt, RLA has put aside its original application and invented a new one for this case.

Under local law, RLA has a perfect right to abandon its original application.[8] In **11 DCMR 3113.10**, the District of Columbia regulations indicate that "the applicant may

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[5] *See generally* **Glasgow & Freeman** (Dec. 22, 2004).
[6] *See generally* **Glasgow & Freeman** (Dec. 22, 2004).
[7] **Glasgow & Freeman** (Dec. 22, 2004), p. 1.
[8] **11 DCMR 3113.10.**

withdraw an application at any time".[9] However, if RLA withdraws its application, "a new application shall not be accepted for filing again for at least ninety days after withdrawal of the application".[10] This rule allows for no exception without the express "leave of the Board".[11]

In this case, the Board should not grant leave for the filing of a new RLA application before the passage of ninety days. After all, RLA has already closed its case-in-chief after more than four hours of testimony on an application vastly different from that proposed at this time by RLA. Moreover, this latest amendment reflects an abuse of this Board's process that should not be tolerated. In addition, the drastic change or "amendment" requested by RLA significantly affects these proceedings under Application #17232 because, under **11 DCMR 3113.12,** "notice of a public hearing on an application shall include … the nature of the application".[12] That is to say, since RLA now purports to amend its application in order to request a variance on parking attendants and to request a special exception (not a variance) on off-street parking requirements, the application would be changed from one

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[9] **11 DCMR 3113.10.**
[10] **11 DCMR 3113.10.**
[11] **11 DCMR 3113.10.**
[12] **11 DCMR 3113.12.**

wherein RLA sought in the main a parking space variance and a roof structure exception.

This means that the original notice from this Board never informed the public about the nature of the application or of the relief that RLA now wants to litigate before this Board, and as a result a new and fully competent pre-hearing notice must be prepared and issued before RLA can lawfully proceed to a hearing on its so-called amended application.[13] In fact, the District of Columbia Administrative Procedures Act ("Act") demands that, for this contested hearing between RLA and the intervenors, "the notice shall state the time, place, and *issues involved*" in order to provide a "reasonable notice of the afforded hearing".[14] Moreover, the Act adds that, "if subsequent *amendment of the issues is necessary*, they shall be *fully stated* [in the notice] *as soon as practicable*", and, in this case, "opportunity shall be afforded all parties [and the public, including the ANC and neighboring property owners,] to present evidence and argument with respect thereto".[15]

Since the old notice never apprised neighboring property owners and the public about the new issues arising

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[13] **11 DCMR 3113.12.**
[14] **D.C. Code, section 2-509(a)** (emphasis mine).
[15] **D.C. Code, section 2-509(a)** (emphasis mine).

from RLA's proposed amendment to the application, a new notice must be issued in order to inform the parties, the neighboring property owners, and the public about the new issues in this case. In fact, a close review of **Exhibit 17** in the Application #17232 case file reveals that, in this case, the original public notice, dated September 2, 2004, informed the public the following about RLA's application for Board relief:

> **Application of RLA Revitalization Corporation**, pursuant to 11 DCMR 3104.1, *for a special exception from the roof structure requirements* under section 411, and pursuant to 11 DCMR 3103.2, *for a variance from the off-street parking requirements* under subsection 2101.1, to permit a multi-use commercial establishment in the C-3-A District at premises 1400-1420 Park Road, N.W., 3100-3220 14th Street, N.W., and 1417-1437 Irving Street, N.W. (Square 2674, Lots 719, 720, 812, 832, 866, 870, 871, and 872).[16]

The nature of this original RLA application differs a great deal from the notice owed to the public in this case under **section 3113.12** for what RLA now proposes for this Board's consideration. After all, RLA wants to apply for a variance on parking attendants and for a special exception from off-street parking requirements, both of which the original notice never alluded to. Since RLA proposes a

[16] **RLA Revitalization Corp. v. Kelsey Temple Church of God in Christ, et al.**, *Notice to Whom It May Concern* (BZA Application #17232)(Sept. 2, 2004)(**Exhibit 17** in Case File)(emphasis mine)(attached as **EXHIBIT #2**).

drastic change in its original application, then RLA has in effect withdrawn its original application in this case. Moreover, a notice properly informing neighboring property owners and the public about the nature of RLA's proposed new application should "be given by the Director not less than forty days before the date of the hearing",[17] published in the District of Columbia Register,[18] and mailed "to the owners of all property within two hundred feet of the property involved in the application".[19]

However, as stated earlier, since RLA withdrew its original application, it cannot lawfully file a new application, not until at least ninety days "after withdrawal of the application".[20] This seems particularly clear since RLA deliberately miscalculated its off-street parking requirements when it presented the applicant's case during more than four hours of hearings on December 21, 2004. The proposed mall would have a "gross floor area and cellar floor area"[21] of 906,173 square feet,[22] not the

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[17] **11 DCMR 3113.13.**
[18] **11 DCMR 3113.13(a).**
[19] **11 DCMR 3113.13(b).**
[20] **11 DCMR 3113.10.**
[21] **11 DCMR 2101.1** (for "retail or service establishment: … C-3-A").
[22] **Bower, Lewis & Thrower,** *DC USA Architectural Plans & Drawings* (BZA Application #17232)(Dec. 7, 2004), p. Z102A (add total square footage for "Building Total" and for "Closed Court" for accurate sum of gross floor area and cellar floor area).

