District of Columbia
Board of Zoning Adjustment
441 4th Street NW, Washington DC 20001

BZA Appeal 19374
Response to DCRA's Motions to Dismiss for Lack of Standing and for Untimely Filing

February 8th, 2017

The Appellant in BZA Case 19374 submits the below response to DCRA's motion to dismiss for (1) lack of standing and DCRA and Owner's motions to dismiss for (2) untimely filing. We respectively request that the Board reject these motions. These claims—curiously, brought at the late date of well over a month after the initial December 14, 2016 case date—are without merit as is apparent from a reading of the zoning regulations and their prior interpretation by the Board as documented in the numerous cases we summarize that speak specifically to citizen association standing and the issue of Zoning Determination Letters and timeliness. We also provide an analysis of novel, untested and unsupportable interpretation of the new ZR-16 clause (Section Y-302) as presented by DCRA and the Owner's representative, and conclude by clarifying cases cited by these parties, which we believe are not applicable to this case and in fact are misinterpreted for purposes of their motions.

Motion to Dismiss on Standing Without Merit

DCRA alleges that Appellant's statement of standing is overly broad, that the reference to "of the area" is vague, that no specific individuals are named, and that the individual Robin Diener (President of DCCA) was not in attendance. We respond to these allegations below.

DCCA's Mission Establishes Standing

Subtitle Y 302.12 defines what an appellant must provide in order to establish standing, as: "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 or 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."

DCCA's mission is clearly stated on its website (http://www.dupont-circle.org) and provides multiple references to its role in neighborhood issues. Our statement of standing is thus reflective of our mission. Our bylaws also state that the object of the Association shall be to promote and protect the interests of the residents of the National Capital, and especially those in the vicinity of Dupont Circle within the boundaries prescribed in the Association's Articles of Incorporation. Among the Association's general purposes, include but are not limited to preserve the historic, architectural, and aesthetic value of property and objects within said boundaries; to present views of the Association to government, public, private and other organizations; to engage in any lawful activity and to take legal action to protect the interests of the neighborhood as determined by the Association. Furthermore, the catchment area of DCCA encompasses the property location, 1514 Q Street, NW (see map, attached). Brian Gelfand is a DCCA member and resides next door to the subject property. The sufficiency of an association's standing, relative to the residency of its members, is further confirmed, for example, in BZA Appeal

16935 of Southeast Citizens for Smart Development (2003), under Findings of Fact 2. "Appellant SCSD is a non-profit corporation organized to facilitate community involvement and education in planning neighborhood development in Ward 6. Its membership includes persons who reside and/or own property within 200 feet of the subject properties."
http://dcoz.dc.gov/orders/16935_1045-134.pdf

Documentation of Representative Individuals

As for lack of specificity of naming specific individuals, an association is by definition representative of a body and not specific individuals. Regardless, Brian Gelfand is a DCCA member and resides next door to the subject property. Mr. Gelfand's participation is further supported by participation in DCCA committee meetings related to the issues presented in this appeal, which took place in September and authorized filing of this appeal. This demonstrates our standing and the individuals involved in this case is consistent with 11 3112.4, as the Board found in BZA 16998 ("Pursuant to 3112.4 of the Zoning Regulations, the Board of Zoning Adjustment, may 'at any time require additional evidence demonstrating the authority of the agent to act for the appellant.'")
http://dcoz.dc.gov/orders/16998_4259-154-81.pdf

Board Recognizes Citizen Association Standing

DCRA and Owner's motions frame standing as solely being a matter of immediacy of physical location to the property in question (Goto v. DC Board of Zoning Adjustment, 1980; Economides v. DC Board of Adjustment, 2008). While the status and standing of citizens' association was met with derision in Goto, the particulars of this 36 year old case cannot be applied to the present situation as DCCA has valid claims on its representation of the affected area in terms of its jurisdictional map, its formal meeting with Brian Gelfand, the neighboring property owner, to establish an alleged grievance, and DCCA's well-established status with the Board as a organization with standing before this Board.

