

RICHARDSON PLACE NEIGHBORHOOD ASSOCIATION,

Appellant,

v.

D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,

and

OAKTREE DEVELOPMENT, LLC, d/b/a OTD 410-412 RICHARDSON PLACE LLC,

Applicant.

BZA Case No.: 19441

**APPELLANT RICHARDSON PLACE NEIGHBORHOOD ASSOCIATION (RPNA)’S
OPPOSITION TO DCRA’S MOTION TO STRIKE**

On May 4, 2017, RPNA filed a Letter response to DCRA’s Post-Hearing Submission. *See* IZIS Exh. 40, 42. DCRA moved to strike the Letter. IZIS Exh. 44. RPNA opposes the Motion.

RPNA filed its Letter for a single reason: DCRA’s post-hearing submission exceeded what the Board requested, and RPNA believed it would be prejudiced unless it filed a response. At the March 22 hearing, the Board asked DCRA to provide *only* the “information the Zoning Administrator had when he was reviewing the certificates of occupancy”—nothing more. *See* March 22 Hrg. Tr. at 437. But DCRA provided more than that. In addition to submitting the relevant applications for CofOs, DCRA saw fit to append a 3-page brief, replete with legal argument and factual assertions that lacked any evidentiary support. *See* IZIS Exh. 40. RPNA realized it would be prejudiced if it did not refute DCRA’s bare assertions and legal arguments.

The Board’s Rules of Practice & Procedure unambiguously gave RPNA a right to file its Letter. The relevant rules are in Chapter 6, “Post-Hearing Procedures,” which “applies to all applications and appeals.” 11-Y DCMR § 600.1. Specifically, § 602.3 states that “[t]he Board shall allow all parties an opportunity to file written responses to any exhibits, information, or briefs submitted after the close of the hearing.” *Id.* § 602.3 (emphasis added). Although this text

is clear enough, we reproduce the entirety of §§ 602.1–602.3, lest we again be wrongly accused of quoting legal texts “selectively, and misleadingly.” DCRA Mot. to Strike at 3.

602.1 The record shall be closed following the public hearing, except that the record may be kept open for a stated period for the receipt of specific exhibits, information, or legal briefs, as may be directed by the presiding officer.

602.2 Each party shall serve any specific exhibits, information, or legal briefs on all other parties at the same time as specific exhibits, information, or legal briefs are filed with the Board.

602.3 The Board shall allow all parties to a case an opportunity to file written responses to any exhibits, information, or briefs submitted after the close of the hearing. All responses shall be filed within seven (7) days after the date by which the exhibits, information, or briefs were due, unless otherwise directed by the presiding officer. Replies by other parties to the aforementioned responses will not be accepted into the record.

§§ 602.1–602.3 (emphases added). The rules require no explanation. RPNA had a right to file a written response to DCRA’s post-hearing submission, which consisted of “exhibits, information, [and] briefs submitted after the close of the hearing.” *Id.*; IZIS Exh. 40 (brief), 40A-C (exhibits).

The D.C. Administrative Procedure Act provides an independent basis guaranteeing RPNA’s right to file a response. Section 2-509(b) requires that parties in contested cases be allowed to respond or test by cross-examination any new information added to the record:

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.

D.C. Code § 2-509(b). Even when a hearing has been closed, paragraph (b)’s guarantees apply.

The Board may “h[o]ld the record open for post-hearing submission of documents,” provided such decision is “coupled with full opportunity for opposing parties to comment.” *Tenants Council v. DC Rental Accom. Comm’n*, 426 A.2d 868, 874 (D.C. 1981). A full “cross-examination” is unnecessary; it is sufficient that RPNA be given the “opportunity to ‘present

argument,’ . . . in the form of memoranda or briefs.” *Palisades Citizens Ass’n, Inc. v. DC Zoning Comm’n*, 368 A.2d 1143, 1145 n.6 (D.C. 1977).

Contrary to DCRA’s protestations, *all* of the APA, including § 2-509, governs Board procedures. *See* D.C. Code § 2-501 (APA “supplement[s] all other provisions of law establishing procedures to be observed by [D.C.] agencies”); 11-Y DCMR § 100.1 (“This chapter supplements procedures set out in . . . the [APA] . . . §§ 2-501 to 2-511.”). And contrary to what Oaktree/OTD claims in its May 9 Letter, the Board did not—and cannot—rely on 11-Y DCMR § 101.9 to “waive” RPNA’s right to respond. The right to refute new materials is enshrined not only in the Board’s rules but in the APA itself, which “shall supersede any [agency] law and procedure to the extent of any conflict therewith.” D.C. Code § 2-501. Also, 11-Y DCMR § 101.9 requires three predicates missing here. First, the *Board* must act to waive (not the Chair alone); second, the Board must find that denying RPNA an opportunity to respond would not cause it prejudice; third, there must be good cause for waiver. *See id.* None has occurred here.

Finally, RPNA notes that 11-Y DCMR § 602.3 forbids “[r]eplies by other parties to the aforementioned responses.” Although RPNA is not asking the Board to formally strike either DCRA’s Motion to Strike or Oaktree’s May 9 Letter as impermissible replies, we urge the Board to disregard (a) the bottom of page 4 through page 7 of DCRA’s Motion to Strike, and (b) pages 2 through 4 of Oaktree’s May 9 Letter—both of which contain only substantive replies to RPNA’s May 4 Letter. Those substantive replies are prohibited under § 602.3.

RPNA regrets that the Board has been drawn into this ancillary procedural tangle. We hope that this response serves to clarify matters and we remain grateful for your patience.

DATED: May 15, 2017

Respectfully submitted,

/s/ James J. Wilson
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CERTIFICATE OF SERVICE

I hereby certify that on this Monday, May 15, 2017, I have served the foregoing letter upon the following by electronic mail and/or the Board of Zoning Adjustment's online Interactive Zoning Information System (IZIS).

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