

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Friends of the Babcock-Macomb House,)

Appellant,)

vs.)

**Department of Consumer and)
Regulatory Affairs,)**

Appellee.)

Case No. 17663

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MOTION TO DISMISS

Soka Gakkai International - USA ("SGI" or "Intervenor"), the second oldest Buddhist community in the Washington metropolitan area, hereby moves this Board to dismiss the appeal of Friends of Babcock-Macomb House ("Appellant" or "Friends") related to the property at 3417 Massachusetts Avenue, N.W. located in Square 1939, Lot 42 ("the Property"). SGI owns the Property, and moves to dismiss this appeal for two primary reasons: first, Appellant has failed to state a claim of zoning error related to any of the permits or rulings at issue (collectively the "SGI decisions"¹); the proposed construction of a house of worship is explicitly permitted by right under the relevant Zoning Regulations.² Second, it is beyond dispute that the appeal of the excavation,

¹ The "SGI Decisions" are: the Zoning Administrator's March 2, 2007 Ruling stating that "it is clear to me that the principal use of the proposed building will be as a place of worship," and the approval of Building Application 5263 A 6.

² The Property is located in the R-1-B Zone. It is undisputed that 11 DCMR 201.1(b) permits "Church[es] or other place[s] of worship" to be constructed by matter-of-right in the R-1-

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sheeting, and shoring permit and the covered pedestrian walkway permit (collectively “Excavation Permits”), which were issued on November 30, 2006, and December 11, 2006, respectively, is untimely because this appeal was filed well after the 60-day appeal period in the Zoning Regulations. Moreover, Appellant has failed to even allege a zoning error in regard to the Excavation Permits.

The utter lack of any factual basis supporting the appeal, which seeks to stop SGI from continuing to construct its religious cultural center (“Project”), strongly suggests that it was filed for reasons that are ignorant at best, or discriminatory at worst. Indeed, the facts are clear that, contrary to Appellant’s claims, the Project is a house of worship and therefore, should be constructed as a matter of right under the Zoning Regulations. To that end, the Zoning Administrator did not err by ruling on March 2, 2007, that the SGI worship center qualifies as a “church or other place of worship” under the Zoning Regulations, or by approving the building permit application. Appellant has failed to provide any specific, factual evidence of a zoning error whatsoever. Therefore, because Appellant has failed to state a claim of zoning error as to any of the SGI Decisions, has waited too long to appeal the Excavation Permits, and has failed to even allege a zoning error in regard to those permits, this Appeal should be dismissed.

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B Zone District.

FACTS

I. BACKGROUND ON SGI

The Washington Region of SGI is the second oldest Buddhist community in the Washington metropolitan area. Since 1968, SGI has been located on the edge of the District at 4603 Eastern Avenue in Mount Rainier, MD. SGI is registered as a 501(c)(3) religious non-profit entity. It has been ruled exempt from the District of Columbia Income and Franchise Tax as a “religious” organization. SGI’s membership has grown, and the Maryland house of worship now houses four congregations (called “areas”), including the Washington DC Area, which has a membership of approximately 369 congregants. The congregants come from all over the District and reflect the ethnic and racial diversity of the District of Columbia.

SGI’s mission is the study and practice of the teachings of the Nichiren School of Mahayana Buddhism. The roots of this school go back to 13th century Japan. SGI members seek to apply Buddhist principles, such as wisdom, responsibility and compassion, to the complex realities of modern living. Toward this end, its worship and communal practice take place through both small and large gatherings.

The regular gathering of the full community of congregants, approximately 200 people, takes place on the first Sunday of each month. In addition to this full community meeting, called “World Peace Prayer,” SGI congregants regularly meet in smaller groups at other times to worship by studying and discussing Buddhist teachings. These groups range in size from 10 to 40 congregants. All of these worship services begin with the

liturgy of Nichiren Buddhism and include a recitation of the Lotus Sutra and other Buddhist prayers. These worship services are performed before a Buddhist altar. Moreover, worship groups may also gather either during the week or on weekends for extended communal prayer recitation, especially if there is a special need for prayer.

II. BACKGROUND ON THE PROPERTY AND THE PROJECT

In 2003, SGI entered into a contract with the Embassy of Cape Verde to purchase the Property, a vacant lot adjacent to the Embassy. The subdivision that resulted in the Property was approved by the Mayor's Agent for Historic Preservation and other relevant authorities. Furthermore, the design of the Project was approved by the Historic Preservation Review Board.

The Project complies with, and is well within, all of the zoning requirements of the R-1-B Zone District. As currently designed, the Project will contain 18,000 square feet of program space, of which 11,000 sq. ft. are above ground. In addition, the Project proposes two levels of below-ground parking. Indeed, while 60% lot occupancy is permitted for places of worship, the lot occupancy for the Project is only 40%.

The Project will be dedicated to the religious worship of SGI's spiritual community. An overview of the Project is as follows:

- 200-seat main sanctuary with adjacent baby room, which constitutes 31% of the total space of the Project;

- 50-seat smaller sanctuary, which constitutes 10% of the total space of the Project;
- One combination classroom/worship spaces to accommodate 25-30 people, with an altar/shrine, which constitute 8% of the total space of the Project;
- Three rooms for personal worship, reading, meditation, and reflection, which constitute 17% of the total space of the Project;
- Multi-purpose fellowship hall, which constitutes 9% of the total space of the Project;
- Children's activity room, which constitutes 2% of the total space of the Project;
- Library that can also be used for personal dialogue and reflection, which constitutes 4% of the total space of the Project;
- Administrative office space for the SGI staff and volunteers that includes one workstation for SGI's Office of Public Affairs, which constitutes 11% of the total space of the Project;
- Bookstore for the convenience of the members, which constitutes 4% of the total space of the Project; and
- Serving kitchen, which constitutes 3% of the total space of the Project.

Therefore, despite Appellant's claim that SGI will devote 6% of the Project to worship space (Appellant's Statement in Support of Appeal at 2), it is clear that in fact 82% of the Property will be completely devoted to the worship and practice of SGI

Buddhism. Indeed, a mere 18% of the total space of the Project will be used for ostensibly “non-religious” activities.³ Any statement to the contrary is patently incorrect.

In order to construct the project, SGI applied for and received the necessary Excavation Permits. First, on November 30, 2006, DCRA issued the excavation, sheeting and shoring permit, No. B98193. Second, on December 11, 2006, DCRA issued the covered pedestrian walkway and temporary construction fence permit, No. B100009. Pursuant to these permits, SGI began excavation of the site.⁴

SGI has worked hard to engage and involve the neighbors, including Appellant, as it proceeded through the historic preservation process. To that end, SGI held meetings with the neighbors designed to explain the religion and the Project. Indeed, as a result of input gained through these meetings, SGI made several adjustments to the design of the Project. Including a reduction in the overall scale of the Project.

