



March 1, 2018

**Meridith H. Moldenhauer**

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Frederick L. Hill, Chairperson  
Board of Zoning Adjustment  
441 4th Street, NW, Suite 200S  
Washington, DC 20010

**RE: BZA Case No. 19705  
Applicant's Opposition to Motion to Dismiss**

Chairperson Hill and Honorable Members of the Board:

On behalf of Applicant, Madison Investments LLC (the "Applicant"), please find enclosed the Applicant's Opposition to the Motion to Dismiss filed by LDP Acquisitions (Ex. No. 40). We look forward to presenting this application to the Board on March 7, 2018, and we thank you for your attention to this matter.

Sincerely,

Cozen O'Connor

A handwritten signature in blue ink, appearing to read "MM", written over a horizontal line.

By: Meridith Moldenhauer

LEGAL\34674977\1

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of March, 2018, a copy of the foregoing Opposition to Motion to Dismiss was served, via electronic mail, on the following:

District of Columbia Office of Planning  
c/o Matthew Jesick  
1100 4<sup>th</sup> Street SW, Suite E650  
Washington, DC 20024  
[Matthew.Jesick@dc.gov](mailto:Matthew.Jesick@dc.gov)

Advisory Neighborhood Commission IB  
c/o James A. Turner, Chairperson  
[1B09@anc.dc.gov](mailto:1B09@anc.dc.gov)

Advisory Neighborhood Commission IB  
c/o Jon Squicciarini, SMD Commissioner  
[1B04@anc.dc.gov](mailto:1B04@anc.dc.gov)

Vernon W. Johnson III  
Nixon Peabody  
799 Ninth Street NW, Ste. 500  
Washington, DC 20001  
[vjohnson@nixonpeabody.com](mailto:vjohnson@nixonpeabody.com)



Meridith H. Moldenhauer

**BEFORE THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT**

**APPLICATION OF  
MADISON INVESTMENTS, LLC**

**BZA APPLICATION NO. 19705  
HEARING DATE: MARCH 7, 2018**

**APPLICANT MADISON INVESTMENTS, LLC'S OPPOSITION TO THE MOTION TO  
DISMISS FILED BY LDP ACQUISITIONS LLC**

On behalf of the Applicant, Madison Investments, LLC (the "Applicant"), please consider the following opposition to the Motion to Dismiss filed by LDP Acquisitions LLC ("LDP"). The Applicant respectfully requests that the Board deny the Motion to Dismiss because LDP fails to establish a legal or factual basis for dismissing the Applicant's self-certified zoning application to the Board, which was accepted by the Office of Zoning on December 29, 2017 (the "Application"). As explained in further detail below, LDP's Motion should be denied for the following reasons: (1) LDP's Motion is procedurally improper—to obtain the relief they request, LDP was required to file a zoning appeal, the deadline for which has passed; and (2) the issues that form the basis for LDP's dismissal motion are not within the Board's statutory authority and are not germane to the properly filed Application for special exception relief. Accordingly, as with LDP's Request for Party Status, the Motion to Dismiss should be denied.

**I. LDP's claims should have been filed as an appeal of the Office of Zoning's decision to accept the Application, but LDP failed to file a timely appeal**

LDP's Motion to Dismiss is functionally an appeal of the Office of Zoning's decision to accept the Application, but LDP failed to file a timely appeal within sixty days of the date on which the Office of Zoning accepted the Application. In the Motion to Dismiss, LDP asserts that the Applicant did not have a "legal right to submit this application," thereby contesting the Office of Zoning's decision to accept the Application. Under Subtitle Y § 400, the Office of Zoning "shall review for completeness every application filed with the Board," and shall further "notify the applicant in writing of any deficiency." Here, the Office of Zoning accepted the self-

certified Application on December 29, 2017, which functions as a determination that the Application met all of the prerequisites set forth under Subtitle Y § 300.8 and was deemed complete.

If LDP wished to challenge the Office of Zoning's decision to accept the Application, the appropriate avenue would have been an appeal of that decision. The Zoning Regulations permit that those aggrieved "by an order, requirement, decision, determination, or refusal made by an **administrative officer or body**, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely zoning appeal with the Board." (emphasis added) Subtitle Y § 302.1. The Office of Zoning is an administrative body that supports the Board of Zoning Adjustment, and LDP could have appealed the determination to accept the Application as complete. Of course, LDP did not appeal the Office of Zoning's decision to accept the Application.