480,611 square feet claimed by RLA in its application.[23] Since the DC USA Mall's aggregate floor area would equal about 906,173 square feet, RLA would be required by local law to provide at least 3,011 off-street parking spaces,[24] not the 1,592[25] or the 1,599[26] off-street parking spaces which RLA claims to be its obligation.

Therefore, on December 21, when RLA closed its case-in-chief, it failed on that occasion to establish not only a sufficient justification for the variance and the special exception that it sought at that time from the Board, but it also failed to present an accurate calculation of its off-street parking obligation in the first place. Hence, it failed altogether to establish that a variance would not result in "substantial detriment to the public good" and would not cause substantial impairment of "the intent, purpose, and integrity of the zone plan".[27] In other words, since RLA misrepresented the gross and cellar floor square footage and the off-street parking requirements for the proposed mall, RLA never properly assessed "the public

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[23] **Norman M. Glasgow, Jr. & Kyrus L. Freeman,** *Supplemental Statement of the Applicant* (BZA Application #17232)(Dec. 7, 2004), p. 5.
[24] *See* **11 DCMR 2101.1** ("Retail or service establishment …: … C-3-A -- In excess of 3,000 square feet, 1 [off-street parking space] for each additional 300 square feet of gross floor area and cellar floor area").
[25] **Glasgow & Freeman** (Dec. 7, 2004), p. 5.
[26] **Glasgow & Freeman,** *Letter: Amendment to the Application to Add Alternative Parking Relief*, p. 1 (attached as **EXHIBIT #1**).
[27] *See* **D.C. Code, section 6-641.07(g)(3).**

good" or the requirements of the "zone plan" for purposes of this case.

After failing to prove its case for a variance under the **D.C. Code, section 6-641.07(g)(3)**, RLA cannot substantially amend its original application without withdrawing it. Any other rule would permit an abuse of the Board's process as well as prejudice to neighboring property owners, to the public, and to the intervenors' defense. Simply put, RLA cannot in this case, after presenting more than four hours of testimony in its case-in-chief, and after deliberately misrepresenting the gross and cellar floor square footage and the off-street parking requirements for the proposed mall, reopen its case-in-chief and present entirely different evidence from that examined by the Board on December 21, 2004. Reopening the applicant's case after RLA's course of misconduct would undermine the probity of this Board's administrative proceedings and would impugn the public integrity of the Board itself.

Keep in mind that, in April 2002, RLA sought and obtained from this Board a "special exception to allow a reduction in the number of required parking spaces" under

11 DCMR 2108.[28] This decision by the Board ordered that "the number of [off-street parking] spaces provided for the project shall be a minimum of 1,364 spaces".[29] At that time, RLA asserted that the relief granted would be adequate for construction of the mall. Later, on August 13, 2004, RLA filed this application and asked for a variance allowing it to construct the mall with merely 1,000 off-street parking spaces. Four months later, on December 22, after RLA presented its witnesses in its case-in-chief, RLA filed a third and totally different amended application in this case.

Moreover, in Application #16858 filed in April 2002 and in this application as originally filed in August 2004, RLA misrepresented its off-street parking requirements. These misrepresentations alone warrant censure from this Board. However, since about November 16, 2004, the applicant has initiated through Grid Properties, Inc., "several" unlawful *ex parte* communications with this Board's chairperson,[30] and it did so without the consent of the intervenors. These serious acts of misconduct, along with RLA's recurring applications for different forms of

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[28] **In re RLA Revitalization Corporation,** *Corrected Summary Order* (BZA Application #16858)(April 23, 2002), p. 1.
[29] **In re RLA Revitalization Corporation** (April 23, 2004), p. 2.
[30] *See* **Motion to Dismiss RLA Application Because of *Ex Parte* Communications in Violation of Law** (BZA Application #17232)(Jan. 4, 2005).

relief, evidence in RLA a train of abuse of this Board's adjudicative process.

Unless this Board bars RLA from filing its amended application for ninety days, and unless this Board postpones a hearing on the newly filed application until forty days after the mailing and the publication of a lawful notice, then RLA's abuse of the process will continue. Quite frankly, the misconduct to date should be seriously censured, and that censure should take the form of a denial with prejudice of RLA's application in this case. To be sure, RLA's ongoing acts of misconduct have seriously prejudiced Kelsey Temple Church and TCBEDC and, as well, have imposed an inexcusable detriment on the public good.

WHEREFORE, the intervenors ask this Board to deny RLA's motion to amend its original application, and the intervenors ask this Board to issue an order determining that RLA withdrew its original application when it proposed a drastic amendment of that application after RLA presented its case-in-chief; and the intervenors ask in addition that the Board bar RLA from filing its new application until after the passage of ninety days from December 22, 2004,

when RLA in effect withdrew its original application.

