

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’
RESPONSE TO APPELLANT’S SUBMISSIONS
PURSUANT TO BZA MEMO DATED JUNE 26, 2020**

The D.C. Department of Consumer and Regulatory Affairs (“DCRA”) in Response to Appellant’s Submissions Pursuant to the Board of Zoning Adjustment’s (“BZA” or “Board”) Memo dated June 26, 2020, states as follows:

I. INTRODUCTION

On June 26, 2020, the Board requested that the Appellant provide “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,” as required by Subtitle Y § 302.12(h).¹

The Appellant filed a Response to the BZA Memorandum & Order Dated June 26, 2020 (“Appellant’s Response”). However, Appellant’s Response fails to comply with either the BZA Memo or Subtitle Y § 302.12(h). In sum, Appellant’s Response is flawed because: 1) it fails to satisfy Subtitle Y § 302.12(h); and 2) it attempts to expand the appeal by raising new issues in violation of Subtitle Y § 302.13. Accordingly, as the Appellant has failed to cure the gross deficiencies of the appeal under Subtitle Y § 600.4, the Board must dismiss Appellant’s appeal.

¹ BZA Appeal 20191 Exhibit 40 – BZA Memo.

II. ARGUMENT

A. Appellant Expressly Concedes that its Response Violates Subtitle Y § 302.13 by Attempting to Expand the Appeal.

As an initial matter, the Appellant’s Response attempts to raise new issues in violation of Subtitle Y § 302.13.² The Appellant concedes that it has changed its position in numerous filings when it states: “. . . “[W]e’ve provided most of what has been requested above already to the record, albeit perhaps **across several submissions as the pleadings have unfolded** and per prior orders of the BZA. Here, **Appellants seek to consolidate all ‘information’** to be submitted before the hearing and for the sake of the notice to cure. . .”³ However, the Appellant’s filing is more than an effort to cure as directed by the Board, but rather a blatant attempt to raise new issues in violation of Subtitle Y § 302.13.

The Appellant’s Response seeks to introduce new issues not contained in its original filing.⁴ Under Subtitle Y § 302.13, the Board must strike any new issues and evidence not raised in Appellant’s Statement on Appeal. *See*, BZA Appeal 20132 *Concerned Citizens of Woodridge* (the Board concluded that petitioner violated the prohibition on the amending of an appeal to add new claims pursuant to Subtitle Y § 302.13).

Specifically, the Appellant violates Subtitle Y § 302.13 by claiming:

- 1) DCRA issued the permits prior to an alleged review by the U.S. Commission on Fine Arts (“CFA”) and;
- 2) that certain “historic preservation covenants” recorded in land records are somehow “tied” to the permits.⁵

² Subtitle Y §302.13 provides: “An appeal may not be amended to add issues not identified in the statement of the issues on appeal submitted in response to Subtitle Y § 302.12(g) unless the appellee impeded the appellant’s ability to identify the new issues identified.”

³ BZA Appeal 20191 Exhibit 42 - Appellant’s Response, p.1 (emphasis added).

⁴ BZA Appeal 20191 Exhibit 2 - Appellant’s Statement of Appeal.

⁵ BZA Appeal 20191 Exhibit 42 - Appellant’s Response, pp. 3, 5, and Attachment E.

None of these issues were raised by the Appellant in its original filing.⁶ Not only are these new issues a blatant violation of Subtitle Y § 302.13, but they are also *irrelevant* as they do not arise from the Zoning Regulations. The Board lacks jurisdiction to hear these additional claims. *See*, BZA Appeal No. 19477 *Kingman Park Civic Association* (the Board does not have the jurisdiction regarding claims alleging violations Construction Codes, environmental laws, and the Historic Preservation Act). In this instance, the Appellant must be precluded from raising the CFA and historic covenants as a basis for error by the Zoning Administrator, in light of the prohibitions of Subtitle Y § 302.13. On this basis alone, the Board must dismiss this appeal.

B. The Appellant’s Response Fails to Comply with both the BZA Memo and Subtitle Y § 302.12(h).

In its June 26, 2020 Memo, the BZA directed the Appellant to provide: “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” as required by Subtitle Y § 302.12(h).⁷ However, Appellant’s Response fails to provide the required information. In fact, the Appellant’s Response *does not offer a single statement by any witness*, let alone tender a witness report, construction plans, or exhibits as required by the June 25, 2020 Memo.⁸

For example, Appellant seeks to introduce Aristotle Theresa (“Mr. Theresa”) as an expert in zoning who is “well versed in D.C. Zoning Regulations.”⁹ However, Appellant does not offer Mr. Theresa’s formal statement or his report as required by both the BZA and Subtitle Y §

⁶ BZA Appeal 20191 Exhibit 2 - Appellant’s Statement of Appeal.

