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 REPLY TO DCCA'S RESPONSE TO DCRA'S MOTIONS TO DISMISS FOR LACK OF STANDING AND FOR UNTIMELY FILING

DCRA raised the issues of standing and of timeliness when it learned that Mr. Gelfand was the leader of DCCA's appeal – had Mr. Gelfand filed the appeal as the authorized representative of DCCA, DCRA would have raised the issue of timeliness much earlier.

DCRA asserts that DCCA's only credible assertion of standing relies on Mr. Gelfand; that Mr. Gelfand failed to file an appeal within the 60 day time period established by the regulations; and that Mr. Gelfand is using DCCA to avoid the consequences of his failure to comply with the 60 day timely filing requirement.

Moreover, if Mr. Gelfand's standing can inure to DCCA, then Mr. Gelfand's knowledge of the ZA's final decision must also be imputed to DCCA. Otherwise an appellant who fails to file timely can circumvent the 60-day filing deadline by finding, or founding, a non-profit who is not bound by the appellant's notice. This would make a mockery of the timeliness requirements of the Zoning Regulations, and reward those who fail to follow the very Zoning Regulation that this Appeal asserts it is seeking to defend.

Therefore, DCRA respectfully requests that the Board grant DCRA's Motion to Dismiss for Untimely Filing.

STANDING

In response to DCRA's challenge that DCCA had failed to establish its standing by providing anything more than an amorphous statement of community involvement, DCCA only listed one individual potentially directly affected by the project authorized by the Determination Letter and Permit (the "**Project**") - Brian Gelfand, an abutting neighbor to the Project. Yet DCCA's Response did not specify how the alleged errors of the Zoning Administrator (the "**ZA**") would negatively impact Mr. Gelfand, instead appearing to assume that Mr. Gelfand's identity as a neighbor is

sufficient to confer standing (see in contrast the list of concrete adverse impacts asserted would be caused by the ZA's alleged errors - including increased traffic, loss of parking, etc. - stated by appellants in BZA *Appeal 14402 of Hans Larsen, Chairman of ANC 4A*, at 4, Finding of Fact 12). DCCA did not list any other person that would be adversely impacted by the Project – no member of DCCA's Board that lived on the block with 1514 Q Street that would be adversely impacted by the ZA's alleged errors, nor any other person living on the block with 1514 Q Street apart from Mr. Gelfand.

Nor is there any description of a particular, concrete harm directly related to the alleged errors of the ZA that would be suffered by DCCA – just that DCCA "exists to promote and protect the interests of the residents of the National Capital"[1]. DCCA cites BZA Appeal *18568 of Shaw Dupont Citizens Alliance* (the "**SDCA**") in support of its assertion that standing only requires a statement that a community organization file an appeal – but fails to note that the SDCA included not only its articles of incorporation and bylaws in its filing, but also specifically described the concrete harm that the SDCA would suffer from the ZA's alleged errors, including having to contest the issuance of an ABC license (Alcholic Beverage Control Board).[2] Moreover, SDCA was challenging the ZA's approval of a permit for another alcoholic drinking establishment in the ARTS Overlay District, an activity which directly impacted the entire neighborhood as they walked on the sidewalks, looked for parking, or tried to sleep at night. Furthermore, the SDCA had been directly involved in proposing revisions to the Zoning Commission for the ARTS Overlay rules, rules that SDCA sought to enforce by its appeal.[3] In contrast, DCCA has not filed its bylaws or other evidence of its mission, nor described how the ZA's alleged error in classifying the lowest level as a cellar as opposed to a basement presents a concrete injury to the DCCA.

Nonetheless, DCRA is willing to recognize that Mr. Gelfand, as an abutting owner, would have standing and that Mr. Gelfand may "lend" his standing to the DCCA. However, DCRA asserts that Mr. Gelfand failed to timely file his appeal, and so Mr. Gelfand's knowledge or notice of the ZA's decision in the Determination Letter should be applied to the DCCA – as Mr. Gelfand's standing is imputed to DCCA, so should Mr. Gelfand's notice of the ZA's decision be binding on DCCA.

[1] BZA Appeal 19374, Exhibit 53, Appellant's Response, at 1.
[2] BZA Appeal 18568, Exhibits 16 (Incorporation); 17 & 34 (bylaws); 32, 33 & 35 (Filings asserting standing).
[3] BZA Appeal 18568, Exhibit 13.

