

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

Appeal of Dupont Circle Citizens Association

BZA Appeal 19374

DCRA’S MOTIONS TO DISMISS FOR LACK OF STANDING
AND FOR UNTIMELY FILING

DCRA hereby submits two motions to dismiss this appeal – the first for lack of standing and the second for untimely filing.

STANDING

DCRA asserts that the appeal should be dismissed because Appellant failed to properly allege that it has standing to bring this Appeal. The District of Columbia Court of Appeals has ruled is a threshold issue to be addressed prior to a motion to dismiss for untimely filing.¹ Section Y-302.12(f) of the Zoning Regulations requires an appellant to include in the initial appeal filing

“A statement as to how the appellant has standing to bring the appeal, specifically with regard to the administrative decision being appealed:

- (1) For an appeal brought by an officer or department of the government of the District of Columbia of the federal government the statement shall explain how they are affected by the administrative decision; and
- (2) For all other appeals, the statement shall explain how the appellant is aggrieved”.

Yet Appellant merely provided a very broad and amorphous statement that it “is representative of zoning, planning and other interests of the individuals who reside in the area that includes the subject property, and is thus directly impacted by the alleged zoning regulation errors.”² Apart from the vague reference to residents “of the area”, which is not described and so could encompass multiple neighborhoods or blocks, most of whose residents would not be directly impacted or harmed by the ZA’s approval of the Permit, this statement does not list a single resident of a property, which would enable the Board of Zoning Adjustment (the “**Board**”) to evaluate what harm would ensue to that individual from the ZA’s approval of the Permit. This runs counter to the stated authority for the Board to hear an appeal: “Appeals to the Board of

¹ *Economides v. District of Columbia Board of Zoning Adjustment*, 954 A.2d 427, 434 (D.C. 2008).

² BZA Appeal 19374, Exhibit 2 (Appellant’s Pre-Hearing Statement), at 1.

Adjustment may be taken by any person aggrieved, or organization authorized to represent such person.”³ Instead the only individual named in the appeal is Robin Deiner, the president of Dupont Circle Citizens Association (“DCCA”), who is not listed as an owner of property on the block that includes the Property. Nor are any of the board members of the DCCA, based on a review of DCCA’s website. Thus DCCA is effectively a “black box” representing nameless individuals who it is alleged will suffer unspecified harm by the ZA’s approval of the Permit.

This failure of DCCA to identify an individual that DCCA purportedly represents who is specifically harmed by the ZA’s approval of the Project contrasts sharply with the circumstances evaluated by the District of Columbia Court of Appeals in *Goto v. District of Columbia Board of Zoning Adjustment*, where the Court of Appeals specifically noted that appellant lived “immediately behind the subject site” of the appeal in determining that the appellant had standing.⁴

Moreover, Appellant’s brief statement does not specify any particular harm (e.g., loss of sunlight, increased traffic, etc.) that Appellant believes will result from the ZA’s approval of the Permit. In contrast, the Court of Appeals, in finding that the *Economides* appellant had standing, called attention to the specification of the harm that the appellant alleged he would suffer from the issuance of the permit – in that case the loss of light and air due to the elevated platform authorized by the permit that was the subject of that appeal.⁵

Stranger still, Ms. Deiner, who had filed the appeal and subsequent documents on behalf of DCCA (although without filing the letter authorizing her as DCCA’s agent in the appeal as required by Section Y-302.10 and Form 125), did not appear at the hearing. Instead, when the Board called the appeal, Brian Gelfand, who had not previously been identified as part of the appeal, presented himself as the representative of DCCA. Mr. Gelfand also failed to present any evidence of authorization to act on DCCA’s behalf, contrary to the requirements of Y-302.10. Had Mr. Gelfand previously identified himself as the representative of DCCA for this appeal, instead of concealing himself behind DCCA, DCRA would have been able to file much earlier the motion to dismiss for untimely filing as provided below.

Therefore DCRA respectfully requests that the Board grant the motion to dismiss for lack of standing.

³ D.C. Official Code 6-641.07(f).

⁴ 423 A.2d 917 (D.C. 1980), at 921.

⁵ *Economides v. District of Columbia Board of Zoning Adjustment*, 954 A.2d 427, 434 (D.C. 2008).

UNTIMELY FILING

DCRA also moves to dismiss for untimely filing. Section Y-302.12(e) of the Zoning Regulations specifies that an appellant must include in the initial appeal filing

“A statement demonstrating that the zoning appeal meets the jurisdictional requirement of timeliness, as specified in Subtitle Y § 302.2, which shall specifically indicate:

- (1) The date upon which the appellant first had notice or knowledge of the decision being appealed; and
- (2) The circumstances under which such notice or knowledge occurred.”

Yet Appellant’s initial filing only vaguely stated “The Appellant became aware of the Zoning Administrator’s alleged improper interpretation and misapplication of the zoning code ...”, and then referred to the date of issuance of the Permit. This does not satisfy the requirement of Section Y-301.12(e) that Appellant state when exactly it first had notice of the decision appealed.

The identification of the specific date when an appellant had notice or knowledge of the decision appealed is important as it starts the sixty-day period provided in Section Y-302.2 in which a potential appellant must exercise the appeal rights or lose them. Section Y-302.5 specifies that:

“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.” (bold and underscored added).