LDP is now time-barred from filing such an appeal. The Zoning Regulations establish that an appeal must "be filed within sixty days from the 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." Subtitle Y § 302.2. The Application was accepted on December 29, 2017 pursuant to Subtitle Y § 400, after which a copy of the application was placed in the public record of the Board. *See* Subtitle Y § 400.3. As such, the Application was made public on December 29, 2017, and LDP had notice of the Application on that date or reasonably should have known of the decision to accept the Application on that date. LDP thus needed to file any appeal of the Office of Zoning's decision no later than February 27, 2018, which is sixty days from December 29, 2017. Because LDP failed to file an appeal by February 27, 2018, it is now time-barred from appealing the Office of Zoning's decision to accept the Application.

LDP's Motion to Dismiss is functionally a time-barred appeal and, therefore, not appropriate for consideration by the Board as part of this Application. LDP cites no alternative authority in the Zoning Regulations that can form the basis for a dismissal of the Application. As such, LDP's Motion to Dismiss should be denied.

**II. The crux of LDP's Motion to Dismiss is outside the Board's statutory authority and not germane to the Application**

Even if LDP's Motion to Dismiss is considered procedurally appropriate, the allegations contained therein concern a contractual dispute that is not within the purview of the Board's authority prescribed by D.C. Code § 6-641.07 and the Zoning Regulations. As set forth in detail in the Applicant's Opposition to LDP's Request for Party Status (BZA Ex. No. 45), LDP's allegations are wholly unrelated to the zoning relief requested as part of the Application. Specifically, LDP alleges that the Applicant has no legal right to submit the Application because of LDP's alleged contractual interests in the property located at 2118 14<sup>th</sup> Street NW (Square 203, Lot 10) (the "Smucker's Property"), which is part of the Application.<sup>1</sup> LDP's alleged interests in the Smucker's Property are presently in litigation before the Superior Court of the District of Columbia in a case styled as *LDP Acquisitions LLC v. Felix Nelson Ayala, et al.*, Civil Action No. 2017 CA 006699 B. Indeed, the Superior Court has jurisdiction to consider a contractual dispute and is the appropriate venue for such an action. LDP's allegations regarding the contractual dispute should be adjudicated before the only judicial body that can appropriately hear those claims – the Superior Court for the District of Columbia.

In this regard, it is worth noting that another portion of the property that is part of the Application is currently owned by Martha's Table at 2114-2116 14<sup>th</sup> Street NW (Square 203, Lot 96) and 2120-2124 14<sup>th</sup> Street, NW (Square 203, Lot 809) (the "Martha's Table Properties").

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<sup>1</sup> In addition to the Smucker's Property, the Application concerns properties located at 2114-2216 14<sup>th</sup> Street NW, 2120-2124 14<sup>th</sup> Street NW, 1400 W Street NW, and 1403 V Street NW.

The Martha's Table Properties were put up for sale and bids were solicited for its purchase in the spring of 2017.<sup>2</sup> Both the Applicant *and* LDP, among others, submitted bids for the Martha's Table Properties, and the Applicant's bid was accepted. Thus, LDP has no involvement in or control of the relationship between the Applicant and Martha's Table, and there is no dispute that Martha's Table and the Applicant intend to close on that agreement. In other words, LDP is simply a frustrated bidder for the Martha's Table Properties with a disputed "interest" in the Smucker's Property. These frustrations have absolutely no relevance to the Applicant's zoning action pending before the Board.

The Board's jurisdictional authority is limited to hearing and deciding requests for special exceptions and variances, appeals from zoning decisions, and other special questions put to it by the Zoning Commission. *See* DC Code §§ 6-641.07(g)(1-3), 6-641.07(d). Specifically, the DC Code provides that the Board has the power "to hear and decide, in accordance with the provisions of the regulations adopted by the Zoning Commission, requests for special exceptions..." DC Code § 6-641(g)(2). LDP is asking the Board to venture well beyond its statutory authority by improperly injecting itself into this contractual dispute between LDP and the current owner of the Smucker's Property. The Board has no statutory authority to decide such a contractual dispute because the contractual dispute is not relevant to the special exception zoning relief requested by the Applicant. And as the Board has previously recognized in BZA Case No. 18725, the Court of Appeals has repeatedly stated its reluctance to "read into a statute powers for a regulatory agency which are not fairly implied from the statutory language, since the agency is statutorily created." *See Spring Valley Wesley Heights Citizen Ass'n v. District of Columbia Bd of Zoning Adjustment*, 644 A.2d 434, 436 (D.C. 1994) (*citing Chesapeake &*

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<sup>2</sup> If necessary, Sia and Barry Madani, principals of Madison Investments, will be present at the Board hearing to testify to these matters, including the bidding process.