³ Although uses such as the office, pantry or bookstore are not “religious” *per se*, it is clear that these portions of the Project will be used to support SGI’s religious mission and the religious uses that are on-going in the rest of the building. To that end, churches, mosques, and synagogues regularly contain offices, bookstores, and kitchens. Therefore, it is clear that it is certainly *de rigueur* for places of worship to contain such administrative spaces, and well-established that their inclusion does not deprive the church, mosque or synagogue of its otherwise religious nature.

⁴ It should be noted that although the Excavation Permits specifically stated that they were issued for the purpose of constructing a “church”, in response to concerns raised by Appellant and other opposition neighbors, on December 27, 2006, Mr. Crews wrote an e-mail to Appellant and others stating that due to the fact that the Excavation Permits were issued “contrary to [his] specific instructions... neither of these permits authorizes the construction and use of the proposed building.” (Exhibit 1). To that end, in this e-mail, Mr. Crews wrote, “I am still researching the issue of the proposed use of the building.... [and] I have asked the applicant to provide further information on the use of the building.”

However, through these meetings, SGI became aware that a vocal minority of neighbors were seeking to block SGI from building the Project due to the fact that these neighbors did not believe that the Project was “a place of worship.” Therefore, despite SGI’s attempts to demonstrate that the Project is a place of worship despite not being called a “church” per se, and despite its congregants not being Christian, Jewish or Muslim, this vocal minority refused to accept the explanation. Indeed, this group of “Friends” went so far as to submit an “Op Ed” to the Northwest Current reflecting its unfortunate and misinformed statements. (Exhibit 2).

In light of this outspoken opposition, SGI had no choice but to request assistance from the Zoning Administrator, William Crews, Esq. In response to these requests, on February 8, 2007, Mr. Crews submitted a series of questions to SGI. On February 12, 2007, in response to this inquiry, SGI submitted significant documentation to Mr. Crews including a memorandum discussing the SGI faith and practices, comprehensive diagrams of the Project, a document that described the percentage of proposed uses, and a proposed schedule of prayer and worship times. (Exhibit 3). After reviewing these documents and meeting with SGI, on March 2, 2007, Mr. Crews issued a ruling stating that the Project qualifies as a “church or other place of worship” (“Ruling”). (Exhibit 4). In the Ruling, Mr. Crews states:

After careful consideration and reliance upon the attached information provided by SGI, it is clear to me that the principal use of the proposed building will be as a place of worship.... Having determined the use of a matter of right, I have directed by [my?] staff to complete the zoning review of the submitted plans and provide approval or

comments to you by close of business Monday, March 5, 2007.

Next, on April 10, 2007, DCRA approved application #5263-A-6 and, thereby, permitted construction of the worship center (“approval”).

The Appellant filed this appeal on May 1, 2007.

DISCUSSION

This appeal is a classic example of a “Friends” attempt to go to great lengths to stop the construction of a project that they find somewhat “different.” To reach this end goal, Appellant has baldly claimed that the Project is not a house of worship. Indeed, in making this claim, Appellant has failed to proffer any evidence that DCRA made a zoning error when it issued the SGI Decisions. Also, it has tried to appeal the Excavation Permits despite the fact that such appeal is untimely and it fails to allege a zoning error in regards to thee permits. For these reasons, this appeal should be dismissed.

I. LEGAL BACKGROUND FOR APPEALS

The process for appeals under the Zoning Regulations is set forth in Title 11 of the District of Columbia Municipal Regulations. This process is authorized by D.C. Code § 6-641.07(f-g) (2001), which provides that the BZA shall have the power to hear the appeal of an aggrieved party

... where it is alleged by the appellant that there is *error* in any order, requirement, decision, determination, or refusal made by the Inspector of Buildings or the Mayor of the District of Columbia or any other administrative officer or

body in the carrying out or enforcement of any regulation adopted pursuant to this subchapter.

D.C. Code § 6-641.07(g)(1) (2001)(emphasis added).

II. APPELLANT FAILS TO STATE A CLAIM OF ZONING ERROR IN REGARDS TO THE SGI DECISIONS

Appellant claims that DCRA erred by issuing the SGI Decisions and finding that the Project was a “church or other place of worship.” In making this claim, Appellant fails to state a claim of zoning error for DCRA’s issuance of the SGI Decisions.⁵ Instead of providing specific, factual, allegations demonstrating how DCRA had violated the Zoning Regulations in issuing the SGI Decisions, Appellant’s statements are based on documents it pulled off the internet and blanket citations to the Zoning Regulations. Despite Appellant’s baseless claims, it is clear that DCRA followed well-accepted Constitutional and federal law principles when it issued the SGI Decisions. Due to this well-settled body of case law, DCRA’s failure to capitulate to Appellant’s unsubstantiated claims that the Project was not a “place of worship” was not an “error” by any stretch of the imagination. For these reasons, Appellant has failed to make an allegation of a zoning error and, therefore, this Board does not have jurisdiction to review this appeal.

⁵ As will be discussed below, Appellant also failed to allege a claim of zoning error in regards to the Excavation Permits.

A. The Board Often Dismisses Appeals that Fail to State a Specific Claim of Zoning Error.

It is well settled that the Board only has jurisdiction to hear appeals “where it is alleged by the appellants that there is an **error**” in a DCRA decision. D.C. Code Ann. §6-641.07(g)(1) (emphasis added). To that end, this Board regularly dismisses appeals when the appellant fails to state a claim of zoning error. *See Appeal No. 17391 of Diana de Brito and Jonathan Gottlieb*, Jan. 10, 2006 (dismissing appeal because the appellant failed to state a claim of zoning error).

Indeed, it is generally accepted that in order to make a valid “allegation of error” to give the Board jurisdiction over the appeal, the appellant must provide specific factual allegations demonstrating how the Zoning Administrator so erred. Due to this mandatory, jurisdictional requirement, the Board regularly dismisses claims when the Appellant fails to provide such specific, factual allegations demonstrating the error. *See Appeal No. 11018 of Dupont Circle Citizens Assoc.*, Jan. 12, 1972 (dismissing appeal because it was “devoid of specific factual allegations respecting how the Zoning Administrator violated the Zoning Regulations in approving the Building Permit”); *Appeal No. 13917 by the Advisory Neighborhood Commission 2A*, Feb. 16, 1983 (dismissing appeal after finding that the Appellant had only provided general, unspecified assertions of error, and that such assertions were not a proper basis for an appeal).

