

BOARD OF ZONING ADJUSTMENT

Washington, D.C.

Appeal by:

Case No. 20183

The Residences of Columbia Heights, a Condominium

Appeal of Building Permit B1908601
2500 14th Street, NW

**APPELLANT'S OPPOSITION TO
MOTION TO DISMISS AS UNTIMELY**

Appellant The Residences of Columbia Heights, a Condominium ("RCH"), through undersigned counsel, submits this Opposition to the motion of the Department of General Services ("DGS"), now joined in by the Department of Consumer and Regulatory Affairs ("DCRA"), to dismiss this appeal as untimely.

Emblematic of its diligence, not dilatoriness, RCH authorized the filing of the appeal of building permit B190860 (the "Permit") on October 3, 2020, BZA Ex. 3, which was two days after undersigned counsel became aware of issuance of the Permit, which was one day before that. BZA Ex.2. The appeal paperwork could not be filed immediately because RCH's many earlier efforts to get final plans from DCRA to review were not fulfilled until October 9, 2019, i.e., 10 days after Permit approval. Thereafter, the appeal was filed on IZIS on October 19, 2019, and accepted for filing on October 24, 2020. BZA Ex. 1. In short, RCH's appeal of the Permit was fully complete fifteen days after obtaining Permit drawings and twenty-five days after permit issuance, or well within the 60 day limit for the appeal as set forth in Board Rule Y-302.2. None of this is disputed, and that should be the end of the matter.

Nonetheless, DGS has presented untimeliness arguments, belatedly adopted by DCA, that fly in the face of common sense, the facts, and the law. Each is briefly addressed below.

Common Sense. RCH's condominium is directly adjacent to the building whose construction is authorized by the Permit. The zero setback the Permit authorizes from that building will deprive the condominium of the light and air that would come from compliance with the 15-foot setback RCH claims is required in this case. That setback requirement is obviated only if the new building can be deemed part of the Rita Bright Community Center. That conclusion, in turn, depends on the legitimacy of the connection between the existing and the new building which is being made to obviate the setback requirement. That is one of the two issues in this case. Under the circumstances, why would RCH be dilatory in challenging the Permit that authorizes such a drastic, adverse change as the elimination of light and air to one side of its condominium? DGS offers no answer because there is none.

Similarly, RCH has no reason to be dilatory in challenging DGS's evasion of the special exception requirement in U-513.1(b) for an emergency shelter, by claiming that the emergency shelter portion of the building is really an apartment house. That is the other issue in this appeal. A special exception can be approved only if the use will not tend to adversely affect neighboring properties, and to ensure this, the Board can impose a variety of conditions as "it deems necessary to protect adjacent or nearby property." X-901.2(b), 901.4. Again the question: why would RCH be dilatory in seeking such protective scrutiny once construction without it has been authorized by the Permit? DGS offers no answer because there is none.

Facts. DGS's description of RCH's interactions with the Zoning Administrator in this case is speculative, not based on personal knowledge, and is flatly mistaken. Before correcting that, however, it is noteworthy that DGS omitted one aspect of the Zoning Administrator's actions of

which it is well aware: the disclaimer appended to his March 25, 2019 email to DGS making clear that it was not a “final writing:”

This email is NOT a ‘final writing’, as used in Section Y-302.5 of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations), nor a final decision of the Zoning Administrator that may be appealed under Section Y-302.1 of the Zoning Regulations, but instead is an advisory statement of how the Zoning Administrator would rule on an application if reviewed as of the date of this email based on the information submitted for the Zoning Administrator’s review. Therefore this email does NOT vest an application for zoning or other DCRA approval process (including any vesting provisions established under the Zoning Regulations unless specified otherwise therein), which may only occur as part of the review of an application submitted to DCRA.

BZA Ex.5.

This disclaimer is unequivocal notice to all who read it that the single-building issue would be considered finally resolved for appeal purposes only “as part of the review of an application submitted to DCRA.” In this case, that “application” was the Permit. Understandably, therefore, undersigned counsel, apprising this non-final assessment, requested a meeting with the Zoning Administrator, in advance of which counsel prepared two memoranda detailing, *inter alia*, the two issues being pursued in this appeal. BZA Exs. 4, 6. The self-evident purpose of this meeting was to question the Administrator’s non-final advice given to DGS on the single-building question and to point out DGS’s improper failure to seek a special exception, all in the hope of a different outcome in evaluating the Permit application, one that would obviate an expensive Permit appeal.

