

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
RESPONSE TO APPELLANT’S EMERGENCY MOTION FOR
AN IN-PERSON HEARING**

The D.C. Department of Consumer and Regulatory Affairs (“DCRA”) for its Response to Appellant’s Emergency Motion for In-Person Hearing Allowing for Accessibility & Welfare of Protected Participants, states as follows¹:

I. PROCEDURAL BACKGROUND AND INTRODUCTION

The Appellant, DC for Reasonable Development (the “Appellant”) filed this appeal on October 15, 2019.² On May 27, 2020, the Appellant filed an Emergency Motion for In-Person Hearing Allowing for Accessibility & Welfare of Protected Participants (“Appellant’s Motion”).³ Although the Appellant’s Motion requests an in-person hearing, it lacks specificity as to why all of the its unnamed and unidentified witnesses cannot attend virtually (by WebEx or telephone), and fails to state what accommodations can be made to proceed with a virtual hearing. In short, Appellant’s Motion demonstrates a mere “preference” for an in-person hearing, rather than a genuine inability to participate in any way in a virtual forum.

¹ DCRA has filed a Motion to Dismiss this appeal. DCRA, in filing this Motion, in no way waives any rights or arguments raised in the pending Motion to Dismiss.

² BZA Appeal 20191 Exhibit 5 – Appellant’s Statement of Appeal.

³ BZA Appeal 20191 Exhibit 32 – Appellant’s. Emergency Motion for In-person Hearing Allowing for Accessibility & Welfare of Protected Participants.

II. ARGUMENT

A. The Appellant’s Motion Fails to State What Accommodations Might Resolve the Concerns as Required under Subtitle Y § 103.13(a).

Under the Board of Zoning Adjustment’s (the “Board” or “BZA”) Emergency Rules with respect to virtual hearings, Subtitle Y § 103.13(a) provides:

A party to a case may request the Board not to hold the public hearings an online virtual hearing but instead postpone the public hearing until the next available in-person public hearing; **provided that the request includes specific reasons for the postponement and any potential accommodations that might resolve the concerns underlying the postponement request;**

Subtitle Y § 103.13(a) (emphasis added).⁴

Here, the Appellant’s request for a postponement for an in-person hearing fails to state what accommodations may be made to resolve the concerns. Subtitle Y § 103.13(a). Clearly, there are various means available (phone/internet/etc.) for these unnamed witnesses to participate; however, the Motion is silent on these issues. If indeed all these witnesses cannot participate by telephone, the Board can require these unidentified witnesses to provide written testimony in lieu of in person testimony. Appellant fails to offer *any* accommodation.

B. Appellant Has Failed to Identify any Witnesses and/or Expert Witness in violation of Subtitle Y § 302.12 (h)(i)(j).

Outside of the Motion’s deficiencies, equally troubling is that, for the first time, Appellant claims that it intends to call unnamed expert witnesses and unidentified witnesses in this appeal.⁵ Appellant was required to provide witness information at the time of filing as required under

⁴ Office of Zoning 20-11 Notice of Emergency & Proposed Rulemaking

⁵ BZA Appeal 20191 Exhibit 32 – Appellant’s. Emergency Motion for In-person Hearing Allowing for Accessibility & Welfare of Protected Participants.

Subtitle Y § 302.12. Specifically, under Subtitle Y § 302.12 (h)(i)(j), at the time of filing the appeal, the Appellant must provide all of the following:

- (h) All statements, information, briefs, reports (including reports and statements of experts and other witnesses), plans, photographs, or other exhibits that the appellant may wish to offer in evidence at the public hearing;
- (i) A copy of the resume of any expert witness who will be testifying in the case;
- (j) A written summary of the testimony of all witnesses;

Subtitle Y § 302.2(h)(i)(j).

To date, the Appellant has not: 1) identified any witnesses, 2) tendered a resume from any expert; or 3) provided a written summary of the testimony of all witnesses as required by the zoning regulations. At the very least, the Board and the parties are entitled to know whether the purported testimony is relevant and germane to the appeal.

C. Appellant’s Motion Demonstrates the Need for a Virtual Public Hearing Rather than an In-Person Hearing.

Assuming *arguendo* that the purported unnamed witnesses have zoning expertise germane to the issues, Appellant’s Motion does not state precisely why these unnamed witnesses cannot participate by telephone. The Motion only claims that these unidentified witnesses can “follow the procedures more carefully in person.” If indeed these unidentified witnesses have physical limitations—then a virtual public hearing (via telephone or WebEx) is clearly a preferable way to proceed, not only to limit undue exposure, but also to eliminate the challenges of transportation.

D. Any Evidence that the Appellant seeks to Introduce Must be Submitted to the Record Under Subtitle Y § 203 and Can be Presented in a Virtual Format.

The Appellant argues that an in-person hearing will allow the witnesses to tender “physical evidence.”⁶ However, it is unclear what if any specific “physical evidence” is necessary or required by the Appellant to demonstrate compliance with zoning issues. Nevertheless, the recent BZA Virtual Hearing Rules accommodate the use of demonstrative evidence in a virtual hearing proceeding. See, Subtitle Y § 103.13(g).⁷ Thus, the Appellant’s objection regarding exhibits and evidence is unfounded.

III. CONCLUSION

For the foregoing reasons, DCRA respectfully requests that the Board deny the Appellant’s Motion and, if the Board chooses to hear the case on the merits, proceed with a virtual public hearing.

Respectfully submitted,

/s/ Esther Yong McGraw

ESTHER YONG MCGRAW

General Counsel

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

⁷ Office of Zoning 20-11 Notice of Emergency & Proposed Rulemaking, Subtitle §103.13(g) states:

Exhibits may be offered into evidence at an online virtual public hearing; provided that:

- (1) An exhibit is submitted to the Office of Zoning by the Interactive Zoning Information System (IZIS) or by e-mail to BZASubmissions@dc.gov prior to the start of the hearing in which the exhibit will be used; except as allowed by the Board as relevant and not prejudicial to a party;
- (2) Exhibits submitted by parties shall be simultaneously served by e-mail on all other parties;
- (3) If the Office of Zoning is unable to display the exhibits publicly during the online virtual public hearing, the Board may keep the record open for submission of the exhibits or provide other accommodations the Board deems appropriate; and
- (4) The Board may provide parties additional time to respond to exhibits introduced at an online virtual public hearing or other accommodations the Board deems appropriate;

/s/ Melanie Konstantopoulos

MELANIE KONSTANTOPOULOS

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Date: 6/18/20

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CERTIFICATE OF SERVICE

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

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