On this point, the Board’s decision in Appeals No. 11699, 11721 by the North Dupont Community Association is instructive. In this July 23, 1974 decision, the Board dismissed the Association’s appeal of the Zoning Administrator’s granting of a building

permit to allow the construction of a 90-foot building. In that case, much like the case at hand, the appellant claimed, without any specific facts to support its claims, that the Zoning Administrator's decision violated the 1910 Height Act. Ultimately, the Board dismissed the appeal because it found that the appellants in that case had failed to state a claim of zoning error because they had not alleged any specific facts supporting the argument that the Zoning Administrator had misapplied the 1910 Height Act. Rather, the Board found that the "Zoning Administrator's determination was both reasonable and accurate in light of the clear meaning of the Act of 1910..."

Much like the Zoning Administrator in Appeals No. 11699, 11721, DCRA's SGI Decisions were "reasonable and accurate" in light of the well-settled body of Constitutional and federal law prohibiting the government from infringing on the free exercise of religion. Due to SGI's unassailable Constitutional and legal rights to the free exercise of its religion, Appellant has failed to state anything other than general assertions of error, and, for this reason, this Board should follow its own precedent and dismiss the appeal.

1. Appellant's Claim that the Project is Not a "Church" or "Place of Worship" Fails.

In its attempt to articulate DCRA error, Appellant first generally asserts that under the nomenclature of SGI, the Project is not a "church" or "place of worship." Although SGI calls its places of worship "centers" rather than "churches" per se, Appellant's semantics-based argument falls flat. Rather, irrespective of what SGI calls the Project, it

is beyond dispute the Project is a house of worship. Indeed, it is the only location in the District where SGI members will be able to meet and practice their religious beliefs.

It is clear that DCRA was prohibited by both the Constitution and federal law from questioning SGI's assertion that the Project is a church. *See Congregation Kol Ami v. Abington Twp.*, 2004 U.S. Dist. LEXIS 16397 (E.D. Pa. Aug. 17, 2004)(finding that when determining whether a specific religious exercise is central to a plaintiff's belief system and requires a certain place of worship, the adjudicator "must be careful not to question what is asserted by the plaintiff"). Moreover, in *Cam v. Marion County*, 987 F. Supp. 854 (D. Or. 1997), the U.S. District Court for the District of Oregon granted a religion's right to use a barn as a church. Importantly, the court stated:

Wherein lies the authority for the building inspector [to find that a building is not a church]? In the first place, the regulations do not define the term "church."... Nor are there any standards governing the building inspector's exercise of discretion in this area....[W]hat guides the Building Official in the exercise of his discretion as to what level of religious activity [is necessary to constitute a] use as a church? There simply are no standards. It is unfathomable that, in a country which so zealously protects freedom of religion, a state official can be given [such] virtually unfettered discretion....

Id. at 863-64.

To this end, it is beyond dispute that SGI made sufficient proffers to demonstrate to DCRA that the Project was a place of worship under the Zoning Regulations. As stated above, pursuant to 11 DCMR §3202.2, on February 8, 2007, the Zoning Administrator asked SGI a series of questions that he stated were necessary "for [him] to

determine compliance with the provisions of the Zoning Regulations of the District of Columbia.” On February 12, 2007, SGI responded to these inquiries. Specifically, in this response document, SGI proffered that the Project was going to be a place of worship and described the different types of worship that will take place inside the Project including the monthly “World Prayer Meeting”, and regular chanting, study, discussion and dialogue sessions.

In trying to claim that the Project is not a “church,” Appellant is basically arguing that DCRA “erred” when it failed to accede to Appellant’s baseless claims, and instead, accepted SGI’s proffers that the Project was a place of worship.

As stated above, throughout this process, the opponents (including Appellant) have gone to great lengths to assert its position that the Project is not a “church or place of worship” and could not be constructed by matter of right. Indeed, Appellant and the handful of outspoken opponents have even gone so far as to allege that SGI “added numerous altars in a transparent attempt to avoid zoning board review.” (Exhibit 2).

These outrageous and culturally insensitive claims demonstrate the neighbors’ xenophobic fear of a non-Judeo Christian house of worship. DCRA was prohibited from making decisions based on such prejudices. *See Marks v. Chesapeake*, 883 F.2d 308 (4th Cir. 1989)(granting the applicant’s special use permit despite strong neighborhood opposition).

Indeed, in quoting the Supreme Court, the *Marks* court specifically found that:

As a general matter, therefore, the public's negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for local officials' land use decisions. . . . constitutional concerns are heightened [where] the individual permit application decision may rest upon inaccurate and stereotypic fears. . . . Unless it specifically serves such [state] interest, the permit denial is arbitrary and violates due process.

Marks, 883 F.2d at 311.

Moreover, the *Marks* court further concluded that:

[D]enial of [a] permit [is] arbitrary [where] the decision to deny was not related to any substantial zoning interest, but was instead motivated 'principally [by] the heavy opposition of neighbors [expressed] at [a] public hearing.' . . . Government officials simply cannot act solely in 'reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety [or otherwise] dealing with zoning.' Simply put, the dispositive principle is that 'private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'

Marks, 883 F.2d at 311.

Therefore, it is clear that DCRA did not err when it issued the SGI Decisions, which are supported by the facts, and as will be shown, the Constitution and federal law. Indeed, to have done otherwise would have clearly been an "error", requiring the reversal of any such decision. Therefore, Appellant's general assertions that the Project is not a "church" must fail because Appellant hereby shows absolutely nothing that would have permitted a different finding under the relevant law. For that reason, Appellant has failed to meet its burden of alleging a zoning error, and the appeal should be dismissed for failure to state such an error.

2. DCRA would have violated the United States Constitution if it had denied the SGI Decisions

It is clear that DCRA protected SGI's members' Constitutional rights when it issued the SGI Decisions. Indeed, any other finding, would have been a direct violation of these rights.

The First Amendment to the Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Const. Amend. I.

The free exercise clause prohibits the District of Columbia government from making discretionary (i.e., not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest. *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 547 (D.D.C. 1994)(finding that the zoning administrator's refusal to grant a church its building permit to construct a soup kitchen violated the First Amendment because it substantially burdened the church's right to the free exercise of its religion). Land use regulation regularly involves "individualized governmental assessment of the reasons for the relevant conduct," thus triggering increased constitutional scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993)(finding a town's zoning ordinance that prohibited animal sacrifice to violate the free exercise clause); *Islamic Center of Mississippi, Inc. v. Starkville*, 840 F.2d 293 (5th Cir. 1988).