The claim to invalidate citizens association standing before the Board, on its face, is a challenge to the very notion of citizen association participation in this cases as well as any other BZA case moving forward, for this plain and simple reason: associations are representative of the geographic area they represent, including—as we document—residents who directly abut the property in question. DCRA's motion is, therefore, an unprecedented effort to silence citizen input in the zoning review process.

Many other citizen associations have participated in BZA cases, as is evident from a cursory review of various citizen association appeals. Their standing has been established in previous cases. For example, in BZA 18568 (2013), standing of the Shaw Dupont Citizens Alliance to bring an appeal was challenged and rejected by the Board, even though Shaw Dupont Citizens Alliance did not provide any mention of its aggrieved status. Board member/Zoning Commission member Miller directed the Board's position on standing of the association: "I think they exist for this very type of issue, and I think they meet the standards for standing…." (transcript 6/18/13, page 55) The Board upheld Shaw Dupont Alliance's standing in that case by a vote of 3-0-2. The position is further confirmed in the final order for this case, in footnote 2, which reads: "The Board also voted to deny the motions to dismiss on the issue of standing, finding that the Appellant exists in part to respond to issues arising from the establishment or resumption of neighborhood business."
http://dcoz.dc.gov/orders/18568.pdf

In BZA 17513 (2006), the Board granted party status to Citizens Association of Georgetown, "finding that the organization had a significant relationship to the property because the property is located in

Georgetown where its members live. In addition, the organization was in a position to address the broader context or ramifications of the appeal issues on Georgetown properties in general." This decision adopted the same rationale reflected in an extensive discussion of standing for Citizens Association of Georgetown in BZA 16702 (2001), whereby the Board granted the association party status.

Disputes of citizen association standing aside, such participation is rarely challenged by DCRA, based on our case review. For example, Kalorama Citizens Association (KCA) submitted an appellant statement explaining how it was aggrieved, which is strikingly similar to the one submitted by DCCA. That statement explains that KCA is a citizens' organization whose members include individuals who live and own residences within 200 feet of the subject property and is "interested in protection of the architectural integrity and aesthetic values of the neighborhood in which this property is located. Consequently, it is interested in faithful adherence to the District's laws and regulations governing construction, including those relating to permissible height and density." (BZA 17109A, Attachment 1, 2003)

BZA Appeal Process Endorses Citizen Association Standing

Finally, citizen association participation is clearly endorsed in the very process of submitting an appeal, which requires completion of Form 125, on which options for signatories (under Waiver of Fee - Status of Appellant), the form reads: "Citizens' Association/Association created for civic purpose that is not for profit."

Presence of Robin Diener

Contrary to the allegation in DCRA's motion, Robin Diener was in attendance. Ms. Diener was present at the opening of the BZA session but had to leave for a time in order to arrange for a meeting at the Mayor's office. She returned during the hearing on this matter, and was in the second row but not at the witness table.

Motion to Dismiss on Timeliness Without Merit

DCRA's claim that a Zoning Determination Letter is when the 60-day clock starts is incorrect, for the following reasons.

DCCA Was Unaware Of the Issues In This Appeal Until After the Building Permit Was Issued

DCCA was not aware of the issues in this case until after the building permit was issued July 18th 2016. The matter was brought to the attention of DCCA the week of September 5th and then before the Regulatory Committee meeting and then its full Board the week of September 12th. DCCA voted to file the appeal, which was then filed September 16th. Accordingly, DCCA timely filed the appeal within 60 days of the issuance of the building permit. To claim that DCCA's time period to appeal should have commenced in March when the zoning determination letter was emailed to individual neighbors, which DCCA had no knowledge of and was not a recipient of, would set an impossible to meet standard. Further, if this novel interpretation were to be accepted, it would be highly prejudicial to all Citizens Associations participating in any appeal as it would be infeasible for a Citizens Association to know about every zoning determination letter that was issued. Also, there would be no way to monitor how a project could change from the date of a zoning determination letter's issuance until actual, tangible

plans were submitted and approved under the full DCRA building permit review process by all applicable departments, each of which may make comments and change the nature of the project before issuance of a final building permit.

