

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001

Appeal by DC for Reasonable Development

BZA Appeal No. 20191

**D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS’S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE APPEAL**

The D.C. Department of Consumer and Regulatory Affairs (“DCRA”) for its Reply in Support of its Motion to Dismiss, states as follows:

I. PROCEDURAL BACKGROUND

The Appellant, DC for Reasonable Development (the “Appellant”), filed this appeal on October 15, 2019.¹ On March 3, 2020, the Appellant filed a Motion to Postpone the Hearing.² On March 4, 2020, DCRA filed a Partial Consent Motion to Dismiss the Appeal.³ On March 5, 2020, the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) filed a Motion to Dismiss.⁴ On March 12, 2020, the Board of Zoning Adjustment (the “Board” or “BZA”) administratively rescheduled the hearing to May 13, 2020.⁵ Due to the ongoing issues surrounding COVID-19, the Board did not hold a public hearing on May 13, 2020.

On May 27, 2020, the Appellant filed an “Emergency Motion for In-person Hearing Allowing for Accessibility & Welfare of Protected Participants.”⁶ At a virtual public meeting of the Board on May 27, 2020, the Board discussed the Appellant’s request that the Board not hold

¹ BZA Appeal 20191 Exhibit 5 – Appellant’s Statement of Appeal.

² BZA Appeal 20191 Exhibit 22 – Appellant’s Motion to Postpone Hearing.

³ BZA Appeal 20191 Exhibit 23 – DCRA’s Motion to Postpone Hearing.

⁴ BZA Appeal 20191 Exhibit 24 – Property Owner DMPED Motion to Dismiss Appeal.

⁵ BZA Appeal 20191 Exhibit 25 – BZA Memo.

⁶ BZA Appeal 20191 Exhibit 32 – Appellant’s Emergency Motion for In-person Hearing Allowing for Accessibility & Welfare of Protected Participants.

the public hearing on this appeal as an online virtual hearing but instead postpone the public hearing until the time the Board holds in-person public hearings.⁷ On May 28, 2020, the Board entered an Order directing the parties to submit to the record any responses to motions regarding preliminary matters, by June 8, 2020. Further, the Board ordered that by June 18, 2020, the parties are to submit to the record responses to any preliminary matters.⁸

On June 8, 2020, the Appellant filed a Motion for Summary of Affirmance of Complainant's Appeal of Respondent's DCRA Erroneous Issuance of Permits (“Appellant’s Motion”).⁹ However, the Appellant has neither offered any substantive challenge to DCRA’s Motion to Dismiss, nor has it provided any specific facts demonstrating that the Zoning Administrator erred in approving the permits. As the appeal is devoid of any genuine facts, the Board must dismiss this matter.

II. ARGUMENT

A. The Appeal Must be Dismissed as the Appellant has Failed to Allege Any Facts demonstrating that the Zoning Administrator Erred.

It is axiomatic that the Appellant has the burden of demonstrating sufficient facts to support the appeal. *See, BZA Appeal No. 17502 of Johnathan Gottlieb* (“...in order to proceed at hearing, the Board and the parties must know the basis of the errors alleged, an appellee to defend the appeal, any intervening parties to address the appeal and the Board to evaluate it”); *see also, BZA Appeal No. 19477 of Kingman Park Civic Association* (“...the burden is on the Appellant to state

⁷ BZA Appeal 20191 Exhibit 33 – BZA Memo. DCRA did not receive a formal written notice that the Board was considering the Appellant’s request for an in-person hearing at its May 27, 2020 public meeting.

⁸ BZA Appeal 20191 Exhibit 33 – BZA Memo.

⁹ The BZA Rules do not expressly provide for a “Summary Affirmance,” nor does the Appellant cite to any rule or code provision which warrants Appellant’s requested relief. In response to the Board’s Order of May 28, 2020, DCRA shall treat Appellant’s Motion as a Response to DCRA’s Motion to Dismiss.

a claim based on the Zoning Regulations (11-Y DCMR § 302.2.)”). This Board has held that an appellant cannot rest on only general allegations of error with no factual support or specificity. *See, BZA Appeal No. 17502 of Johnathan Gottlieb (“Gottlieb”).*

Gottlieb is instructive. In *Gottlieb* the neighboring owner appealed DCRA’s decision to issue a building permit. The property owner moved to dismiss the appeal claiming that the appeal and its attachments did not state a claim upon which relief could be granted. The owner argued that dismissal was warranted because “no facts” were stated for the Board to evaluate. DCRA joined in the owner’s motion. In dismissing the appeal, the Board agreed, stating that while an appellant may have some leeway, an appellant **must, at a minimum, articulate the error alleged.**¹⁰

The Board in *Gottlieb* went on to state that, although the appellant was able to identify the subject matter of the errors (lot occupancy and FAR), he could neither explain in what respect the plans approved by the Zoning Administrator exceeded these limitations, nor point to any errors in the methodology used or calculations made by the Zoning Administrator in concluding that the plans were non-compliant.¹¹

The Appellant in the instant appeal similarly cited various zoning regulations without any explanation as to how these cited regulations were violated by the Zoning Administrator. The appellant in *Gottlieb* at least properly identified the subject matter, however, this Appellant cites regulations which do even not apply to the Zoning Administrator. (Subtitle X § 309.2, Subtitle X

¹⁰ BZA Appeal 17502 of Johnathan Gottlieb Exhibit 21 - Decision and Order, p.6

¹¹ BZA Appeal 17502 of Johnathan Gottlieb Exhibit 21 - Decision and Order, p.6
Page 3 of 7

§ 311.1 and Subtitle Z § 702.7). The mere recitation of inapplicable zoning provisions, in addition to the lack of factual analysis, warrants this Board’s dismissal.