To that end, generally, the denial of a building permit to an owner of property can unconstitutionally burden the free exercise of religion when it interferes with a religious group's ability to establish a house of worship. *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 707 N.E.2d 53, 59 (Ill. Dist. Ct. 1999); see also *Alpine Christian Fellowship v. County Commissioners of Pitkin County*, 870 F. Supp. 991, 994 (D. Colo. 1994).

Had DCRA denied SGI the necessary permits for construction of its house of worship, it would have plainly violated the free exercise clause of the Constitution. For this reason alone, DCRA acted properly when it issued the SGI Decisions.

3. Denying the SGI Decisions Would Have Violated Federal Law.

Moreover, denial of SGI's permits would also have violated the Religious Freedom Restoration Act of 1993 ("RFRA"). Passed in 1993, RFRA was intended to prohibit the government from placing a substantial burden on the exercise of religion without a compelling governmental interest for doing so. Specifically, the federal law states:

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000BB-1.⁶

It is clear that RFRA applied to the SGI Decisions because DCRA was making an individualized assessment regarding SGI's proposed use of the Property. See *Western Presbyterian Church*, 862 F. Supp. at 545 (finding that RFRA applied to decision by DCRA).

It is generally accepted that it is "clearly not within [a land use regulator's] ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigant's interpretations of those creeds." *Hernandez v. Commission*, 490 U.S. 680, 690 (1989). Moreover, in applying the RFRA, the U.S. District Court for the District of Columbia has found that:

Zoning boards have no role to play in telling a religious organization how it may practice its religion. A city cannot use its zoning laws to regulate the way a particular religion offers its prayers or the way a religion celebrates its holidays.

Western Presbyterian Church, 862 F. Supp. at 545.

⁶ Although, in the *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court found that the RFRA was unconstitutional as it applied to the states through the Fourteenth Amendment, it still applies in the District of Columbia. Specifically, in 2000, Congress amended the RFRA to only apply to the Federal Government and "covered entities." In this amendment, the District of Columbia was specifically listed as a "covered entity." 42 U.S.C. § 2000BB-2.

Therefore, case law makes it clear that DCRA did not commit an error when it issued the SGI Decisions. Indeed, denying the SGI Decisions would have restricted SGI's ability to exercise its religion, in direct contradiction of Constitutional and Federal Law. Appellant has failed to allege any zoning error with particularity. For this reason, the appeal of the SGI decisions should be dismissed for failure to state a claim of zoning error.

III. THE APPEAL OF THE EXCAVATION PERMITS IS UNTIMELY AND FAILS TO STATE A CLAIM OF ZONING ERROR IN REGARDS TO THESE PERMITS.

In addition to the SGI Decision, Appellant is also appealing the Excavation Permits, which were issued on November 30, 2006, and December 11, 2006, respectively. This appeal was filed on May 1, 2007, over five months after DCRA issued the Excavation Permits and is, is therefore, untimely. In addition, Appellant fails to state a claim of zoning error in regards to the Excavation Permits. Therefore, because this appeal was filed well beyond the 60-day time period provided for in the Zoning Regulations and it fails to state a claim of zoning error, and it should be dismissed insofar as it relates to the Excavation Permits.

A. The Appeal of the Excavation Permits is Untimely.

The Zoning Regulations are clear that appeals of an agency decision must be filed within 60 days of "date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR 3112.2(a)

To that end, the D.C. Court of Appeals has found that “the timely filing of an appeal with the BZA is mandatory and jurisdictional.” *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). Furthermore, it is well settled that for the purposes of calculating timeliness, “the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of.” 11 DCMR 3112.2(a), *Mendelson*, 645 A.2d at 1093. In the context of a building or excavation permit, the party appealing is chargeable with notice on the date DCRA approves and issues the permit. *Id.* at 1094 (petitioner was on notice of right to appeal revised permit on date permit was issued).

Therefore, it is clear that the appeal of the Excavation Permits is patently untimely. Indeed, pursuant to the Zoning Regulations, the appeal period for the excavation permit expired on January 30, 2007, and the appeal period for the pedestrian walkway permit expired on February 10, 2007. Indeed, it is clear that Appellant understands that it missed the opportunity to appeal DCRA’s granting of the Excavation Permits and now it seeks to create a second chance to do so by filing an appeal at this juncture. Such action is not permissible under the Zoning Regulations. Appellant’s appeal on these permits is simply too late and any argument to the contrary lacks basis in law or fact.

B. Appellant Fails to Allege a Zoning Error in Regards to the Excavation Permits

Appellant has conceded that DCRA did not err at the time that it issued the Excavation Permits on November 30, 2006, and December 6, 2006, respectively.

(Appellant's Statement in Support of Appeal at 2). Indeed, Appellant has not even alleged that DCRA made any sort of error whatsoever at the time it issued these permits. Rather, according to Appellant, the error (if any) **only** arose when the Zoning Administrator issued the Ruling finding that the Project qualifies as a "church or other place of worship." That did not occur until March 2, 2007, over three months after the Excavation Permits were issued (and indeed a full month after the appeals period for these permits had expired). Therefore, because Appellant fails to allege that DCRA erred in any way by issuing the Excavation Permits, it is clear that the Board lacks jurisdiction to hear the Appeal, and it should be dismissed in regards to the Excavation Permits.

CONCLUSION

The filing of a timely appeal alleging a zoning error is mandatory and jurisdictional. If this appeal were allowed, community members would have carte blanche to do the following. First, they would be allowed to file appeals designed to halt construction on any religious places of worship that they find "different" or "foreign", when the facts are beyond dispute that the proposed building is clearly a place of worship and can be constructed by matter of right in the R-1-B zone. Second, they would be allowed to wait up to five months to file baseless appeals in direct violation of the Zoning Regulation. It is beyond dispute that neither neighbors in general nor the Appellants in particular are permitted to take either action. Indeed, in the case currently before the Board, SGI made sufficient proffers to support the SGI Decisions, and Appellant has

filed an appeal that fails to state a zoning error for the SGI Decisions and is untimely and fails to state a claim of zoning error in regards to the Excavation Permits.

For these reasons, the Board should dismiss the appeal for failure to state a claim of zoning error for all of the SGI Decisions, as well as dismiss the appeal as untimely and failure to state a claim of zoning error as it relates to the Excavation Permits.

Accordingly, the Intervenor hereby requests that this Board dismiss this appeal with prejudice on the papers or schedule an expedited hearing to decide this motion.