By definition, a citizens association membership is comprised of a wide swath of residents in its jurisdiction. The notion that the knowledge of any single member can be imputed to the organization as a whole, would effectively negate the opportunity for any citizens association to contest a zoning action. In this case, the governing board of the association acted promptly and timely once it was made aware of the situation and the actual issuance of the building permit

DCRA ZR-16 Y-302.5 Interpretation Irrelevant, Disadvantageous to Public

To the extent that the owner and DCRA are asking this Board to interpret Subtitle Y-302.5 to preclude the filing of a timely appeal of a building permit, such an interpretation is flatly contrary to the Zoning Act, D.C. Official Code 6-641 -07 (f), the plain language of which provides that appeals may be taken from "any decision . . . granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map." A building permit is plainly an appealable decision under the statute and the BZA cannot interpret its regulations to conflict with the plain language of its governing statute. *Viera v. D.C. Dep't of Employment Services,* 721 A.2d 579, 582 (D.C. 1998)

Nonetheless, this argument merits dissection as it would put many parties at a disadvantage as there is widespread understanding of Zoning Determination Letters as being provisional, which is why the overwhelming majority of appeals are brought in relation to building permits, which are official decisions by DCRA.

In contrast, Board cases involving claims that Zoning Determination Letters are the basis for establishing timeliness, which we present below, have typically been met with uncertainty and disputes among parties and, notably, Board rulings that Zoning Determination Letters and emails are, in fact, not the basis for setting timeliness.

As such, the Board would invite a tremendous amount of uncertainty if it ruled that a Zoning Determination Letter is what is meant by the "first writing" of an "administrative decision complained of" and that a building permit would constitute a "subsequent document" in relation to a Zoning Determination Letter. Such a ruling would grant new meaning to a Zoning Determination Letter, from an advisory document to an official zoning decision. This would represent a fabrication as the zoning regulations simply do not grant such status to Zoning Determination Letters. As we explain below, a Zoning Determination Letter is not a decisional document and is certainly not unquestionable authorization to grant a building permit. A building permit, however, is DCRA's official decision, according to the zoning regulations.

In addition, designating such status to Zoning Determination Letters would put many parties at a disadvantage in being able to participate in the appeal process as Zoning Determination Letters are not disseminated widely. They are housed, with delays, on DCRA's website in hard-to-locate webpages, are not generally advertised to ANCs or other parties, and are not prepared according to known procedures and requirements. This is in contrast to building permits, which are available on two DCRA database-

driven websites, are disseminated to ANCs on a monthly basis, and are posted on properties so that neighbors are aware of such approvals.

Finally, DCRA references Appellant's awareness of disagreements with the Zoning Administrator on interpretations of the zoning regulations. It would be illogical to establish the matter of differing perspectives as the basis upon which to start the 60-day clock. Rather, a tangible agency action, a building permit, is the trigger.

Zoning Determination Letter is Clearly Provisional

One need only read the Zoning Determination Letter to conclude that is equivocal and does not constitute permission to grant a building permit. Indeed, no Zoning Determination letters convey such permission and are in general provisional in nature.

As for the Zoning Administrator's provisional observations in this case, one need look no further for uncertainty than footnote 2, which references the critical issue of the basement/cellar measurement ("The mock up is necessary because the property owner does not yet have the building permits to construct the proposed ceiling.").

There are other provisional warnings in the letter demonstrating that Appellants would have been rash to prematurely file an appeal. They include:

- "[I]t is my determination that the Project may be constructed as a matter of right, provided that the project plans filed with the applicable building permit do not substantially deviate from the plans attached…."
- "My approval does not obviate the need to obtain all of the other approval required or a building permit.