Another case directly on point is *BZA Appeal No. 19477 of Kingman Park Civic Association (“Kingman Park”)*. In *Kingman Park*, the Kingman Park Civil Association (“Civil Association”) appealed the DCRA’s issuance of a building permit on the grounds that the permit violated unspecified zoning regulations and the permit holder’s failure: (i) to obtain the required business license; (ii) to register as a corporate entity as required; (iii) to comply with the notification requirements of the Construction Codes; (iv) to comply with environmental laws; and (v) to comply with the D.C. Historic Preservation Act.¹² DCRA filed a motion to dismiss arguing, *inter alia*, that the appeal failed to state a claim based on the Zoning Regulations, and that the other laws and regulations were outside the Board’s jurisdiction.

In granting DCRA’s motion in *Kingman Park*, the Board soundly rejected the Civil Association’s arguments, stating:

The Appellant claimed violations of laws and regulations other than the Zoning Regulations. Because these claims are outside of the Board’s jurisdiction, they must be dismissed. The Appellant claimed that granting the Permit violated the laws that required the Permit Holder to obtain a Basic Business License; (ii) to register as a foreign or domestic business entity; (iii) to provide neighbor notification required by the D.C. Building Code, 12A DCMR § 3307A; and also violated (iv) unspecified “environmental laws” due to the impact on the sewer system; (v) unspecified “building construction laws and regulations” for fire and structural safety; and (vi) unspecified provisions of the D.C. Historic Preservation Act because an application for an historic district is under review at the D.C. Historic Preservation Review Board. **The one thing all of these claims have in common is that none of them alleges a violation of the Zoning Regulations. The claims alleging violations of the business licensing laws and regulations, Construction Codes, environmental laws, and the Historic Preservation Act do not arise from the Zoning Regulations; consequently, the Board does not have the jurisdiction to hear them and they must be dismissed.**¹³

¹² BZA Appeal No. 19477 of Kingman Park Civic Association Exhibit 34 – Dismissal Order, p.1.

¹³ BZA Appeal No. 19477 of Kingman Park Civic Association Exhibit 34 – Dismissal Order, p.6 (emphasis added).

Turning to this case, the Appellant mechanically cites to zoning regulations but fails to support them with genuine facts. Moreover, this Appellant, as the appellant in *Kingman Park*, seeks to demonstrate alleged violations of the Historic Preservation Act (“HPA”) D.C. Code § 6-1104(h). However, as specifically held in *Kingman Park*, claims asserted under the HPA are not based on the Zoning Regulations. Therefore, the Board lacks jurisdiction to hear them. Following the facts and reasoning of *Kingman Park*, the Board must dismiss this case.

B. The Appeal Must be Dismissed as the Zoning Administrator is Not Obligated to Issue a Determination Letter.

The Appellant claims that the Zoning Administrator failed to issue a determination letter in connection with the permits. However, Appellant’s argument is baseless as: 1) there is no zoning regulation that requires that the Zoning Administrator issue a determination letter; and 2) the Appellant has appealed the building and demolition permits which is considered the “first writing” under Subtitle X 302.5.¹⁴ Under the zoning regulations, a **building permit is the zoning determination** of the Zoning Administrator. *See, Schonberger v. D.C. Bd. of Zoning Adjustment*, 940 A.2d 159, 161 n.2 (D.C. 2008) (BZA’s determination that a building permit “contained the relevant zoning decision”). Thus, the Board cannot find this as a basis of error and must dismiss this appeal.

III. CONCLUSION

For the foregoing reasons, DCRA respectfully requests that the Board dismiss this Appeal and Deny the Appellant’s Motion for Summary Affirmance in this case.

¹⁴ Subtitle Y § 305.2 provides: “A zoning appeal may only be taken from the first writing that reflects the administrative decision complained of to which the appellant had notice. No subsequent document, including a building permit or certificate of occupancy, may be appealed unless the document modifies or reverses the original decision or reflects a new decision.”

Respectfully submitted,

/s/ Esther Yong McGraw

ESTHER YONG MCGRAW

General Counsel

Department of Consumer and Regulatory Affairs

/s/ Melanie Konstantopoulos

MELANIE KONSTANTOPOULOS

Deputy General Counsel

Department of Consumer and Regulatory Affairs

Date: 6/18/20

/s/ Hugh J. Green

HUGH J. GREEN (DC Bar #1032201)

Assistant General Counsel

Department of Consumer and Regulatory Affairs

Office of the General Counsel

1100 4th Street, S.W., 5th Floor

Washington, D.C. 20024

(202) 442-8640 (office)

(202) 442-9447 (fax)

CERTIFICATE OF SERVICE

I certify that on this June 18, 2020 a copy of the foregoing was served via electronic mail to:

Brendan Heath
Fernando Amarillas
Andy Saindon
Office of the Attorney General for the
District of Columbia
441 Fourth Street, N.W.,
Suite 630 South
Washington, D.C. 20001
Brendan.Heath@dc.gov
fernando.amarillas@dc.gov
andy.saindon@dc.gov
*Counsel for Property Owner Office of
the Deputy Mayor for Planning and
Economic Development*

Chris Otten
DC for Reasonable Development
dc4reality@gmail.com
Appellant

Bradley Ashton Thomas
Chairperson ANC5E05
107 P Street NW
Washington, DC 20001
5E05@anc.dc.gov

Dianne Barnes
Single Member District Commissioner 5E09
41 Adams Street NW 20001
5E09@anc.dc.gov

Jeff Nestler
Single Member District Commissioner 2D02
ANC2D
2D02@anc.dc.gov

David R. Bender
Chairperson ANC 2D01
2126 Connecticut Avenue, NW #34
Washington, DC 20008
2D01@anc.dc.gov

/s/ Hugh J. Green
Hugh J. Green