Sincerely,

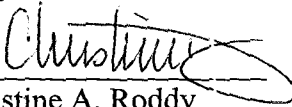


Allison C. Prince Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N St, N.W.
Washington, D.C. 20037

I hereby certify that on October 2, 2007, a copy of the foregoing Motion was mailed first class, postage prepaid, or hand-delivered as a courtesy to the following:

Friends of the Babcock-Macomb House
c/c John R. Magnus
2740 34th Place, NW
Washington, DC 20007

ANC 3C
2737 Devonshire Place, N.W.
Washington, D.C. 20008


Christine A. Roddy

1

From: Crews, Bill (DCRA) [mailto:Bill.Crews@dc.gov]
Sent: Wednesday, December 27, 2006 5:02 PM
To: Csmaymd@aol.com; pac@harkinscunningham.com; john.magnus@starpower.net; Nmacwood@aol.com; kpatterson@dccouncil.us; ppagano@dccouncil.us; mcheh@law.gwu.edu; afenty@dccouncil.us; Pelwood4@aol.com; Canavan, Patrick (DCRA); cveneroso@juno.com
Subject: RE: Soka Gakkai

Commissioner May,

I understand your concerns. Two permits were approved by my zoning technicians contrary to my specific instructions and I have admonished these staff members. The two permits are 1) for excavation, sheeting and shoring, and 2) for construction fence and covered pedestrian walkway. Neither of these permits authorizes the construction and use of the proposed building.

I am still researching the issue of the proposed use of the building and whether it is allowed in this location. I have asked the applicant to provide further information on the use of the building.

Best regards,

Bill Crews

Zoning Administrator for the District of Columbia
Department of Consumer and Regulatory Affairs
941 N. Capitol St. NE Suite 2000
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2

THE CURRENT

Group's claims circumvent zoning rules

VIEWPOINT

PAUL A. CUNNINGHAM AND JOHN R. MAGNUS

Soka Gakkai International-USA, a Buddhist association, wants to build a community center on a small, residentially zoned site at 3714 Massachusetts Ave. A community center may not be built legally at that address without Board of Zoning Adjustment review. Yet Soka Gakkai has sought a building permit without that review, arguing without basis that the center would be an exempt "church" or "house of worship." It seeks to circumvent the law. The Fenty administration should enforce the law.

Based on Soka Gakkai's plans, dedicated sanctuary space would occupy less than 20 percent of the center. The center's principal use would be for community meetings, education and administrative offices. Its use would be like that of the group's roughly 80 other U.S. community centers, none of which is styled as a "church." It is therefore not entitled to an "of right" building permit.

This fact has been recognized by local community groups and by the Committee of 100 on the Federal City, which for 80 years has advocated responsible planning and land-use regulation throughout the city. In a recent letter to the zoning administrator, the committee wrote: "The proposed building would be what all of Soka Gakkai's other buildings around the country are: places of assembly for instruction and discussion, and administrative support. Such uses cannot be considered in the matter of right category within R-1 zones. ... Therefore, the Committee of 100 joins the Friends of the Babcock-Macomb House and ANC3-C in opposition to the issuance of a building permit ..."

While Soka Gakkai generally holds itself out as a "lay" organization, it has suggested here that it is entitled to an "of right" permit because it is a religious organization. But that's not what the law requires; it requires the principal use to be worship.

There's no evidence that the center's principal use will be worship. Soka Gakkai originally asserted that the principal use would be for offices, community meetings and education, and the original plans contained just two altars. After neighbors objected that a zoning exemption must be based on use and not affiliation, later plans added numerous altars in a transparent attempt to avoid zoning board review. However, the

altars added no space to the less than 20 percent of the building dedicated to sanctuary use.

Soka Gakkai has also never explained why its center should have a legal status different from other religion-affiliated buildings, such as the National Cathedral School and the Vatican Embassy, which are subject to zoning regulation because they are not principally places of worship.

It's a mystery why the D.C. government has not summarily rejected the permit application, leaving the group free to seek zoning board review.

The answer may lie in the fact that Soka Gakkai has assiduously worked the corridors of government without any regard for the facts or the views of the community. As one of the last acts of the Williams administration, the D.C. government granted preliminary excavation permits and permitted Soka Gakkai to block the sidewalks in front of its proposed construction site. It did so despite repeated promises by the zoning administrator that no permits would be granted before a full review and discussion with the neighborhood commission and neighbors of the merits of the application.

There's a right way to pursue a community center in a residential neighborhood: seek special relief from the board. This allows a full airing of concerns about compatibility with an R-1 area that are ignored when a project is accorded "matter-of-right" status.

Then there's the Soka Gakkai way: disingenuously portray the community center as a "church" in order to avoid any need to address neighborhood impacts. The group is betting heavily that by simply incanting words like "church" and "worship," it can evoke a knee-jerk, favorable response, persuade zoning officials to overlook what obviously is a sham, and avoid the law that governs ordinary citizens.

The neighbors are making a different bet. They're betting that the Fenty administration, which strongly advocates neighborhood rights, will reverse the prior administration's abuse of due process and reject Soka Gakkai's baseless invocation of the "house of worship" exemption. The new administration should not buckle in the face of this "special interest." It should enforce the law.

Paul A. Cunningham is counsel to Catherine May, advisory neighborhood commissioner for single-member district 3C08. John R. Magnus is president of the Friends of the Babcock-Macomb House, a preservation group.

3



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February 12, 2007

Allison C. Prince
Phone: 202.663.8853
allison.prince@pillsburylaw.com

Mr. Bill Crews
Zoning Administrator
District of Columbia Consumer & Regulatory Affairs
941 North Capitol Street, NE
Washington, DC 20002

Re: Soka Gakkai International - USA (SGI-USA) Building Permit for 3417
Massachusetts Avenue, NW
Response to February 8, 2007 Inquiries

Dear Bill:

In order to facilitate the timely granting of the building permit application No. 5263A-6, attached within are the responses of Soka Gakkai International - USA ("SGI") to your February 8, 2007 inquiries ("inquiries").

As a preliminary matter, SGI objects to the scope of the inquiries. The inquiries infringe on SGI's Constitutional and statutory rights because they inquire into how SGI's exercise of its religion affects the design of the Project. DCRA is not legally permitted to make such assessments. Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538, 547 (D.D.C. 1994)(finding that the Zoning Administrator's refusal to grant a church its building permit to construct a soup kitchen violated the First Amendment and the Religious Freedom Restoration Act because it substantially burdened the church's right to the free exercise of its religion and concluding that "Zoning boards have no role to play in telling a religious organization how it may practice its religion"); Martin v. Corp. of Presiding Bishop of the Church of Jesus Christ Latter-Day Saints, 747 N.E.2d 131 (Mass. 2001)(finding that it was not permissible for an adjudicator "to determine whether the inclusion of a particular architectural feature is 'necessary' for a particular religion"). Indeed, it is well settled that DCRA should defer to SGI's assertions that the Project is a "church", rather than capitulate to the opposition's prejudice-based claims. See Congregation Kol Ami v. Abington Twp., 2004 U.S. Dist. LEXIS 16397 (E.D. Pa. Aug. 17, 2004)(finding that when determining whether a specific religious exercise is central to a plaintiff's belief system and requires a certain place of worship, the adjudicator "must be careful not to question what is asserted by the plaintiff"); Marks v. Chesapeake, 883 F.2d 308 (4th Cir. 1989)(granting the applicant's

Mr. Bill Crews
February 12, 2007
Page 2

special use permit despite strong neighborhood opposition and finding that "Government officials simply cannot act solely in 'reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety [or otherwise] dealing with zoning'").

