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Appeal of David Belt on behalf of ANC 7F BZA Appeal 19627

- REQUEST TO WAIVE THE 60 DAY TIME FRAME FOR THE APPEAL OF BUILDING PERMIT B1501924 DUE TO SPECIAL EXTENUATING CIRCUMSTANCES

- REQUEST TO HEAR ALL CLAIMS UNDER JURISDICTION OF ZONING ADMINISTRATION TO REFER TO AUTHORITIES FOR REVIEW

On behalf of the Advisory Neighborhood Commission 7F (ANC 7F), we request the BZA to waive the 60 day appeal period due to special extenuating circumstances. This appeal is not based on a previous hearing decision but on several, egregious zoning violations committed during actual construction of St. Stephen Apartments at 4000 Benning Rd., N.E. Coupled with this is evidence of inaction of DCRA to admonish the developer of the necessity of variances during construction and to defer to the BZA for the permit approval process. Consequently, these alleged actions by DCRA has resulted in the developer bypassing the BZA process and to the detriment of the community.

Our communities put their trust in our city agencies, particularly those entrusted to enforce the city's rules and regulations, and for these agencies to operate efficiently within their scope. The BZA, not a sub-agency, is the arbiter of any ambiguity and right of use in the construction process. However, we will show that DCRA both overstepped their authority in approvals and in enforcement of current regulations

The specific issues with this project were brought to the attention of ANC 7F with discovered evidence during construction and the fact that neither DCRA, DDOT, nor the developer would speak to the issues. The ANC, after having visited the site and speaking to the developer, agreed that there is merit enough in these findings to unanimously support an appeal. The issue of designated authority for David Belt to bring the appeal and represent the ANC during the hearings was established by the Chair and Vice-Chair personally during the initial hearing on Dec. 13, 2017.

Contrary to DCRA's argument and their own motion, it would not have been reasonable or even possible for to have known of the permitting of the building: this permit for the project was issued "by right" whereby no variances or easements would be requested and no notification was required to the ANC or the community. The permit was issued a year and a half after the zoning amendment. Construction initiated approximately six months later.

Zoning Change and Lack of Project Scope Modifications

The development was first brought to light in 2013 at a zoning hearing for a zoning amendment to correct the erroneous C-3-A zoning boundary, set in 1958 for the low density residential single-family homes in square 5081. In the response provided by DCRA's counsel, it is unclear the relationship of this project and the case reference ZC13-07 – the cases are mutually exclusive and sets no precedent.

The community initiated square 5081 zoning change in 2006, well in advance of the St. Stephen Apartments plot acquisition and project inception. It was noted that this area was included in the commercial district when historically this corridor (apart from the commercial strip) is composed of single-family brick homes, established in the late 1930's and early 1940's. **The Office of Planning (OP)** agreed and designated this section low to moderate residential in the District's Comprehensive Plan of 2006.

In 2013, it was discovered that the Comprehensive Plan did not translate to the actual zoning change. After conferring once again with the Office of Planning, OP instructed us to petition the Zoning Commission. OP recommended the proper, corresponding zoning as R-5-A, to which the community agreed. The **Zoning Commission (ZC)** unanimously voted for the new designation. It was during the R-5-A zoning set-down notification period that the developers came forward after seeing the notification signage. During this hearing the Zoning Commission agreed that the commercial designation of the residential properties was not the proper zoning so, as a compromise with the developer, set down for R-5-C.

Both OP and ZC apprised the developer that they now must conform to the R-5-C zoning restrictions and that their present design would definitely require a BZA variance for the rear yard (the drawings at that time indicated eight feet for the rear yard; a rear yard is not a requirement under C-3-A). In addition, the developer at that time expressed the need for an additional curb cut for the parking entrance which would require a variance.

It is important to emphasize that the zoning amendment adopted in ZC 13-07 did not grandfather nor designate the project as "by- right". What OP did at the zoning amendment hearing was to point out the fact that it would be possible to build their project as by-right under R-5-C zoning with the proper tweaking and modifications.