Contrary to DGS’s supposition, at the meeting RCH had with the Zoning Administrator on May 10, 2019, the Zoning Administrator did not “affirm[] the Project’s zoning compliance.” Motion at 4. Rather, the Zoning Administrator was non-committal about the merits of the two issues presented in this appeal. Subsequent to that meeting and consistent with its indeterminate outcome, on separate occasions, undersigned counsel and an RCH board member contacted the

Zoning Administrator to keep apprised of when there would be a final appealable decision to ensure a timely appeal. See May 29, 2019 email (**Exhibit A**); September 24, 2019 email (**Exhibit B**).

The Law. The Motion reviews pre-Permit pronouncements by City officials and Advisory Committee deliberations (which did not include zoning matters) to buttress its claim that RCH acted untimely. Motion at 2-3. But none of these interactions constituted a BZA-appealable event under the Zoning Regulations, which limit appeals to decisions “made by an administrative officer or body . . . in the administration or enforcement of the Zoning Regulations. . . .” Y-302.1. DGS also refers to permits for the building foundation and sheeting and shoring as arguable triggers to the appeal deadline. Motion at 4, 10-13. But these subsidiary permits are not zoning determinations. As made clear in *Basken v. BZA*, 946 A.2d 356, 364 (2008), it is the building permit that “is the document that reflects a zoning decision about whether a proposed structure, and its intended use as described in the permit application, conform to the zoning regulations.”

As for BZA cases on timeliness claims adjudicated in the Court of Appeals, three cases are mentioned in the Motion as “analogous” to this case; none supports DGS’s untimeliness claim. In *Woodley Park Community Ass’n v. BZA*, 490 A.2d 628, 637 (1985), the permit appeal was brought before the BZA **more than a year** after the permit was issued, a delay the court found was not reasonable. In *Georgetown Residents Alliance v. BZA*, 816 A.2d 41,50 (2003), decided when the Board had no specific time limit on filing appeals, the court concluded that the Alliance was “chargeable with notice” in August 1996, when the challenged permits issued, but the Alliance did not appeal until seven months later. The court also found that the Alliance knew that the permits had issued.” *Id.* On that record, the court deferred to the BZA finding that the seven-month delay in filing the appeal was unreasonable. *Id.* By contrast, in this case there was no such delay in the

permit appeal; the appeal was filed during the first half of the prescribed 60-day appeal period. The Motion also refers to the inapposite *Basken v. BZA*, 946 A.2d 356 (2004). In that case, the building permit was not timely appealed and it reflected the zoning decision that the appellant sought to raise in a later appeal of a certificate of occupancy permit.

Lastly, BZA seeks support for its position from a number of BZA cases that were final at the agency level. None of these cases are helpful to its claim, and some actually demonstrate exactly why there is no timeliness problem here. Among the cited cases are eight plainly inapplicable ones where a building permit appeal was dismissed as untimely because the appeal was filed well after the 60-day time limit specified in the Zoning Regulations.¹ Two other cited cases involved untimely appeals of actions other than a building permit.²

DGS characterizes BZA Case Nos. 19374 and 18300 as “particularly relevant,” in that the appeals were dismissed as untimely despite timely appeal of the building permit, because the appeal was filed “long after the initial zoning decision had been provided.” Motion at 9. In Case No. 18300, the Board concluded that the initial zoning decision was an email from the Zoning Administrator to the property owner seeking a permit. That parallels this case, but at that point the facts diverge. In that case, the email “unequivocally stated that [the ZA] would proceed to approve the revised plans for the submitted building permit application,” and that this “effectively removed all zoning obstacles to permit issuance.” BZA Order at 7, Case No. 18300 (Nov. 8, 2011). In Case No. 19374, the initial zoning decision (or “first writing”) was a March 21, 2016 Zoning Determination Letter issued by the Zoning Administrator that “did not leave open the possibility

¹ BZA Case Nos. 17391, 17411, 17468, 17513, 17648, 18469 and 19049.