*Potomac Tel. Co. v. Public Service Comm'n of District of Columbia*, 378 A.2d 1085, 1089 (D.C. 1977)). Furthermore, the Board itself has previously restricted the testimony and discussion of concerns raised that were outside of the Board's jurisdiction. *See* BZA Case Nos. 19229 and 18799. The Board has also refused to postpone cases due to pending litigation and narrowly interpreted its authority to address the zoning application before it.

LDP incorrectly attempts to wedge a contractual dispute into this zoning arena. But the contractual dispute is not within the statutory purview of the Board, nor is it relevant to the pending Application. Therefore, LDP's Motion to Dismiss Application should be denied.

**III. The Applicant is authorized to file this Application by the current property owners**

Notably, the Applicant submitted letters of authorization from each owner of the properties that are the subject of this Application, including the owner of the Smucker's Property. *See* BZA Ex. No. 10. The Zoning Regulations provide that "the owner of property for which zoning relief is sought, or an authorized representative, shall file an application with the Office of Zoning." Subtitle Y § 300.4. The Applicant, as the authorized agent, is permitted by the Zoning Regulations to file the Application. LDP's alleged contractual dispute with the owner of the Smucker's Property has no legal effect on the Applicant's ability and right to file the Application on behalf of the Smucker's Property owner.

Further, the Zoning Regulations specifically contemplate the filing of an application for zoning relief by a contract purchaser, stating as follows:

if the owner will be represented by a third party, including the lessor or contract purchaser of the property, a letter of authorization signed by the owner authorizing the representative to act on the owner's behalf with respect to the application . . . shall be submitted in the record. Subtitle Y § 300.5.

The owners of the Smucker's Property have submitted affidavits, attached hereto at **Tab A**, testifying and reiterating that they have authorized the Applicant to file BZA Case No. 19705.

Additionally, Martha's Table has submitted a letter, attached hereto at **Tab B**, stating that it

authorized the Applicant to file this Application and requesting that there be no delay in the Board processing this Application.

Anything that impedes this properly authorized Application from being heard by the Board could very well delay the sale of the Martha's Table Properties to the Applicant; as such, the impediment could adversely affect both the Applicant's enjoyment of those properties as well as Martha's Table's enjoyment of the funds raised from the sale. This delay may be the very result that LDP, as a frustrated bidder, seeks to achieve. This tactic is inappropriate and, as outlined above, not within the Board's jurisdiction. Simply put, the Applicant has received the requisite authority to move forth with the Application for zoning relief and LDP's delay tactics should be disregarded.

**IV. LDP's alleged interest in the Smucker's Property will not be affected by the Application**

LDP's alleged contractual interest in the Smucker's Property will not be affected by the pending Application. LDP claims it would be "severely, irreparably, and adversely affected by an application moving forward for review..." This is a fundamental misunderstanding of the nature of this zoning proceeding. If the Board grants the Application, the Board is simply **authorizing** the Applicant to construct the proposed project. An order of the Board is valid for two years and would then expire if the proposed project does not come to fruition. *See* Subtitle Y § 702.1. Yet, the Board's approval **does not** require the Applicant, or any subsequent property owner, to construct the proposed project. Furthermore, the Board's approval does not limit any current or future owner of the subject properties to file a different application before the Board or a matter-of-right permit application to the Department of Consumer and Regulatory Affairs.

Accordingly, LDP's alleged interests, whether valid or not, are not "irreplaceable," as LDP claims, nor will LDP's alleged interests be affected by the Application. LDP simply seeks to delay the proposed project from moving forward. As discussed above, in addition to the cost and



harm imposed on the Applicant, this delay may impact Martha's Table's enjoyment of the funds to be raised from the sale.

**V. Conclusion**

In summation, LDP's Motion to Dismiss is improperly filed and the issues raised by LDP are not germane to BZA Case No. 19705 or within the Board's statutory authority. LDP's allegations are best left for resolution with the Superior Court of the District of Columbia. Accordingly, the Applicant opposes LDP's Motion to Dismiss Application and requests that the Board deny the Motion to Dismiss.