The ZC 13-07 case was not about preventing development – it was merely making a correction on the zoning to now be consistent with the correction already made on the Comprehensive Map of 2006. It was to bring future development to scale and compliance with the existing structures. With that, the reasonable assumption would be that the developer would do as instructed before submitting to DCRA's Zoning Administration for approval and that the DCRA Zoning Administration would competently and reliably do its job in assuring that the zoning regulations are followed. We had accepted the new set down and had no reason to believe that neither DCRA nor the project owners would not do as instructed. Rather, eventual construction revealed they would proceed to build according to the former C-3-A zoning regulations.

The community relies on the strength of the Zoning Commission to enforce the laws. There was no reason to consider filing an appeal since we were confident that DCRA's Zoning Administrator should provide proper oversight and refer the developers to the BZA for any

easements or variances to the zoning regulations when necessary. All infractions and possible infractions would be flagged for corrections, along with any variances from the zoning regulations would be flagged for BZA approval.

There is no way anyone on the outside would have possibly known that the developer, with the lack of enforcement from DCRA, would attempt to bypass the BZA for variances and deliberately build this project illegally.

DCRA Lack of Enforcement

Project Rear Yard Depth and Retaining Wall Height

In the calculation of the rear yard distance and the retaining wall height, the Zoning Technician did not properly apply regulation DCMR 11-404. This regulation is a formula that maintains a ratio of rear yard depth to building height with a minimum fifteen feet rear yard depth which applies at building height of forty-five feet or less in residential zones. The Zoning Technician instead allowed the developer to use either the minimum depth of rear yard or the formula – their preference.

The retaining wall regulation (previously amended in 2010) was amended again in ZC13-06 and adopted in 2014 to clarify certain language regarding wall height measurements and general retaining wall height that would directly impact this project. The Zoning Technician's rationale in application of the rules pertaining to retaining walls in DCMR 11-413 were that because R-5-C was not mentioned as an exception then the rules did not apply. This maximum retaining wall height for any retaining wall in general was confirmed by the Zoning Commission as six feet, (DCMR 11-413.3) with any variance requiring BZA approval as noted in the retaining wall amendment ZC13-06. Holland and Knight were present at this amendment hearing, and this information was made available to their client and firm.

There are serious questions about the rear yard measurement as it relates to the measured height of the rear of the building and the height of the retaining wall. This was also the point of concern at the zoning hearing. The rear yard was not required under the commercial zone but is under the residential zoning. At that time, the rear was eight feet and in the residential R-5-C, the minimum is fifteen feet depending on building height.

The building was pushed forward seven feet to get the minimum of fifteen in the rear, pushing the front of the building four feet over the front property line. At that point, it should not have been ignored by the DCRA Zoning Technician as a DDOT issue but flagged to require a variance or easement. We did inquire about this to both the developer and DCRA and they both showed us the rear yard measurement ruling adopted in 2010 (which initially appeared to be correct).

This is included in this appeal because of a later definition change adopted in ZC13-06 (pub. June 2014) which establishes the definition of 'height' and also with reference to "artificial berms" being included or excluded in the measurement of retaining walls and walls in general. The discovery of the latest language amendment pertaining to wall height measurement and the maximum height of six feet for retaining walls is extremely important since this definition applies to the rear wall height and the inclusion of the berm in the center of the wall.

In ZC13-06 the measurement of 'Height of a retaining wall' should be consistent with the definition of 'building height' as in this case 'rear building height' and the measurement should not include the artificial berm but be taken from natural grade. This case covered the maximum height of retaining walls in general as six feet except where specified and did emphasize that any variance from the rules must come before and be approved by the BZA.

This information was not readily available to a lay person but should have reasonably been known by the Zoning Technician. Also, the firm of Holland and Knight were aware of this amendment to the height measurement of retaining walls (also building walls) which excludes artificial berms and measures from "natural grade" not finished grade since, again, they were party to the zoning amendment ZC13-06 hearing. The 2014 adopted amendment ZC13-06 would apply to this building since the building permit was issued late 2015.