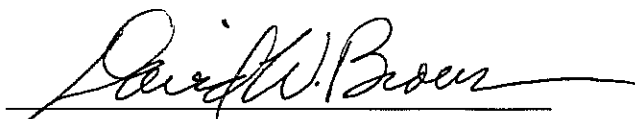
² BZA Case No. 17915 (letter affirming validity of earlier, final permit); BZA Case No. 18568 (C & O permit).

that this decision would be overturned or altered at a later stage.” BZA Order at 8, Case No. 19374 (Feb. 27, 2019).

Unlike the circumstances in these two cases, this case does not involve any sort of unequivocal communication from the Zoning Administrator that could be thought of as “effectively removing all obstacles to permit issuance.” All DGS had obtained was an advisory email from the Administrator on one of the two issues RCH subsequently presented to him for consideration. His email to DGS made explicitly clear that it was not a “final writing” and not an appealable “final decision” that DGS’s plans were zoning-compliant. BZA Ex. 5. Notably, the Board had previously issued an Order ruling that a letter from the Zoning Administrator that “does not contain the ZA’s final determination on the zoning compliance issues discussed,” is lacking in “any of the elements of finality that would permit it to be appealed or serve to bar a subsequent appeal of any such final administrative determination.” BZA Case No. 18522, Order at 3 (Apr. 30, 2013).

Much more “particularly relevant” is the Board’s recent deliberations at its Public Meeting on December 18, 2019 on Case No. 20141. At the Meeting, the Board considered and rejected DCRA’s claim that the appeal was untimely, as measured from the Zoning Administrator’s letter of October 16, 2018. That letter (**Exhibit C**) contains the same disclaimer of non-finality as BZA Ex. 5, the Zoning Administrator’s email in this case. **Exhibit D** is a copy of that portion of the transcript of the December 18, 2019 Public Meeting in which the Board discussed and explained its ruling in Case No. 20141. The Board should similarly rule in this case and deny the Motion.

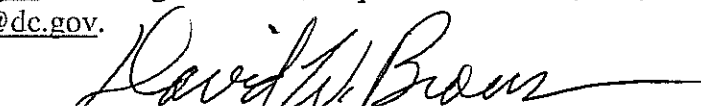
Respectfully submitted,



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401 E. Jefferson Street
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Rockville, Maryland 20850
(301) 545-6100
(301) 545-6103 – fax
Email: brown@knopf-brown.com

CERTIFICATE OF SERVICE

IT IS CERTIFIED that this 28th day of January 2020 (or as soon thereafter as the BZA approves the filing), two paper copies of the Appellant's Opposition to Motion to Dismiss, as Untimely was mailed, first class, postage prepaid to the Office of Zoning, and on this 28th day of January 2020, one copy was mailed, first class, postage prepaid or sent via email, to the applicant and owner of the building permit, Department of General Services, 1250 "O" Street, NW, Washington, DC 20009 dgs@dc.gov; and Advisory Neighborhood Commission 1B, Suite #100 B, 2000 14th Street NW, Washington, DC 20009, 1b09@anc.dc.gov; Advisory Neighborhood Commission 1B Chairperson 1B06, 1B06@anc.dc.gov; Commissioner Jen Bristol, who represents the Single Member District, 1B06@anc.dc.gov; and Hugh J. Green, Esq. 1100 4th Street, SW, 5th Floor, Washington, DC 20024 hugh.green@dc.gov.


David W. Brown, attorney for appellant

David Brown

From: Cammeron Girvin <cgirvin@gmail.com>
Sent: Wednesday, May 29, 2019 12:55 PM
To: Matt LeGrant
Cc: Megan O'Rourke; David Brown
Subject: meeting 5/10 and permit status

Dear Mr. LeGrant,

Please accept my belated thanks for meeting with me and David Brown on May 10. We know you have a lot going on, so we appreciated your attention to our concerns with the planned shelter construction at 2500 14th St NW.