Therefore, despite the fact that the inquires infringe on its basic Constitutional and statutory rights, SGI hereby responds to the inquiries without prejudice to, or waiver of, any claims pertaining to this Project that it currently has or may have against DCRA in the future.

We must emphasize again that SGI will face damages claims from its contractor if the building permit is not issued by February 20, 2007. Thank you for your prompt consideration of this urgent matter.

Sincerely yours,



Allison C. Prince

cc: Ms. Lisa Marie Morgan, Interim Director, DCRA
Mary Cheh, Councilmember Ward 3
Harriet Tregoning, Director, Office of Planning
Hon. Adrian Fenty, Mayor of the District of Columbia
Dan Tangherlini, City Administrator

Proposed Soka Gakkai Buddhist Culture Center Usage

"Exert yourself in the two ways of practice and study. Without practice and study, there can be no Buddhism. You must not only persevere yourself; you must also teach others. Both practice and study arise from faith. Teach others to the best of your ability, even if it is only a single sentence or phrase." Writings of Nichiren Daishonin Vol. I, p.386

Most uses fall into one of the following categories. They all derive from and are centered on the observance and transmission of Buddhist faith, practice and study as exemplified by the above passage from the 13th Century writings of Nichiren.

Chanting sessions

This includes the recitation of the Liturgy of Nichiren Daishonin (conducted each morning and evening) and the chanting of *Daimoku* (great invocation). While this is often conducted in members' homes, some members come to the center in the AM to recite the liturgy as a group. In addition one room ("Chanting Room") will be available whenever the center is open for members (and guests) to chant the *Daimoku*. These devotional recitations constitute one of the fundamental practices of Nichiren Buddhism. Nearly every scheduled activity begins with the recitation of the Liturgy.

Study Sessions

Buddhist study is another essential part of Buddhist practice and is conducted in many different formats according to language, age group, interests (men's women's groups), etc.

Discussion and Dialogue

Discussion and dialogue sessions whether in groups or one-on-one, enables practitioners to share their experiences in applying Buddhist practice to their daily lives, ask questions of senior leaders, or seek personal spiritual counseling. The dialogic method dates back to the days of Gautama Buddha (all of the Buddhist sutras are in the form of question and answer) and remain an essential element in all traditions.

Planning Meetings

Conducting effective worship and study events requires planning and preparation for those events.

Performance Groups

Our congregational services (like World Peace Prayer) and general meetings will often feature musical performances either from our Washington DC Chorus, or from our youth band. As with other traditions, music plays the role of uplifting peoples' hearts; and it also has a devotional characteristic rooted in Buddhist tradition.

Office Staff

The Culture Center will operate with three full-time and one part-time staff person. The full-time staff includes the director, the assistant director, the office manager; the part-time staff member assists the office manager.

Both the director and assistant director are senior level leaders and teachers in the Nichiren Buddhist tradition. Both are post-graduate level in the Soka Gakkai study Department; they are commissioned by the SGI-USA as Ministers of Ceremonies, and hold organizational responsibilities positions that center on providing both spiritual and organizational direction in the Soka Gakkai community, as well as conducting such pastoral duties as visiting the sick and aged, providing spiritual counseling, and conducting study lectures.

The office manager is primarily responsible for maintaining the membership rolls, managing the finances, the bookstore, any shipping and receiving of supplies and (together with the director and assistant director) the physical care and maintenance of the center.

In addition a volunteer receptionist comes for 4-6 hours per day to answer the phone and greet visitors.

Who can attend?

Most of the religious activities held at our center are open to our members and any interested guests. There are some activities (planning meetings, personnel meetings, etc.) which are only open to designated leaders of the Soka Gakkai community.

No fees are ever charged to attend our services. We do not rent our facilities out to the public, but may consider making the center available for certain civic functions like voting etc.

Which SGI members will use it?

We currently have (and will continue to operate) Buddhist centers in Hyattsville, MD, Baltimore MD and Springfield VA to accommodate the regular worship and study needs of members in the suburban areas. In addition we are actively pursuing a new location in Montgomery County near Gaithersburg, MD

Therefore, the principal users of this center will be the 400 members that make up the "Washington Area" organization made up mostly of members who live within DC. This will be their center for day-to-day worship and activity use. The center will also host *occasional* events open to the membership in the wider Washington DC Region which includes the surrounding Maryland counties.

Large general meetings and lectures as well as any regional conferences are held in rented halls/ballrooms or on high school or university campuses or in our Florida Nature

and Culture Center located on 125 acres in Weston Florida. These kinds of events often involve more than 1,000 participants and clearly will NOT be held in this modest facility.

**Pantry
(158 sf)**

Containing a sink, refrigerator, microwave, coffeemaker and small table, this will be the place for staff to eat their lunch or members to eat before-meeting snacks. No meal preparation here.

**Fellowship Lounge
(434 sf)**

This space will be used as a setting for informal dialogue essential to Buddhist practice, and may also be a place to enjoy some refreshments after a meeting

**Chanting Room
(286 sf)**

This room is set aside for members to come at any time during open hours to recite the Daimoku. There may be anywhere from 2-20 people in here at a time.