To drive the point home, as if that is necessary, below are additional inconclusive observations by the Zoning Administrator, any one of which might have been reviewed and reversed under a robust building permit review process. They include:

- "based on the evidence provided to me and attached hereto" (this information does not comprise the sum total of what is necessary to secure a building permit)
- "satisfies the requirements of Title 11 of the District of Columbia Municipal Regulations in effect at the date of this letter" (the referenced zoning regulations were replaced on 9/6/16 and appellants had no basis to conclude that the project would proceed under the 1958 regulations on ZR16 regulations)
- "The property owner proposes to redevelop the Property" (there is no certainty that this proposal would actually be the scope of work applied for in a permit, nor is the owner under any obligation to adhere to a scope of work outlined in a determination letter)
- "I have determined that the evidence provided to me" (this demonstrates that the Zoning Administrator is making a determination based upon a certain set of information that no parties could verify represents the totality of what is necessary to secure a building permit)

The Zoning Administrator also makes a comment that is simply incorrect: that the "change to the window sill height does not have any effect on the cellar dimension measurement." In fact, the windows were shortened specifically to raise the grade in order to manipulate the grade measurement.

Zoning Administrator Communicated Uncertainty About the Determination Letter's Provisions

The Zoning Administrator's representatives communicated that any circumstances under which the measurement of less than 4' was not achieved could be satisfied by further changing of the plans and changing of the grade and ceiling height. These communications provided Appellants with additional signals that they should wait for issuance of a building permit instead of wading into a situation of changing conditions that might invalidate their appeal and certainly would unduly waste the time of the BZA, DCRA and the owner.

Supporting Documents Not Readily Verifiable

The Zoning Determination Letter references a November 4, 2015 PDRM (and a "subsequent meeting on January 22, 2016" as well as a February 12, 2016 Site Meeting) as the basis for confirming the Zoning Determination Letter. However, DCRA's own website is clear in defining the PDRM as "a preliminary review of their building plans prior to filing" (Overview of the Permitting Process, Before you submit your permit application. https://dcra.dc.gov/page/overview-permitting-process) As for the January 22, 2016 and February 12, 2016 Site Meeting, the formality and specifics of these meetings are unclear and certainly are not reflective of a formal building permit review process.

The proposed plans were not prepared by a certified architect. In addition, the draft drawings contained many uncertainties, forcing Appellants to conclude that a competent building permit review process would be necessary and might reveal and correct any errors that might then become moot points of contention in an appeal. For example, the structural drawing in Exhibit A shows 9'-10" from slab to first floor. Yet, in Exhibit B, the drawing shows 7'-10" plus 1'-11 1/2" from Exhibit D totals 9'-10" and yet a ceiling height of 8'-8 1/2" is presented.

BZA Case Precedent Reveals Inconclusive Nature of Zoning Determination Letters

Appellants conducted a review of multiple BZA and court cases to determine the basis for 60-day timeliness criteria and whether Zoning Determination Letters were the appropriate basis for starting the clock. It is clear from these cases that Zoning Determination Letters are provisional in nature and that a building permit is the proper basis for submission of an appeal. These cases provide the Board with a sound basis for denying DCRA's motion to dismiss based on timeliness. (NOTE: The Owner's Motion to dismiss cites as series of Board decisions and contends that our appeal is untimely based upon their findings, although most fail to speak to Zoning Determination Letters. We briefly address a number of those cases below in order to clarify any confusion that might be created by their introduction.)

- **Determination Letter Not an "Appealable Decision**. In a recent Board Order, issued November 16, 2016 in BZA 18793, the Board concluded that "The threshold issue is what is 'the decision complained of" and goes on to rule that the Determination Letter was not an "appealable decision" and that, rather, issuance of a sign permit "started the Appellants' time for filing this appeal." While the particulars of this case vary from BZA 19374, the Board further clarified its position in Finding of Fact 22, which reads: "Neither the ZA's Determination Letter nor his February 28th email to Ms. Blumenthal stated an unequivocal decision to allow the issuance of the needed sign permit." http://dcoz.dc.gov/orders/18793.pdf

- **Determination Letter Issued Before Building Permit May Not Be Basis for Appeal**. In BZA 18522 (2012), Washington Harbour Condominium Unit Owners' Association, the Board ruled that a Zoning Administrator determination letter issued before a building permit application may not

be appealed. The determination letter in this case (3050 K St NW, November 7, 2012) included a Computation Sheets, a Plan Set prepared by a licensed architect (which is not the case for the 1514 Q Street NW letter), and contained Determination Letter wording that is strikingly similar to the wording used in the present case (e.g., "I have concluded that the proposed project complies with the Zoning Regulations as described below") https://dcra.dc.gov/release/3050-k-st-nw-prince-11-7-12