As we understood from the meeting, no building permit or zoning determination letter has been issued. The online system permit tracking application appears to show this as well for the "New Building Permit" (B1908601). We certainly understand that a thorough review of these plans will take time and trust that any decision made will be publicly available.

Thank you again for your time and attention.

Sincerely,

Cammeron Girvin

1420 Clifton St NW
Board Member, Residences of Columbia Heights

David Brown

From: David Brown <brown@knopf-brown.com>
Sent: Tuesday, September 24, 2019 2:48 PM
To: 'LeGrant, Matt (DCRA)'
Cc: 'Cammeron Girvin'
Subject: FW: 2500 14th Street - Development Proposal - Discussion Points
Attachments: 2500 14th Street - Development Proposal - Discussion Points.pdf

Mr. LeGrant,

This is a further inquiry into the status of the zoning review of building permit B1908601, for what has been dubbed an "apartment house" to be erected by the Department of General Services at 2500 14th Street, N.W. As shown below, we met on this in May, where I raised several issues, including DGS's failure to seek a special exception for the emergency shelter component of this proposed construction. The Permit Tracking page of the DCRA website shows zoning review approval as of 9/3/19. Is that correct? Inclusive of your decision on the issues I raised with you? If so, I would appreciate a heads up as to when the permit might issue, so that I can ensure a timely appeal to the BZA. Otherwise, I stand ready to meet with you at your convenience if you think it would be helpful to further discuss the issues.

Thanks for your attention and especially for your cooperation in getting the Smallwood matter resolved to the satisfaction of all.

Best regards,
Dave Brown

From: Joy Johnson [mailto:joy@knopf-brown.com]
Sent: Wednesday, May 8, 2019 6:30 PM
To: matthew.legrant@dc.gov
Cc: 'David Brown' <brown@knopf-brown.com>; cgirvin@gmail.com; 'Megan O'Rourke' <megan.orourke@gmail.com>
Subject: 2500 14th Street - Development Proposal - Discussion Points

Dear Mr. LeGrant,

Please find attached a letter with an attachment from David Brown, regarding your meeting with him on Friday regarding the captioned proposal.

Sincerely yours,

Joy Noel Johnson
Office Administrator

KNOPF & BROWN
401 E. Jefferson Street
Suite 206
Rockville, MD 20850
Phone (301) 545-6100
Cell (240) 630-9800
Fax (301) 545-6103
lawfirm@knopf-brown.com



DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR

October 16, 2018

Hilmar Noble, Principal
SynRG Global Holdings
1626 North Capitol
Washington, DC 20001



GOVERNMENT OF THE DISTRICT OF COLUMBIA

Matthew Le Grant
Zoning Administrator

RE: DC FEMS Engine Co 27 - 4409 Minnesota Ave NE

Department of Consumer and Regulatory Affairs
1100 4th Street, SW
Room 3100
Washington, D.C. 20024

www.dcr.dcgov
Phone (202) 442-4576
mat.legrant@dc.gov

Dear Mr. Noble:

I have reviewed the proposed facilities for DC FEMS Engine Co 27 at 4409 Minnesota Ave NE, located on lot 846 in Square 5097 that we discussed on July 10, 2018. The project includes a Fire Station principal building, and two accessory support shelters to store fire apparatus on the long narrow lot adjoining the WMATA MetroRail tracks to the north [See Attachment A].

The lot is zoned R-2, which allows a Fire Station as a matter of right use as a "Local Government Use" under Sections B-200.2(f) and U-201.1(f).

The plans conform with the applicable minimum requirements for setbacks. There is no set back required from the northern lot line bordering the rail line which as there is no side yard setback required, under Section D-307. The project will still need to conform to all lot occupancy, building height, parking, impervious surface and all other applicable zoning standards.