Respectfully Submitted,  
COZEN O'CONNOR



Meridith H. Moldenhauer  
1200 19<sup>th</sup> Street, NW, 3<sup>rd</sup> Floor  
Washington, D.C. 20036  
202-747-0763

Tab A

**AFFIDAVIT OF MARIA E. AYALA REGARDING 2118 14<sup>th</sup> STREET NW**

I, Maria E. Ayala, first being duly sworn under oath and competent to testify as to all matters set forth, depose and say that I am over the age of 18 years old and hereby state the following:

1. I make this affidavit based on my personal knowledge.
2. Felix Nelson Ayala and I are the current owners of the property located at 2118 14<sup>th</sup> Street NW (Lot 10, Square 203) (the "Property") and have owned the Property since 1994.
3. As of the date of this affidavit, Felix Nelson Ayala and I have not sold the Property.
4. Felix Nelson Ayala and I authorized Madison Investments in writing to file BZA Case No. 19705 seeking zoning relief related to the Property.
5. The authorization letter is filed in BZA Case No. 19705 at Exhibit 10.
6. Felix Nelson Ayala and I are aware and familiar with pending BZA Case No. 19705 filed by Madison Investments.

Under penalty of perjury, I certify that I have examined this affidavit and that, to the best of my knowledge, it is true, correct, and complete.

Executed on this 23 day of FEBRUARY, 2018.

Maria E Ayala  
Affiant

District of Columbia

SUBSCRIBED AND SWORN TO before me this 23 day of February, 2018.

Alessandra De La Jara  
Notary Public

My commission expires:

**Montgomery County, Maryland**  
Notary Public  
Alessandra De La Jara  
My Commission Exp 12/04/2020

**AFFIDAVIT OF FELIX NELSON AYALA REGARDING 2118 14<sup>th</sup> STREET NW**

I, Felix Nelson Ayala, first being duly sworn under oath and competent to testify as to all matters set forth, depose and say that I am over the age of 18 years old and hereby state the following:

1. I make this affidavit based on my personal knowledge.
2. Maria E. Ayala and I are the current owners of the property located at 2118 14<sup>th</sup> Street NW (Lot 10, Square 203) (the "Property") and have owned the Property since 1994.
3. As of the date of this affidavit, Maria E. Ayala and I have not sold the Property.
4. Maria E. Ayala and I authorized Madison Investments in writing to file BZA Case No. 19705 seeking zoning relief related to the Property.
5. The authorization letter is filed in BZA Case No. 19705 at Exhibit 10.
6. Maria E. Ayala and I are aware and familiar with pending BZA Case No. 19705 filed by Madison Investments.

Under penalty of perjury, I certify that I have examined this affidavit and that, to the best of my knowledge, it is true, correct, and complete.

Executed on this 23 day of FEBRUARY, 2018.

  
\_\_\_\_\_  
Affiant

District of Columbia

SUBSCRIBED AND SWORN TO before me this 23 day of February, 2018.

  
\_\_\_\_\_  
Notary Public

My commission expires:

**Montgomery County, Maryland**  
Notary Public  
Alessandra De La Jara  
My Commission Exp 12/04/2020

Tab B



February 23, 2018

Frederick L. Hill, Chairperson  
Board of Zoning Adjustment  
441 4<sup>th</sup> Street NW, Suite 200S  
Washington, DC 20010

**Re: Board of Zoning Adjustment (“BZA”) Case No. 19705**

Dear Chairperson Hill and Honorable Members of the Board:

I am the president and chief executive officer of Martha’s Table, Inc. Martha’s Table owns 2114-2116 14<sup>th</sup> Street NW and 2124 14<sup>th</sup> Street NW (collectively the “Property”). The Property is part of the pending BZA Case No. 19705. Martha’s Table has signed a binding purchase and sale contract to sell the Property to Madison Investments, LLC (“Madison”). Martha’s Table authorized Madison, as contract purchaser and as Martha’s Table’s agent, to apply to BZA for zoning relief for the Property.

Martha’s Table is selling the Property to Madison to facilitate the construction of a new Martha’s Table facility that will be located in Ward 8.

Martha’s Table, as the owner and authorizing agent, requests that the Board of Zoning Adjustment proceed with BZA Case No. 19705, and grant the relief Madison has requested, without delay.

Thank you for your time and consideration of our request.

Sincerely,  
Martha’s Table, Inc.

By:   
Patty Stonesifer  
President and Chief Executive Officer