Wall Check

By its own admission via one of its Zoning Technicians, the wall check is a requirement of DCRA. A wall check is required to locate the actual building footprint with respect to the lot lines. This is normally done early in the project when the exterior walls are approximately one foot out of the ground so that any issues such as the issue in question can be addressed and corrected before getting too far into the project. As evidence of such, one DCRA Zoning Technician issued a stop work order and scheduled the required wall check. The technician that did the wall check specifically circled and noted the projections that breached the property line by four feet.

DCRA has ignored the findings of the Wall Check without comment and the encroachment on public property. No outreach to the ANC nor the community for its input was performed, yet it has claimed its not their responsibility. The wall check may not be referenced in the zoning regulations but according to the Zoning Technician, it was most definitely a requirement of DCRA and their responsibility to see that it was completed.

The wall check is not the kind of thing that both the developer and DCRA would have conveniently forgotten. One of DCRA's primary goals for new construction is to ensure the building stays within property lines.

Paper Alley

The 'paper' alley that is public space should have been addressed and also should have been flagged. A paper alley is an unimproved throughway that exist in city maps as a public alley. There is a standard process to be followed in order to permit the closing or granting a portion of a public "paper" alley to a private entity which would have included the ANC and the BZA as demonstrated in the evidence provided, "Proposed Closing of a Paper Alley in Square 150 - S.O. 13-10218".

We questioned this several times with the builders and the DC Department of Transportation (DDOT) and was referred to public space permit for to the necessary sheeting and shoring to access the site, just as it says on the permit #PA107910-R1. The evidence will show that DDOT and DCRA both engaged in unlawful practices in order to avoid the proper process. DCRA was ultimately responsible for identifying this issue which should have been deferred

to the ANC and the BZA.

Misapplication of "By-Right"

DCRA designated this project as a by-right but did not adhere to the zoning conditions under final order of ZC 13-07. When questioned by Councilman Gray's office and the ANC SMD 7F01 Commissioner on what authority this was given 'by-right' status, DCRA intimated their only reference was ZC13-07.

Zoning Case #13-07 as is stated in the ruling only addressed the down-zoning of square 5081 from commercial to residential and there is no reference to the proposed project for lot 0052. However, with a by-right designation by DCRA, neither DCRA, DDOT, nor the developers are required to advise the ANC or community of any aspect of this project. When the builders for the developer eradicated the old growth trees from the plot in May 2016, this was the only community notification. Since we were aware of the impending project and, as they made clear in previous interactions, they had no obligation to the community, we still had no reason to believe that the project would not be built according to the law.

It was not until the development team were denied the alley closing by DDOT and were forced to negotiate with the community that we had our first interaction. The development's project manager insisted that they shut down the entire end of the alley – the entrance to federal land, Fort Mahan National Park and the Fort Circle bicycle/hiking trail (both a highly used community and visitor asset). This proposal also posed a hazard, as there is a three-point-turn-around area at the end of the alley which allows vehicles to turn around and safely travel back down the steep graded alley.

In about May of 2016, DDOT was called to meet all parties and insisted that they were not going to allow the alley to be shut down until an agreement was reached with the community. At this juncture, **the actual building construction had not begun**. We had no evidence to demonstrate the developers would violate zoning and permitting rules. It wasn't until the building was being built that violations became evident.

Community Benefit

With respect to the developers, the circumstances of the "community benefit" is not germane to this case. However, as this has been entered for the record as an attempt to question my character, I welcome the opportunity to document actual events. Towards the end of May of 2016 on a Saturday morning, a man and woman were seen standing in the alley at the rear steps of my home pointing to things. I went out to meet Mr. Christopher Stennett, Project Manager for the Warrenton Group, and Ms. Ivey Dench-Carter of Pennrose Properties, one of the property owners.

