May 4, 2017

Board of Zoning Adjustment
441 4th Street, NW, Suite 200S
Washington, DC 20001

RE: Letter Response to DCRA's May 1, 2017 Submission (IZIS Exh. 40, BZA App. No. 19441)

Dear Chairperson Hill and Members of the Board:

On behalf of Richardson Place Neighborhood Association (RPNA), I write this letter in response to DCRA's May 1, 2017, filing ("DCRA Supp. Br."), which responds to the BZA's request for the "information the Zoning Administrator had when he was reviewing the certificate of occupancy." Mar. 22, 2017, Hearing Transcript (Hrg. Tr.) at 437, ln. 18-19. We offer three points in response to DCRA's submission and accompanying arguments.[1]

First, DCRA evades answering the only critical question: did the Zoning Administrator (ZA), when reviewing the application for Certificates of Occupancy, consider **any** of the factual evidence submitted by RPNA in its appeal? DCRA's answer is a resounding "**NO**." DCRA admits that "[t]he ZA . . . *had available* Appellant's filings with the Board in this appeal." DCRA Supp. Br. at 2 (emphasis added). But saying that the ZA "had available" RPNA's evidence is miles short of claiming that he "considered," "reviewed," "evaluated," or even "glanced at" it.

DCRA's failure to consider this evidence was unlawful. The ZA must consider all evidence "known to [him] at the time the Certificate of Occupancy was issued." *Ward 5 Imp. Ass'n v. BZA*, 98 A.3d 147, 149, 153 & n.11 (D.C. 2014); *see id.* at 149 (evidence supplied by opponent regarding the "planned use of the establishment" must be considered).[2] This is hornbook administrative law. Indeed, an agency's action is by definition arbitrary and capricious *whenever* it "fails to consider relevant evidence and fails to adequately explain its findings." *Metropole Condo. Ass'n v. BZA*, 141 A.3d 1079, 1082 (D.C. 2016). The ZA's failure in this case to evaluate, weigh, and reckon with evidence supplied by RPNA is per se arbitrary and capricious. *See* BZA Appeal No. 15264 (July 10, 1991) at 16 ("[ZA] [i]s responsible for . . . making a sufficient inquiry about the proposed use to allow for an informed decision about the appropriateness of the use category on the certificate of occupancy application."). What's more, "[g]eneralized, conclusory or incomplete findings are insufficient; subsidiary findings of basic fact on all material issues must support

[1] RPNA is entitled to submit this response under 11-Y D.C.M.R. § 408.9, which, by incorporating D.C.'s Administrative Procedure Act, requires the Board to allow parties in contested cases to the "opportunity . . . to file exceptions and present argument" in response to "evidence" offered to the Board that its members "did not personally hear." D.C. Code § 2-509(b)-(d).

[2] Contrary to DCRA's argument that the ZA has complete discretion to decide what evidence he will consider, *see* DCRA Supp. Br. at 2, D.C. Court of Appeals and BZA decisions consistently require the ZA to evaluate ***all*** evidence in his possession. *See, e.g., Ward 5 Imp. Ass'n*, 98 A.3d at 153 n.11; *Bannum, Inc. v. BZA*, 894 A.2d 423, 427 (D.C. 2006) (criticizing DCRA for issuing permit based on indicated use where DCRA "did not request any information to verify that the [proposed building] could legally operate in [the relevant] zone"); *Sisson v. BZA*, 805 A.2d 964, 974 (D.C. 2002) (ZA must undertake a "complete and accurate" evaluation); BZA App. No. 17092 (Oct. 15, 2004) at 6 (ZA evidentiary research inadequate); BZA App. No. 16791 (June 21, 2002) at 22 ("[ZA] is authorized to request from applicants 'information necessary to determine compliance' with the Zoning Regulations, 11 DCMR § 3202.2, and should have done so in this case to obtain a complete understanding of the *proposed use*."); BZA App. No. 16404 (Mar. 8, 2000) at 6 (Board decides whether ZA made a reasoned decision by considering evidence available to him at time of decision); BZA App. No. 16066 (Nov. 25, 1997) at 6-7 (reversing ZA's issuance of CofO where opponent informed ZA of key omissions in owner's application but ZA failed to demand additional proof from owner of compliance with zoning rules); BZA App. No. 15264 (Jul. 10, 1991) at 16 (describing ZA's responsibility to make a "sufficient inquiry").