**Classroom
(375 sf)**

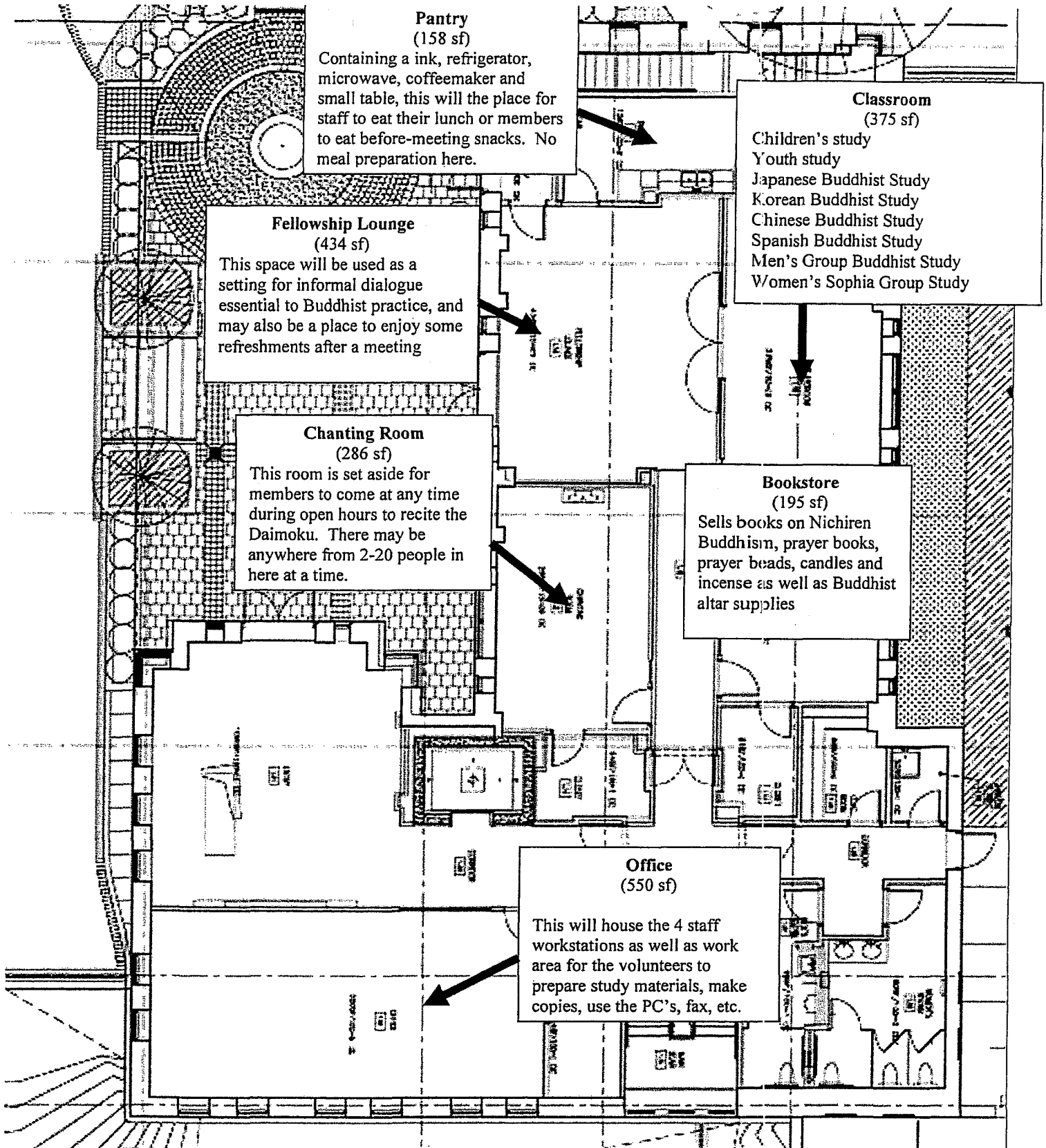
Children's study
Youth study
Japanese Buddhist Study
Korean Buddhist Study
Chinese Buddhist Study
Spanish Buddhist Study
Men's Group Buddhist Study
Women's Sophia Group Study

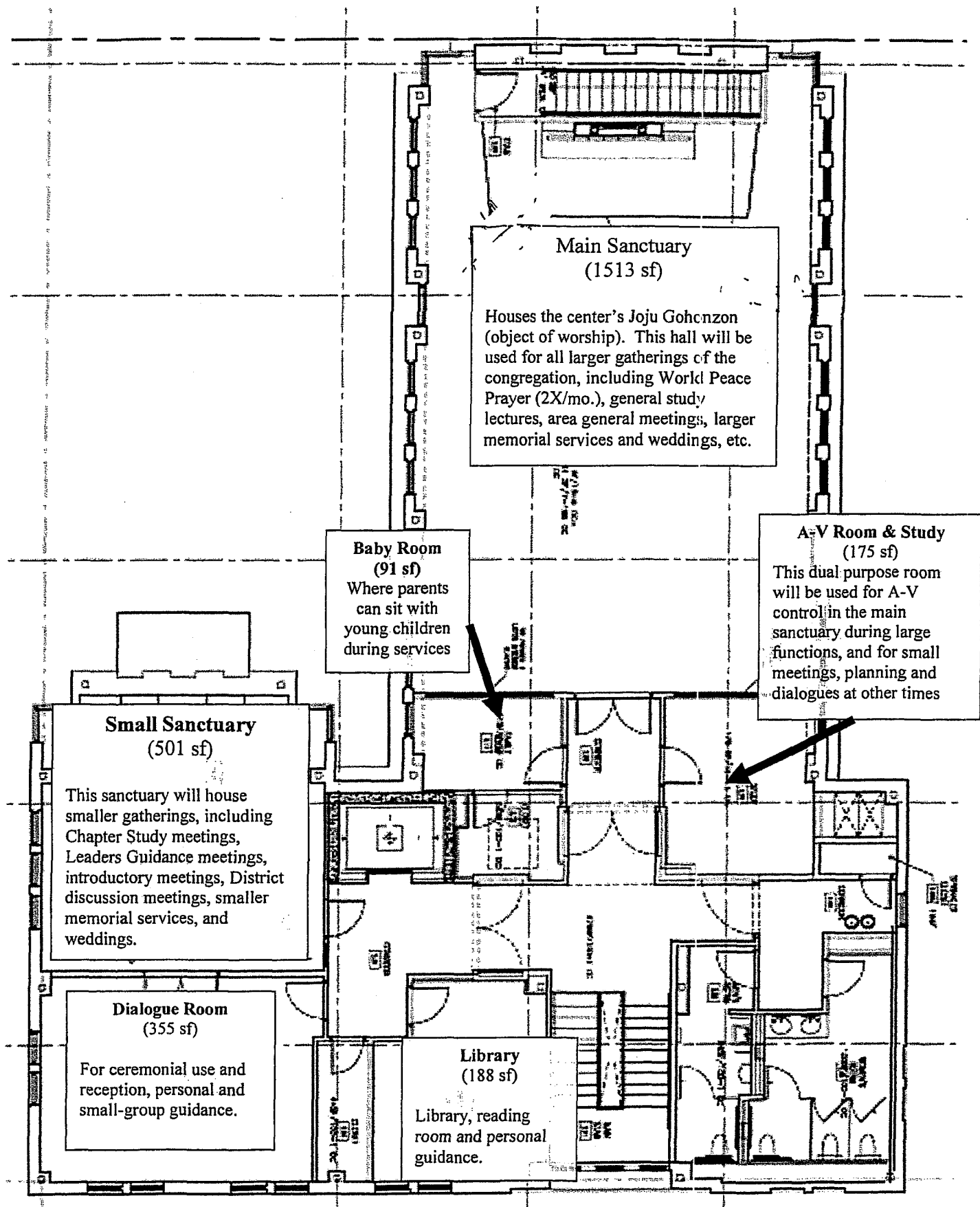
**Bookstore
(195 sf)**

Sells books on Nichiren Buddhism, prayer books, prayer beads, candles and incense as well as Buddhist altar supplies

**Office
(550 sf)**

This will house the 4 staff workstations as well as work area for the volunteers to prepare study materials, make copies, use the PC's, fax, etc.