- **Emails Cannot Serve as Basis for an Appeal**. In BZA 18568 of Shaw-Dupont Citizens Alliance, Inc. (2013), the Board concluded that an official permit was the required basis for an appeal and not, as in the case before the Board, several emails communicating that such a decision was previously made. That case reads: "The Appellant claims to be appealing two decisions contained in emails dated February 6 and March 11 of 2013. The Board concludes that neither of these decisions can form the basis of any appeal and that the only decision relating to the tavern use on the Subject Property from which an appeal could have been taken was made on January 7, 2004 when Certificate of Occupancy ("C of O") No. CO68314 was issued to Kalechristo N. Jima and Fetawork B Reta. It was this C of O that first authorized a tavern use on the Subject Property and no C of O has since been issued that amended that use or authorized a replacement use."

- **Determination Letters Do Not Authorize Granting of Building Permits**. In BZA 16998 (2003), the Board ruled that "concurrence letters are decisions, but not decisions to grant a building permit." Furthermore, the Board ruled that failure to appeal "concurrence letters" "does not bar a subsequent appeal of the related building permit" and that the "express authority granted by Section 8[1] to appeal a decision granting a building permit cannot be negated by the failure to appeal a related, but earlier decision. A contrary interpretation would skew the entire zoning process." The Board went on to observe that building permits require significant documentation per 11 DCMR 3202.2 but that "no similar requirements apply to the concurrence letters at issue, compelling appeals of such decisions would allow property owners to force appeals a the point when the public has the least information available. Moreover, since there is no guarantee that a project, for which an interpretation is sought, will ever be built, compulsory appeals of such interpretations are likely to generate needless appeals that will waste the time and resources of all." http://dcoz.dc.gov/orders/16998_4259-154-81.pdf

BZA Cases Cited Do Not Support Timeliness Argument in This Case

The Owner's Motion to Dismiss based on timeliness presents a series of cases that provide Board interpretations on the meaning of timeliness, although they are largely not specific to the matter of a Zoning Determination Letter's issuance in relation to the 60-day time period for filing an appeal. Furthermore, these cases are characterized as dismissing what the Owner's representative characterizes as our decision to await issuance of a building permit as being a matter of being, for example, more "convenient." As we state above, we were merely waiting for the official and affirmative decision of DCRA, as expressed in a vetted building permit.

We contrast and clarify several of those cases below but not exhaustively as the cases we cite above are

[1] Section 8 (f) of the Zoning Act of 1938 (D.C. Official Code 6-641 -07 (f) provides that appeals may be taken from "any decision . . . granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map.. . ."

far more germane to our case.

BZA 18300 (2012). In this case, the Zoning Administrator's letter to the owner was communicated by the Zoning Administrator directly to the appellant, who therefore had actual notice, whereas here, the appellant DCCA had no actual notice of the March 21, 2016 letter. Moreover, the Board and a subsequent court ruled that the Zoning Administrator's email was unambiguous in stating that the project complied with the Tree Protection Plan. In contrast, as noted above, the Zoning Administrator's Determination Letter for 1514 Q Street NW contains multiple provisional statements and uncertainties.

BZA 17411 (2005). This case relates to an ANC's failure to file an appeal within a 60 day time period following issuance of a permit, whereby the ANC instead chose as the 60 day period notification from the Zoning Administrator an intent to issue a Certificate of Occupancy, which the Board characterized as "fair and equitable in light of the zoning error that had been made." No such uncertainties exist in 19374.

BZA 17513 (2006). The Owner's representative claims that in this case that "[a]ctual or constructive notice or knowledge that a decision has been made is what starts the 60-day clock' and that the "rationale for the decision" is not required. This suggests that the Zoning Determination Letter is what puts parties on notice and that waiting until a building permit is issued to confirm the decision in the letter is not the proper starting point. However, this decision does not reflect this interpretation. Rather, the Board in fact ruled that "the time for appealing the permit, which is the administrative decision in which error is alleged in this appeal, runs from the issuance of the permit on January 20, 2005, not from the March 23, 2005, meeting" when the Zoning Administrator shared the permit application previously approved January 2005. The Board thus ANC disallowed the filing of the ANC's appeal, 88 days after issuance of the permit. This case, in summary, bears no insights on the present case.