Sincerely,

Matthew Le Grant
Zoning Administrator

DISCLAIMER: This letter is issued in reliance upon, and therefore limited to, the questions asked, and the documents submitted in support of the request for a determination. The determinations reached in this letter are made based on the information supplied, and the laws, regulations, and policy in effect as of the date of this letter. Changes in the applicable laws, regulations, or policy, or new information or evidence, may result in a different determination. This letter is NOT a "final writing", as used in Section Y-302.5 of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations), nor a final decision of the Zoning Administrator that may be appealed under Section Y-302.1 of the Zoning Regulations, but instead is an advisory statement of how the Zoning Administrator would rule on an application if reviewed as of the date of this letter based on the information submitted for the Zoning Administrator's review. Therefore this letter does NOT vest an application for zoning or other DCRA approval process (including any vesting provisions established under the Zoning Regulations unless specified otherwise therein), which may only occur as part of the review of an application submitted to DCRA.

Attachment: Plan Set dated 7-10-18

File: Det Let re FEMS EC 27 4409 Minnesota Ave NE to Nobel 10-16-18

Board of Zoning Adjustment

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

WEDNESDAY

DECEMBER 18TH, 2019

+ + + + +

The Regular Public Meeting convened in the Jerrily R. Kress Memorial Hearing Room, Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:30 a.m., Frederick L. Hill, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

FREDERICK L. HILL, Chairperson
LORNA JOHN, Board Member
CARLTON HART, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

ROBERT MILLER, Commissioner
PETER MAY, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALEXANDRA CAIN, ESQ
MARY NAGELHOUT, ESQ
DANIEL BASSETT, ESQ

The transcript constitutes the minutes from the Public Meeting held on December 18th 2019.

1 grant, and I don't know Mr. Moy how this kind of works. But
2 I'm going to go ahead and grant the motion to strike
3 everything in Exhibits 85 through 85B-2 other than -- except
4 for pages 1 and 2 and 27 through 29 of Exhibit 85, and I
5 guess ask for a second?

6 VICE CHAIR HART: Second.

7 CHAIR HILL: Motion has been made and seconded.
8 All those in favor say aye?

9 (Chorus of ayes.)

10 CHAIR HILL: All those opposed?

11 (No response.)

12 CHAIR HILL: Okay. So that's that. So then the
13 other issue was whether or not this was untimely or not, and
14 I guess this is something that we should -- we could talk
15 about a little more, because there's the determination letter
16 and/or building permit, right? And so what -- and this is
17 kind of for I guess a discussion even that we've been having
18 on the Board for a while, is that I've seen it where we have
19 argued that the determination letter was actually the
20 instrument that we were using to determine whether something
21 was timely or not.

22 However, this particular determination letter, at
23 the very bottom of the determination letter, and I don't have
24 it in front of me, it had language again that said this is
25 not to think that you will get a permit. So it's not

1 something that I thought that was something that the clock
2 would necessarily start, or that people would necessarily
3 know that a determination has been made.

4 And so I would think that this actually is timely
5 before us because they, the appellant, put forward the appeal
6 based upon when the building permit was set forward, and
7 therefore was timely if that's what we were using as the
8 basis for whether it was timely or not. So does anyone have
9 any other thoughts on that?

10 VICE CHAIR HART: Yeah, only that -- yeah. I
11 think that the -- in this case and other cases, we looked at
12 whether or not when was a party understanding that there was
13 a decision that had been made by the Zoning Administrator.
14 The determination letter was not something that was actually
15 sent out to anybody. I mean this was something that was kind
16 of put in the file for the -- for the appellee I guess, the
17 folks that are trying to build. I guess it was the D.C.
18 government, DGS, that are trying to build this.

19 The building permit was the first time that the
20 applicants or the appellants were aware that there was a
21 -- that this was actually something that has been -- that a
22 decision had been made and that they could kind of act upon
23 it. You know, they made their appeal within a timely fashion
24 after that building permit was issued.

25 So I think if you look at that part of it, I think

1 we can say yes, that it is -- it was timely filed. So the
2 first writing would have been the permit, and then the actual
3 appeal would have been filed within that time frame to be
4 able to be considered timely as it being filed. So I would
5 agree. I think that it is timely, but it is a little bit
6 confusing.

7 I think that there was some discussion that had
8 gone on between -- or at least some understanding between the
9 community and DGS about this particular facility coming. It
10 just wasn't clear as to when that was finalized and for the
11 community. I think that the building permit is that one
12 period that kind of -- or that one point in time that you can
13 look back and say well this is something that was definitely
14 happening, as opposed to some conversation that was going on,
15 because it seems like there was some conversation going on
16 prior to that.