In this appeal, the alleged violations cited by Appellant were those that neighbors, including Mr. Gelfand, Mr. Hawkins, and ANC Commissioners Nichols and Gambrell, brought to the attention of the ZA in March 2016.⁶ The ZA responded to those objections in the Zoning Determination Letter dated March 21, 2016, which was published on the ZA’s website⁷ and which the ZA emailed on that same day to Mr. Gelfand, Mr. Hawkins, Ms. Gelfand, and Commissioners Nichols and Gambrell.⁸ In that Determination Letter, the ZA specifically stated that “I have

⁶ BZA Appeal 19374, Exhibit 27B (Owner’s Pre-Hearing Statement, Tab B “ZA Memos 3-22-16”), at 1-2 (March 9, 2016 email from Brian Gelfand, and copying Don Hawkins, Jenny Gelfand, and Commissioners Nichols and Gambrell) and 4 (March 9, 2016 email from Brian Gelfand, and copying Don Hawkins, Jenny Gelfand, and Commissioners Nichols and Gambrell).

⁷ BZA Appeal 19374, Exhibit 27A (Owner’s Pre-Hearing Statement, Tab A “ZA 3-21-16 Admin. Decision”), at 1-7.

⁸ BZA Appeal 19374, Exhibit 27B (Owner’s Pre-Hearing Statement, Tab B “ZA Memos 3-22-16”), at 1.

determined that the Cellar Area satisfies the Zoning Regulations’ definition of a “cellar”....”⁹ The ZA followed up on that Determination Letter with an email sent the next day – March 22, 2016 - to Mr. Gelfand and copying Mr. Hawkins, Ms. Gelfand and Commissioners Nichols and Gambrell that specifically addressed Mr. Gelfand’s allegation that the definition of “habitable room” barred the lower level from being categorized as a “cellar”.¹⁰ In that March 22, 2016 email (the “**Habitable Space Email**”), the ZA rejected Mr. Gelfand’s allegations and reaffirmed his decision that the lower level of the Building was correctly categorized as a “cellar” in compliance with the Zoning Regulations.

These two documents – the March 21, 2016 Determination Letter and the March 22, 2016 Habitable Space Email – address all of the issues raised by Appellant in the appeal. These two documents were the “first writing” of the ZA’s decision that the lower level was a “cellar” that at least Mr. Gelfand, Mr. Hawkins, Ms. Gelfand, and Commissioners Nichols and Gambrell had. Therefore under Section Y-302.5, the appeal rights for these individuals on the issues raised in the appeal started on March 21 and 22, 2016 and ended 60 days later on June 20 and 21, 2016. Yet Mr. Gelfand, Mr. Hawkins, Ms. Gelfand, and Commissioners Nichols and Gambrell chose to not appeal this decision by the ZA. Instead, three months after the termination of the 60-day appeal period, Mr. Gelfand and associates appear to have convinced DCCA to file an appeal on their behalf without being named, with the timeliness requirement allegedly met based on the issuance of the Permit.

But DCCA itself indicated that it had notice of the Determination Letter and the Habitable Space Email no later than November 13, 2016 when it filed its Revised Pre-Hearing Statement that referred to and quoted from both the Determination Letter and Habitable Space Email.¹¹ Moreover, DCCA almost certainly knew of the Determination Letter and Habitable Space Email from Mr. Gelfand and Mr. Hawkins, judging on their appearance as representatives of DCCA at the hearing. Nonetheless, the publication of the Determination Letter on the ZA’s website, as well as its mailing to the ANC Commissioner in whose district the Building is located, should have put DCCA on notice, as stated in Section Y-302.2:

⁹ BZA Appeal 19374, Exhibit 27A (Owner’s Pre-Hearing Statement, Tab A “ZA 3-21-16 Admin. Decision”), at 4 (p. 3 of Determination Letter).

¹⁰ BZA Appeal 19374, Exhibit 27B (Owner’s Pre-Hearing Statement, Tab B “ZA Memos 3-22-16”), at 4 (March 9, 2016 email from Brian Gelfand, and copying Don Hawkins, Jenny Gelfand, and Commissioners Nichols and Gambrell).

¹¹ BZA Appeal 19374, Exhibit 24 (Appellant’s Revised Pre-Hearing Statement), at 2.

“A zoning appeal shall be filed within sixty (60) 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.**” (bold and underscore added)

DCRA therefore asserts that the appeal should be dismissed for untimely filing, at least for Mr. Gelfand, Mr. Hawkins, Ms. Gelfand, and Commissioners Nichols and Gambrell, as they clearly failed to appeal the first written decision of the ZA regarding the issues raised in the appeal; but also for DCCA, which also failed to appeal after it should have had notice of the decision in the Determination Letter and Habitable Space Email.

CONCLUSION

For the reasons stated above, DCRA therefore respectfully requests that the Board grant either or both motions to dismiss for lack of standing and for untimely filing.

Respectfully submitted,
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General Counsel
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Date: 1/25/17

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January 2017, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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ATTACHMENT A: TIMELINE

March 9, 2016	emails from Mr. Gelfand to the ZA, copying Mr. Hawkins, Ms. Gelfand, and Commissioners Nichols and Gambrell
March 21, 2016	publication on the ZA’s website of the Determination Letter and emailed to Mr. Gelfand, Mr. Hawkins, Ms. Gelfand and Commissioners Nichols and Gambrell
March 22, 2016	Habitable Space Email from the ZA to Mr. Gelfand, copying Mr. Hawkins, Ms. Gelfand, and Commissioners Nichols and Gambrell
June 21, 2016	End of appeal period for issues addressed by the ZA in the Determination Letter and Habitable Space Email
July 18, 2016	Issuance of the Permit by DCRA
September 16, 2016	Filing of appeal by DCCA (60 days after issuance of Permit)