the end result in a discernible manner." *Levy v. BZA*, 570 A.2d 739, 746 (D.C. 1990). The ZA's actions fail to satisfy even this relatively undemanding standard: nothing in the record shows that the ZA either considered RPNA's evidence or made findings explaining why it found the evidence lacking.

Second, DCRA offers no evidence of the conversation(s) it claims to have held with the property owner, no evidence documenting the contents of those conversations, and no proof that the ZA relied on those conversations' contents (whatever they were) in choosing to issue the CofOs. DCRA asserts in its brief that "[t]he affidavit of Common's CEO"—which allegedly memorialized information "discussed with DCRA at least a month earlier"—"confirmed in writing the Owner's prior representations . . . that the proposed use would comply with the Zoning Regulations." DCRA Supp. Br. at 2. But "factual assertions [made] in [parties'] various briefs are not, of course, evidence," *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 569 (D.C. 2011), meaning DCRA's vague assertions in its brief that certain conversations occurred cannot serve as proof of their occurrence.[3] DCRA was, of course, free to submit:

- An affidavit by ZA LeGrant or any other DCRA official who participated in these conversations stating when they occurred and describing the nature of the discussions;
- Meeting minutes or notes taken by any of the conversations' participants; or
- Contemporaneous writings, like emails, memorializing the discussions between the parties.

DCRA, however, failed to do so. There is therefore simply no evidentiary foundation supporting DCRA's claim that the ZA relied on statements made by the property owner in deciding to issue the CofO.

Third, and relatedly, DCRA's submission raises troubling inconsistencies. DCRA claims that the March 13, 2017, affidavit of Common's CFO, Simon Jawitz, confirmed in writing "***the Owner's*** prior representations." DCRA Supp. Br. at 2 (emphasis added). But why would the owner's ***lessee***, not the owner itself, offer an affidavit that DCRA's counsel claimed is a "memorialization of what had gone on in previous conversations ***between the [ZA] and the owner*** in response to the appeal"? Hrg. Tr. at 425, ln. 1-4 (emphasis added). Nothing in the record suggests that Common *ever* had a conversation directly with DCRA officials. More to the point, the affidavit contains not a single reference to conversations held with DCRA. *See* Jawitz Aff., at IZIS Exh. No. 32H-1. To cast the affidavit after the fact as a "memorialization" of earlier conversations thus appears the archetypal example of agency "counsel's post hoc rationalizations," *Comm. of 100 v. DCRA*, 571 A.2d 195, 205 (D.C. 1990), which the Board must reject.

Sincerely,

James J. Wilson
President
Richardson Place Neighborhood Association

[3] The Board also cannot rely on the assertions of DCRA's Counsel, Maximilian Tondro, at the March 22 hearing when he stated that the affidavit submitted by Common's CFO, Simon Jawitz, was a "memorialization of what had gone on in previous conversations between the [ZA] and the owner." Hrg. Tr. at 425, ln. 1-4. Mr. Tondro did not represent that he was present during the alleged conversations or show he was competent to testify that the Jawitz affidavit was a faithful "memorialization" of conversations Mr. Tondro did not himself hear. He was, of course, free to ask the ZA to testify about the conversations, or to file an affidavit documenting the specifics of the ZA's discussions with the property owner. DCRA has, however, taken neither course here.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May 2017, I have served the foregoing letter upon the following by electronic mail and/or the Board of Zoning Adjustment's Interactive Zoning Information System (IZIS).

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