UNTIMELY FILING

The Board has consistently ruled that where the administrative decision appealed to the Board is that of the ZA, the starting point for the appeal period is the date that the ZA's approval of a building permit application as compliant with the Zoning Regulations decision is publicly announced, and the Board has accepted that the publication of the ZA's approval on the DCRA PIVS and Permit Status Tracking websites – even though this precedes the issuance of a building permit - qualifies as public announcement sufficient to trigger the start of the appeal period.[4]

Mr. Gelfand definitively had notice and knowledge of the Permit application no later than February 22, 2016, when he sent an email to DCRA challenging the Project on the basis of the alleged "manipulation of the basement/cellar FAR calculation" (**Attachment A**). Mr. Hawkins and Commissioners Nichols and Gambrell were included on that email indicating their involvement with this property at this time. In fact, Mr. Hawkins noted in a March 4, 2016 email to a DCRA official that the Project had been presented at ANC 2B's Zoning, Planning and Development Committee on November 3, 2015 – indicating that the neighborhood was aware of this project and had expressed concerns for four months prior to the Determination Letter and Habitable Space Email. In that same email chain, a March 7, 2016 email from Commissioner Nichols cited a meeting with the ZA on December 21, 2015 and the inspection of the Property by a DCRA inspector on February 18, 2016. In that March 7, 2016 email Commissioner Nichols singled out "the Gelfands and Don Hawkins for their leadership on this matter" on behalf of the "whole block" - further evidence that Mr. Gelfand was the moving force behind this appeal well before the (**Attachment B**). Mr. Gelfand also raised the specific issue of the definition of "habitable room" as it applied to the determination of the lowest level as a "basement" or "cellar" in a March 9, 2016 mail to the ZA and copying Mr. Hawkins and Commissioner Nichols (**Attachment C**).

These emails, in addition to the evidence provided in DCRA's Motions to Dismiss, show that Mr. Gelfand, Mr. Hawkins, Commissioners Nichols and Gambrell; the "whole block" of the Project; and anyone who attended ANC meetings and therefore the entire neighborhood was aware

[4] *Basken v. District of Columbia Board of Zoning Adjustment*, 946 A.2d 356, 366 (D.C. 2008)(no specific notice required to trigger the Board's appeal period); *BZA Appeal No. 18469 of Susan L. Lynch* (March 19, 2013)(denotation of "approved" in PIVS sufficient to announce Zoning Administrator's approval and so trigger the Board's appeal period).

of the Project as an ongoing matter of dispute for at least four months prior to the Determination Letter and Habitable Space Email.

Yet Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell – despite having intimate knowledge of the Project, despite having mounted a campaign to convince the ZA of their interpretation of the Zoning Regulations as it applied to the Project, and despite having received the Determination Letter and Habitable Space Email in which the ZA clearly announced his decision that conflicted with their interpretation – chose not to file an appeal. Moreover, they waited to raise this matter with DCCA until September 2016, almost a year after the November 2015 ANC meeting where the Project was presented and six months after the Determination Letter and Habitable Space email. Indeed, DCCA asserts it "was unaware of the issues in this case until after the building permit was issued July 18th 2016".[5] Were there no meetings of the DCCA during any of the preceding 6 months? Or did Mr. Gelfand and Mr. Hawkins, having failed to timely file themselves, look for an organization to provide them a second bite at the apple by creating the appearance of not having notice of the ZA's decision?

Regardless, Section Y-302.2 states that the start of the 60-day appeal period is the date when the appellant "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*" (italics and underscore added). In this case, Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell all had actual knowledge and notice of the ZA's rejection of their interpretation of "habitable space" and the determination of a basement versus a cellar. Yet they request that the Board ignore their clear involvement and treat the DCCA as completely separate – despite using Mr. Gelfand's status to claim standing for the DCCA. Moreover, the various emails, DCRA meetings and ANC meetings listed above clearly establish that the neighborhood was aware of this issue for months and that the DCCA therefore "reasonably should have had notice or knowledge" when the ZA provided the Determination Letter and Habitable Space Email to Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell. Therefore, DCRA asserts that the clear notice and knowledge of the ZA's rejection of Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell started the 60-day appeal period from March 22, 2016 not only for the recipients of the Determination Letter and Habitable Space Email, but also to the DCCA, who have

[5] BZA Appeal 19374, Exhibit 53, at 3.

lent their flag to Mr. Gelfand, Mr. Hawkins and Commissioners Nichols and Gambrell to mount their appeal.

To be clear, if DCCA was represented by other individuals who were not party to the ZA's communications and recipients of the Determination Letter and Habitable Space Email, or if the ANC had not been involved in these communications, DCCA might have a credible case that it lacked notice or knowledge until the issuance of the Permit. But this is not the case here – Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell had already filed their challenges with the ZA, who reviewed them and issued the Determination Letter and Habitable Space Email to communicate his decision rejecting their interpretation of the Zoning Regulations. At that point, they were on notice and by choosing not to file within the 60-day appeal period from the receipt of the Determination Letter and Habitable Space Email, they abandonded their appeal rights. Having made that choice, they should not be able to borrow the flag of the DCCA to pretend that they had no notice of the ZA's decision and so resurrect the appeal rights that they already abandonded.

The Zoning Commission adopted the 60-day appeal period to establish a reasonable time for an aggrieved appellant to file and specifically included the "reasonably should have had notice or knowledge" precisely to address a case like this one, where an appellant seeks to avoid responsibility by cloaking its identity in the clothes of another entity. Morevoer, the Zoning Commission provided a means for an appellant who did not file a timely appeal to request an extension of the 60-day appeal period under Section Y-302.6. The DCCA did not make such a request.

The Zoning Commision specifically identified that even a building permit is not necessarily the trigger for the 60-day period, but rather it is "the first writing that reflects the administrative decision complained of to which the appellant had notice" (Y-302.5). In this case, this was the Determination Letter and Habitable Space Email.