17 But this building permit I think is that kind of
18 point in time, to be able to look back and say yeah, this is
19 a time that we can count from. They were within the 60 day
20 barely, but within that 60 day time frame. So I think that
21 I do agree that it is timely.

22 MEMBER JOHN: So I agree with everything so far,
23 and for me the critical issue is that the determination
24 letter itself, as you noted Mr. Chairman, stated that it is
25 not -- and this the exact language, I believe. It is not a

1 final decision of the Administrator that may be appealed
2 under Section Y302.1, and is an advisory statement.

3 So the DCRA and the property owner can't have it
4 both ways. Here, DCRA says explicitly that this is an
5 advisory opinion, and so based on that statement,
6 notwithstanding all of the history of activity between the
7 property owner and the ANC and DCRA, I don't think that that
8 activity is sufficient notice that would prevent the appeal
9 from going forward.

10 And so I believe that, because the appeal was
11 filed within 59 days of the issuance of the permit, that the
12 appeal was timely.

13 ZONING COMMISSIONER MILLER: I would agree with
14 my colleagues on the Board with everything that they've said.
15 I would acknowledge that the appeal refers to the
16 determination letter, but I think for purposes of this case,
17 for all the reasons that my colleagues have said, that it's
18 the permit that gave official notice to the ANC that -- from
19 DCRA. So I think for purposes of this case, that's what's
20 being appealed here.

21 I just think we can go forward with the merits of
22 the case opposed to dismissing it on timeliness.

23 CHAIR HILL: Okay.

24 MEMBER JOHN: I agree on that point, and it's
25 something that I struggled with as well. But in reading the

1 statement of appeal, it correctly cited the regulatory
2 provisions that were at issue. And so I did not think, as
3 you did, that that would prevent the appeal from going
4 forward.

5 ZONING COMMISSIONER MILLER: I agree.

6 CHAIR HILL: Okay. And Mr. Moy, actually I know
7 we have a training coming up, but can we look at again the
8 first writing rule again a little bit, because I know that's
9 what happened with this, and I think that there's a little
10 bit -- we just like to be a little bit more clear.

11 I'd like to be a little more clear as to again the
12 determination letter versus the building permit because we
13 have had arguments both ways, and there's things in the
14 regulations that state that, you know, whether you should
15 have had had notice, which is also what the argument was
16 before us, was that there was the determination letter and
17 there was plenty of information to everyone around that this
18 was actually happening.

19 So it's a little bit -- it can be a little
20 confusing, and I think that everybody should know what's
21 going on including us. So --

22 ZONING COMMISSIONER MILLER: I've seen a draft
23 agenda of that training session, and that is on the agenda.

24 CHAIR HILL: Oh great, wonderful.

25 ZONING COMMISSIONER MILLER: I don't know when it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 was happening.

2 CHAIR HILL: Yeah. When is that happening Mr.
3 Moy?

4 MR. MOY: It's going to be a date on February sir.

5 CHAIR HILL: Okay, all right. Okay. So then I'm
6 going to go ahead and then dismiss the motion, and I don't
7 know which one, I think the property owner and DCRA, that
8 this was untimely, and just on consensus, okay. So
9 everyone's nodding their heads yes. So we're going to
10 dismiss that motion, okay.

11 So now to the merits of the appeal. I think that
12 the appellant seemed to be bringing up issues under
13 D5201.3(b), as well as U202.1(i). With regard to D5201.3(b),
14 it seemed that that was like special exceptions for accessory
15 building uses or accessory buildings, and I didn't think that
16 that -- that D5201.3(b) had anything to do with the appeal
17 at all. I mean it seemed like it was just, you know,
18 misplaced information.

19 So I mean I think that that's just -- I wouldn't
20 be in agreement, that this is the right place for that. I
21 mean I do understand what they're bringing in terms of the
22 -- so appeal. So anyway, so D5301.3(b) I didn't think
23 applied. So I did think in terms of the discussion about
24 U202.1(i), where they're speaking to whether or not this fire
25 station is kind of --