Ms. Dench-Carter's first comment was that she understands that I have influence and that the community listens to me. At the time, I was unaware of what was the meaning of her remark. We discussed the proposed alley closure. It was Mr. Stennett who informed me that they were surveying my property for a solution so that I would have a means to turn my vehicle around in "a new private carport that they would build for me at no cost." Ms. Dench-Carter then advised me that they would do this for me however they "would expect for me to support their

project and specifically a new curb cut for their parking garage."

I told them that this did not seem right and turned down their offer. It occurred to me they wanted to leverage my upcoming assignment as an ANC Commissioner. This conversation was reported to the Director of the Office of ANC immediately after my swearing-in.

Shortly after this initial meeting with Mr. Stennett, I reached back to inform him what this "offer" appeared and gave him an opportunity to come clean. This was how the deal came to be changed to a "community benefit". We helped a neighbor most affected by the closing of the alley – a senior and the only resident without a private parking pad. This development is directly next door to her house and had displaced her parking area; also it deprived her of the use of her vehicle since she was unable to back down the steep alley hill. This deal was tied solely to the closing of the alley which was also modified to accommodate bicycle and foot traffic.

The alley was to have been opened at the completion of the retaining wall which was supposed to have been August/September of that year 2016. The carport for the elderly neighbor was to be immediately done. Ms. Jones-Pisi had her family lawyer draw up the contract that was signed by all parties. In good faith, we immediately allowed them to close that portion of the alley with the stipulation that it be partially open enough to allow continued access for bicyclist and pedestrians. The carport was not completed until late November after constant calls from me, Ms. Jones-Pisi, and then her attorney.

The retaining wall took approximately 16 months to complete and finished in approximately September of 2017. The Alley was not opened until about one month later.

Conclusion

It is our sincere hope that the BZA notes the inconsistencies and egregious acts on the part of the development team with DCRA's Zoning complicity. We, as a community, are overrun with unethical tactics. We need the BZA to make a stand for us and hold builders accountable to its governance. This is not build by any means necessary.

Summary

- The ZC13-07 case did not grant any special exceptions to the project and was not about the project. It **did** assert that the project must adhere to the regulations of the new zoning.
- ZC13-07 did point out specific features on the developers' plans that would likely need BZA approval or variances unless highly modified to build as 'by right'.
- The building permit was granted one year and a half later and tree cutting was approximately six months later.
- After the sixty-day window, there was neither knowledge of the project status nor reasonable to anticipate that DCRA would allow the builder to commit certain major zoning regulation infractions and withhold these infractions from the community, ANC 7F, and BZA. There was no rationale to appeal the development at that time.

- This appeal could not have been brought within almost any timeframe, even if we were aware of these specific deadlines. We, as the community, performed due diligence, followed the process, and reached out to the appropriate enforcement agencies. It was incumbent upon them to regulate and impose penalties, when necessary.
- It became increasingly clear with the refusal to answer basic questions, lack of transparency and the misinformation given to the community from DCRA, DDOT and the development team, we are forced to have this matter adjudicated. In essence, we are seeking remedy for the failings of our city agencies.
- The evidence and allegations should be reviewed by this commission on the merits and the seriousness of each and every allegation.
- The wall check evidence, which the defense claims was not under the purview of DCRA, was in their own evidence and discovered by them as a requirement. A stop work order was issued by DCRA, who later approved the wall check despite the violations found.
- The defense also claims that DCRA had no jurisdiction over the closing or use of the 'paper alley' next to the property in question. When asked about due process to use public space, the evidence will show that it was only an alleged discussion between OP, DDOT, and the developer. I will introduce evidence that, contrary to what was told to the community that there is a process involved when requesting the closing of a 'paper' alley.

Respectfully,

David Belt
On behalf of ANC 7F

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2017, a copy of the foregoing Request to waive the 60 day time frame for the appeal of building permit B1501924 due to special extenuating circumstances and request to hear all claims on the merits.

Served via electronic mail to:

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