⁷ BZA Appeal 20191 Exhibit 40 – BZA Memo.

⁸ Appellant’s tendered “exhibits” are merely its prior filings, or documents in connection to new matters in violation of Subtitle Y § 302.13.

⁹ BZA Appeal 20191 Exhibit 42 - Appellant’s Response, p. 3.

302.12(h). Furthermore, the Appellant has not tendered Mr. Theresa’s resume as required under Subtitle Y § 302.12(i), but rather directs this Board and parties to review Mr. Theresa’s website. Such a response is entirely inadequate. Despite the clear directives from this Board to provide the information by July 8, 2020, the Appellant states that it will produce Mr. Theresa’s credentials “before the hearing.”¹⁰ However, Appellant’s perfunctory reference to Mr. Theresa’s website falls far short of the requirements of this Board’s Memo and the zoning regulations regarding expert witnesses. *See*, Subtitle Y § 203.9.¹¹

In addition, the Appellant seeks to elicit testimony from a Mr. Jim Schulman (“Mr. Schulman”), a “professional architect.”¹² Mr. Schulman, according to the Appellant, will opine on “evidence and reports.”¹³ However, Appellant fails to provide Mr. Schulman’s statement or any report produced by Mr. Schulman, as required by Subtitle Y § 302.12(h). More importantly, Appellant’s Response lacks any reference to the alleged “evidence” and “reports” Mr. Schulman will address through his testimony. The Board and parties must speculate as to Mr. Schulman’s purported testimony and its relevance to this appeal. Moreover, if Mr. Schulman is being tendered as an “expert witness,” the Appellant must provide a copy of Mr. Schulman’s resume and expertise as required by Subtitle Y §§ 203.9 and 302.12(i), which Appellant has once again failed to produce.

Lastly, the Appellant seeks to elicit testimony from “all plaintiffs directly affected by the

¹⁰ BZA Appeal 20191 Exhibit 42 - Appellant’s Response, p. 4.

¹¹ Subtitle Y § 203.9 provides: “An individual offered as an expert witness shall provide written evidence to the Board of expertise including but not limited to educational attainment, licensing, accreditation, and examples of relevant or comparable work and employment.”

¹² BZA Appeal 20191 Exhibit 42 - Appellant’s Response, p. 4.

¹³ BZA Appeal 20191 Exhibit 42 - Appellant’s Response, p. 4.

demolition of McMillan Park.”¹⁴ However, in defiance of this Board’s Memo and Subtitle Y § 302.12(h), the Appellant does *not* provide any statements from any of the “plaintiffs,” or even provide a summary of their testimony. *See*, Subtitle Y § 302.12(j). It is unclear whether any of the “plaintiffs” have any zoning expertise germane to the issues. The cursory reference to the testimony from “plaintiffs,” absent any substantive information, flies in the face of this Board’s directives.

It is apparent that, the Appellant’s Response highlights the lack of any genuine evidentiary support or valid argument to sustain this action. Accordingly, the Board must dismiss this appeal, or in the alternative, bar the witnesses *in limine* from providing any testimony, as a result of Appellant’s failure to adhere to the Board’s Memo.

C. The Board Must Exclude Appellant’s Unduly Repetitious and Irrelevant Testimony.

The Board has the power to limit or exclude irrelevant testimony under Subtitle Y § 506.1(e). Appellant intends to tender “all plaintiffs directly affected by the demolition of McMillan Park.”¹⁵ However, such testimony should be excluded under Subtitle § 506.1(e). (See, also, Subtitle Y § 408.9, citing D.C. Code §2-509(b) (. . . every agency shall exclude irrelevant, immaterial, and unduly repetitious evidence).

In this case, the proposed plaintiffs’ testimony: 1) is unduly repetitive; 2) is entirely irrelevant since *none* of the proposed “plaintiffs” are being offered to demonstrate *how* the Zoning Administrator erred in approving the foundation and demolition permits; and 3) will not assist the Board in determining any technical zoning matter. Accordingly, the proposed testimony from all

¹⁴ BZA Appeal 20191 Exhibit 42 - Appellant’s Response, p. 4.

¹⁵ BZA Appeal 20191 Exhibit 42 - Appellant’s Response, p. 4.

of the “plaintiffs” is wholly irrelevant, immaterial, and unduly repetitious and should be excluded under Subtitle Y § 506.1(e).

III. CONCLUSION.

WHEREFORE, DCRA respectfully requests that the Board dismiss this Appeal, or in the alternative, bar Appellant’s proposed witness testimony *in limine* for failure to comply with the BZA Memo and Subtitle Y § 302.12(h).

Respectfully submitted,

/s/ Esther Yong McGraw

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I certify that on this July 15, 2020 a copy of the foregoing was served via electronic mail to:

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