BZA 17468 (2006). The Owner's representative claims that "the Board must determine if there is an earlier date that should apply" and goes on to site this case as evidence that such earlier date is necessary or starting the 60-day clock. However, in this case, that earlier date was in fact issuance of the building permit. The ANC filed its appeal 10 months after the permit had been issued. The Board rejected the ANC's claim that its constituents did not know of the permit decision until this point in time and thus were allowed to follow at this late date, remarking that the permit was posted on the property and additionally was on file with DCRA. was not aware of the scope of the work.

BZA 18070 (2010). In this case, the Board ruled that an ANC failed to file within 60 days of issuance of a building permit and denied the ANC's contention that is had no way of knowing when the 60-day clock started and that the ANC could not have taken action quicker given its meeting schedule. In this case, the ANC filed six weeks after the 60-day permit issuance date.

BZA 17915 (2009). The appellant in this case waited six months after having been received a letter from DCRA that confirmed the validity of a building permit issued in 2004 and then chose not to respond given various obstacles (from allegations of DCRA's poor process to the international credit market's collapse) before seeking relief before the Board. We are hard pressed to see how the Owner's motion can characterize these delays to file as having similarities to our decision to await an actual building permit's issuance.

BZA 17391 (2006). This case involved filing of an appeal of five permits, from 17 months to more than 2 years after their issuance. The owner's representative frames this case as a matter of the appellant

finding it more convenient to delay filing, and seeks to apply that same logic to our case in which we were timely in having filed within 60 days. We believe that no more commentary is necessary to draw out the distinction.

The decision in *Basken v. D.C. Board of Zoning Adjustment*, 946 A.2d 356 (D.C. 2004), , cited by the Owner is also clearly inapposite here. In *Basken*, the issue was whether an appeal of a certificate of occupancy to the Board of Zoning Adjustment ("BZA") was timely when the underlying zoning issue had been decided in an earlier building permit. Thus, the earlier "decision" that triggered the deadline for filing a zoning appeal was a final building permit, an obviously final and appealable agency decision that was formally noticed after its official issuance through posting on the property and written notifications to the ANC, not an informal communication to a neighbor.

Finally, it is well-established that "[i]n situations where ambiguity exists regarding the date of an order or decision, this court has resolved the ambiguity in favor of the party seeking review." *Askin v. D.C. Board of Rental Housing Commission,* 521 A.2d at 675. *See also In re D.R.*, 541 A.2d 1260, 1264 (D.C. 1988) ("In [] areas of administrative law, we have emphasized the importance of eliminating ambiguity, and, where we have found ambiguity, we have construed it against the government agency that drafted the language"). This ambiguity here must be resolved by finding that the building permit rather than the Zoning Administrator's letter is the pertinent final appealable order.

Contention of Project Being Under Roof Is A Question Of Disputed Fact

Zoning regulation 3112.2(b) states that an appeal may not filed later than 10 days after the structure is under roof, while 3112.2(c) provides appellants 60 days from the date of the administrative decision being complained of to file an appeal. We have met that test.

Without any supporting evidence, the Owner's motion claims that the building permit was issued July 18, 2016 and the project was" under roof" 15 days later, July 31, 2016, and the owner had expended $780,000 in costs. We leave it up to the Board to determine whether such a short time frame and amount of spending is a valid reason to claim under roof status. We reiterate that we the Appellant have met the deadline for filing, while all delays have been on the part of DCRA (i.e., first, a failure to submit its pre-hearing statement in a timely manner for the December 14, 2016 initial case date and DCRA's last minute motions introduced at the January 18, 2017 rescheduled case date)

Conclusion

For the reasons stated above, Appellant respectfully requests that the Board deny the Motion to Dismiss for Standing and the Motion to Dismiss for Timeliness.