Respectfully submitted,

Thomas Ruffin, Jr. #370817
RUFFIN LEGAL SERVICES
153 Galveston Place, S.W.
Suite 4
District of Columbia 20032
(202) 561-2898

Certificate of Service

I, Thomas Ruffin, Jr., certify that, on January 7, 2005, I mailed a copy of this opposition to the offices of Norman M. Glasgow, Jr., Esquire, and Kyrus L. Freeman, Esquire.

Thomas Ruffin, Jr.

Exhibit #1

Holland+Knight

Tel 202 955 3000
Fax 202 955 5564

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006
www.hklaw.com

Norman M. Glasgow, Jr.
202 419 2460
norman.glasgowjr@hklaw.com

December 22, 2004

VIA HAND DELIVERY

D.C. Board of Zoning Adjustment
Suite 210
441 4th Street, N.W.
Washington D.C. 20001

Re: Application No. 17232
14th Street between Park Road and Irving Street, N.W.
Amendment to the Application to add Alternative Parking Relief

Dear Members of the Board:

At the public hearing held on December 21, 2004, substantial discussion occurred between the Applicant's team and members of the Board concerning the adequacy of the number of spaces proposed to be provided in the underground garage (1,000 spaces on two levels). The Board's concern related to the operational issue of whether the parking spaces would be used to serve other demand in the neighborhood, thereby reducing the number of spaces available to serve the proposed development since the parking garage would be owned by NCRC and would be open to the public.

In order to respond to that concern and to provide more parking spaces on-site within the two parking levels which can feasibly be provided, the Applicant hereby amends its application and requests that the Board consider alternative parking relief. The potential of utilizing attendant parking was raised by a Board member during the course of the hearing, which lead the Applicant to focus on the relief necessary for the Board to approve such a parking program at the subject site. That relief would be as a special exception pursuant to 11 DCMR § 2108 to reduce the amount of required parking spaces by no more than twenty-five percent (25%), and a variance from section 2115.9 to permit attendant assisted parking in the C-3-A District. Using attendants, the Applicant can park approximately 1,250 cars on the two levels, which is a reduction of approximately twenty-two percent (22%) from the requirement of 1,599 spaces.

The Application has been continued for hearing on January 25, 2004, as the last case of the day following the regular afternoon agenda. The Applicant will submit a pre-hearing statement no less than fourteen days prior to the hearing, explaining in detail the relief sought and the manner in which the tests of the Regulations will be satisfied. The Applicant has mailed a copy of this request

to the parties to the application, to the Office of Planning and DDOT and to all owners of property within 200 feet of the subject property. The Applicant will also post notice of the hearing on the amended application on the subject property in the same manner as for a new application. These steps will provide notice of the amended application to all potentially interested persons.

We look forward to proceeding with consideration by the Board on January 25, 2004, of this amended application.

Sincerely,

Norman M. Glasgow, Jr.

Kyrus L. Freeman*

cc: Advisory Neighborhood Commission 1A
Thomas Ruffin
Stephen Cochran, D.C. Office of Planning
Douglas Nobel, District Department of Transportation
All owners of property within 200 feet

*Admitted only in Pennsylvania;
supervision by principals of the firm
who are members of the D.C. Bar

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Exhibit #2

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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SEP 0 2 2004

APPLICATION NUMBER 17232
TO WHOM IT MAY CONCERN:

Notice is hereby given that the Board of Zoning Adjustment will hold a public hearing in Suite 220 South, 441 4th Street, N.W., Washington, D.C., 20001 on Tuesday, November 16, 2004. Your attention is invited to the following application:

Application of RLA Revitalization Corporation, pursuant to 11 DCMR § 3104.1, for a special exception from the roof structure requirements under section 411, and pursuant to 11 DCMR § 3103.2, for a variance from the off-street parking requirements under subsection 2101.1, to permit a multi-use commercial establishment in the C-3-A District at premises 1400-1420 Park Road, N.W., 3100-3220 14th Street, N.W., and 1417-1437 Irving Street, N.W. (Square 2674, Lots 719, 720, 812, 832, 863, 866, 869, 870, 871, and 872).

At the public hearing, all interested persons will be given an opportunity to express their views. However, you may submit written views about this case. All written views should be sent to the address below, and must be received by the Board before the hearing on the case is concluded. Individuals and organizations wishing party status in any case before the Board must request that status in writing not less than fourteen (14) days prior to the date set for the public hearing on the particular application. The request for party status must contain all the information required by 11 DCMR § 3106.2. Section 3106 is enclosed for your information.

This application is located within the boundaries of Advisory Neighborhood Commission 1A. This application will be heard between 9:30 a.m. and 12:00 p.m.

If you have any questions about this application, you may call the Office of Zoning on (202) 727-6311, or visit the office at 441 4th Street, N.W., Suite 210 South, Washington, D.C. 20001.

PLEASE REFER TO THE APPLICATION NUMBER WHEN YOU WRITE OR CALL ABOUT THIS CASE.

SINCERELY,

JERRILY R. KRESS, FAIA
Director

BOARD OF ZONING ADJUSTMENT (SEE REVERSED SIDE)
District of Columbia

CASE NO. 17232