DCCA asserts that the Determination Letter and Habitable Space Email were not final – despite the title of the Determination Letter indicating that it represented the ZA's decision. DCCA's assertion that it is not appealing the Determination Letter and Habitable Space Email, and instead is really only challenging the Permit is belied by the prominence that DCCA gave to the Determination Letter and Habitable Space Email that are quoted at length and discussed

throughout the pages of DCCA's initial appeal filing.[6] This clearly shows that DCCA's appeal is directly aimed at the Determination Letter and Habitable Space Email, with the Permit mentioned only to enable an end-run around the appeal window have closed in May 2016, four months before Mr. Gelfand and Mr. Hawkins approached DCCA to use DCCA to file this Appeal.

The Permit did not "represent[] … a new decision on the issue[s]" discussed in the Determination Letter and Habitable Space Email, and so per established Board practice the Permit did not start the 60 day appeal period over again for those issues.[7]

The Determination Letter stated:

> "based on the evidence provided to me and attached hereto, the project proposed for the Property satisfies the requirements of Title 11 of the District of Columbia Municipal Regulations in effect as of the date of this letter (the "Zoning Regulations") and can be constructed as a matter of right.
> … **My approval** does not obviate the need to obtain all of the other approval required for a building permit."[8]

This states the ZA's determination that after having reviewed the challenges raised by Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell, and after a DCRA inspector visited the Property, that the proposed plans, including the lowest level's classification as a cellar and not a basement, and hence not included in the Floor Area Ratio calculation, were compliant with the Zoning Regulations and could be constructed as a matter of right. The ZA confirmed that statement in his Habitable Space Email sent to Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell the next day (March 22, 2016) when he explicitly responded to Mr. Gelfand's raising the alleged conflict with the definition of "habitable room" and ended by stating: "I hope that this information is helpful in the explanation of **my office's approval of the project**."[9]

This is as final a statement of decision by the ZA as can made. No changes were made to the Project's plans that altered the decision of the ZA in regards to the challenges raised by Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell. Therefore, under Section Y-302.5, the appeal should have been filed within 60 days of the issuance of the Determination Letter and Habitable Space Email to Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and

[6] BZA Appeal 19374, Exhibit 12, at 2, 3, 5 and 6.
[7] BZA Appeal 18568, quoting *Basken*, 946 A.2d 368 and BZA *Appeal 18300 of Lawrence and Kathleen Ausubel* (2011) ("Appellants could not wait to appeal the building permit where ZA email clearly indicated permit would issue based upon resolution of zoning issue presented.").
[8] BZA Appeal 19374, Exhibit 27A, at 3 and 7.
[9] BZA Appeal 19374, Exhibit 27B, at 3.

Gambrell. When they failed to file an appeal by May 21, 2016, they abandoned their appeal rights. These are the rules that the Zoning Commission established in the Zoning Regulations in Section Y-302. Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell appear to argue that they should be able to circumvent the clearly stated requirements of the Zoning Regulations in Section Y-302 in order to prevent the alleged violations of the Zoning Regulations by the ZA. But Mr. Gelfand, Mr. Hawkins, and Commissioners Nichols and Gambrell cannot pick and choose which of the Zoning Regulations they want to follow and which they want to ignore. They had two months to file an appeal of the ZA's Determination Letter and Habitable Space Email, but chose not to. They should not be able to now resurrect the appeal rights that they chose to abandon by cloaking their appeal in the clothes of the DCCA.

CONCLUSION

For the reasons stated above, DCRA therefore respectfully requests that the Board grant DCRA's Motions to Dismiss for Untimely Filing.

Respectfully submitted,
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Date: _2/18/17___

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February 2017, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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ATTACHMENT A

Email from B. Gelfand to DCRA, February 22, 2016

ATTACHMENT B

March 7, 2016 email from Commissioner Nichols to DCRA citing December 21, 2015 and February 18, 2016 meetings with DCRA to discuss the Project;
and including a March 4, 2016 email from Mr. Hawkins to Mr. Whitescarver at DCRA citing a November 3, 2015 ANC meeting to discuss the Project

ATTACHMENT C

Email from B. Gelfand to ZA, March 9, 2016 specifically regarding "habitable space" and "basement" or "cellar" determination

ATTACHMENT D: REVISED TIMELINE

November 3, 2015	ANC 2B ZPD meeting with Permit Holder presenting the Project
December 21, 2015	Meeting between Commissioner Nichols and ZA
February 18, 2016	DCRA inspection of Property with Commissioner Nichols
February 22, 2016	email from Mr. Gelfand to DCRA, copying Mr. Hawkins and Commissioner Nichols and Gambrell
March 9, 2016	emails from Mr. Gelfand to the ZA, copying Mr. Hawkins, Ms. Gelfand, and Commissioners Nichols and Gambrell
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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
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May 21, 2016	End of 60-day appeal period for issues addressed by the ZA in the Determination Letter and Habitable Space Email
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July 18, 2016	Issuance of the Permit by DCRA

September 16, 2016	Filing of appeal by DCCA (60 days after issuance of Permit)