**Soka Gakkai Buddhist Culture Center
3417 Massachusetts Avenue, NW**

	total sf	% total room space
Main Sanctuary	1513	31%
Small Sanctuary	501	10%
A-V Room/Study	175	4%
Family Room	91	2%
Dialogue Room	355	7%
Library	188	4%
Chanting Room	286	6%
Classroom	375	8%
Fellowship Lounge	434	9%
Bookstore	195	4%
Office	550	11%
Pantry	158	3%
TOTAL ACTIVITY ROOM SPACE	4821	100%

Soka Gakkai Buddhist Culture Center
3417 Massachusetts Avenue, NW

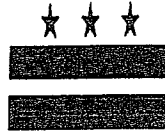
Available Activity Rooms and Sample Schedule

Room	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Center Hours	9 AM - 3 PM	9 AM - 5 PM	9 AM - 5 PM / 7-9 PM	9 AM - 5 PM / 7-9 PM	9 AM - 5 PM / 7-9 PM	9 AM - 5 PM / 7-9 PM	9 AM - 3 PM
Main Sanctuary 1513 sf	10AM - World Peace Prayer Svc (150 PAX)			7PM Memorial Service (80 pax)		7PM Study Session (English) (40 pax)	9AM Chorus Rehearsal (50 PAX) 2PM Wedding (80 PAX)
Small Sanctuary 501 sf	9AM Byakuren Grp Prayer (5 pax) 1PM Healing Arts Group (15 pax)	7AM Morning Liturgy (5-20 pax)	7AM Morning Liturgy (5-20 pax) 7PM Mens Prayer Mtg	7AM Morning Liturgy (5-20 pax)	7AM Morning Liturgy (5-20 pax) 7PM District Discussion Mtg	7AM Morning Liturgy (5-20 pax)	11AM Introductory Mtg (10-15 pax)
AV Rm/Study 175 sf	1PM - Young Mens Planning (10-15 pax)				7PM Chapter Planning Meeting (15 pax)		
Dialogue Room 355 sf	Personal Guidance	Personal Guidance	Personal Guidance	Personal Guidance			
			average 3-5 pax per day				
Library 188 sf	1PM Study Session (French) (5-7 pax)			7PM Study session (Spanish) (10-15 pax)			9AM Study preparation (12 pax)
Chanting Room 288 sf	Chanting (day only)	Chanting (day only)	Chanting (day & eve)	Chanting (day & eve)	Chanting (day & eve)	Chanting (day & eve)	Chanting (day only)
	Available whenever the center is open and usually occupied by 5-10 pax						
Classroom 375 sf	10AM Childrens Grp (15-20 pax) 1PM Study Session (Japanese) (20-25 pax)		7PM Study Session (Women) (35 pax)	7PM Area Planning Meeting (25 pax)			9AM Study Session (Korean) (35 pax)
Fellowship Lounge 434 sf	12PM Post-meeting fellowship (40-60 pax flowing through)						10AM Youth Band Rehearsal (15 pax)
Bookstore Hours	10AM - 1PM			17 - 6:30 PM			

The above is a sample schedule and reflects typical usage based on the existing DC Community Center schedule.

4

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



March 2, 2007

Mr. Bill Aiken, Associate Director
Office of Public Affairs
Soka Gakkai International – USA
2233 Wisconsin Avenue, NW Suite 306
Washington, DC 20007

Ms. Allison Prince
Pillsbury Winthrop Shaw Pittman
2300 N St. NW
Washington, DC 20037.1122

Re: 3417 Massachusetts Ave. NW (Square 1939 Lot 42)
Building Permit Applications #4877-A-6 & #5263-A-6

Dear Mr. Aiken and Ms. Prince:

Soka Gakkai International – USA (SGI) has proposed a new building at 3417 Massachusetts Ave. NW, for use as a ‘place of worship.’ This property is within an R-1-B (Residential) District and the D (Mixed Use Diplomatic Overlay District) and the NO (Naval Observatory Precinct Overlay District).

Use as a ‘place of worship’ is a matter of right use within the R-1-B District and is not prohibited by either Overlay District.

It is the responsibility of the Zoning Administrator to determine whether all uses of property, structures, or buildings comply with the Zoning Regulations of the District of Columbia, Title 11 of the DC Municipal Regulations. Without an objective, fact-based consideration of every use, the residents of the District of Columbia could be subject to spurious claims contrary to the purpose and intent of the Zoning Regulations.

In order to confirm SGI’s claims that the building will be used predominately as a ‘place of worship’ this office requested, and you have submitted, additional information with respect to the intended use of the building. After careful consideration and reliance upon the attached information provided by SGI, it is clear to me that the principal use of the proposed building will

Re: 3417 Massachusetts Ave. NW (Square 1939 Lot 42)
Building Permit Applications #4877-A-6 & #5263-A-6
Page 2

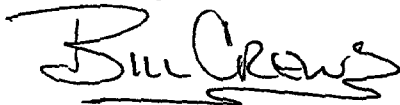
be as a place of worship. You have explained how the space is used for the practice of your faith. The layout of the building with a large main room and smaller room for worship activities as well as classrooms, fellowship hall and a small amount of office space is very typical of churches and other places of worship. You have provided a typical schedule of activities which again mirrors other faiths' regular activities taking place in their churches or places of worship.

The issuance of a certificate of occupancy for use as a 'place of worship' requires maintaining worship as the principal use of the building.

Having determined the use as a matter of right, I have directed my staff to complete the zoning review of the submitted plans and provide approval or comments to you by close of business Monday, March 5, 2007.

I appreciate your willingness to detail the uses of the building in assisting my determination of the applicability of the zoning regulations.

Best regards,

A handwritten signature in black ink, appearing to read "Bill Crews", with a stylized, flowing script.

Bill Crews
Zoning Administrator for the District of Columbia