

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

Appeal by Chain Bridge Board/University Terrace

BZA Appeal No. 20221

**D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS’
OPPOSED MOTION TO DISMISS**

The D.C. Department of Consumer and Regulatory Affairs (DCRA) respectfully requests that the Board of Zoning Adjustment (“Board”), dismiss the Appeal, and in support, states as follows¹:

Appellant, Chain Bridge Board/University Terrace Preservation Committee (“Chain Bridge” or “Appellant”), appeals an Office of Tax and Revenue (“OTR”) Assessment and Taxation Plat (“A&T Plat”) recorded in the land records on or about October 23, 2019. The A&T Plat is in reference to Lots 841-847 in Square 1425 located near Chain Bridge Road, N.W. (the “Property”). According to the Appellant, the A&T Plat “violates the zoning regulations.”

However, the Appeal must be dismissed as the A&T Plat does not constitute either a “first writing” or “final determination” by the Zoning Administrator. Further, the A&T Plat was created not by the Zoning Administrator, as erroneously claimed by the Appellant, but by OTR. In short, the Board lacks jurisdiction to hear this Appeal and it must be dismissed.

A. The Appeal Must be Dismissed as Notice Was Not Given to the Office of Tax and Revenue As Required Under Subtitle Y § 500.4 (c) and § 504.1(c).

The basis of this Appeal rests on an A&T Plat issued by the OTR, the action or decision of a public agency being challenged. However, no notice was provided to the OTR as required under

¹ DCRA Counsel, Hugh Green, sought consent to this Motion from counsel for Appellant and counsel for Owner via e-mail on March 11, 2020. On the same day, the parties responded as follows: Appellant does not consent to the Motion *en toto*. The Owner does not consent to the Motion on claims related to the (1) lot width; (2) street frontage; and (3) need for special exception subdivision approval.

the zoning regulations. Specifically, Subtitle Y § 501.1 states, in relevant part: “Upon acceptance of a zoning appeal, the Director shall provide a notice of filing to: . . . (c) **The administrative official or public agency whose decision is the subject of the appeal. . .**” (See, Subtitle Y § 501.1(c)) (emphasis added).

With respect to notice of a public hearing of an appeal, Subtitle Y § 504.1(c) requires: “Not less than forty (40) days before the public hearing, the Director shall provide notice of the public hearing by: . . . (c) **Providing a copy of the notice of public hearing to the administrative official or government agency** whose decision is the subject of the appeal . . . (See, Subtitle Y § 504.1(c)) (emphasis added).

Turning to this matter, the Appellant’s appeal is founded *entirely* on the A&T Plat issued by the OTR, the governmental agency whose decision is being challenged.² In an examination of the BZA record, the Board has **not** notified OTR either: a) of the filing of this Appeal as required under Subtitle Y § 501.1(c); or b) notice of the hearing in violation Subtitle Y § 504.1(c). (See, BZA Appeal 20221 Docket). *At a minimum*, the Appeal must be dismissed for failure to notify the governmental agency whose decision is the subject of the Appeal.

B. The Appeal Must be Dismissed as the Board Lacks Jurisdiction to Review the A&T Plat As It Does Not Constitute An Order, Requirement, Decision, Determination, or Refusal Made by the Zoning Administrator.

The Appellant is not appealing and cannot appeal the Zoning Administrator’s letter because: 1) it was drafted in 2018, far outside the 60-day limitation under Subtitle Y § 302.2; and 2) the Zoning Administrator’s Determination letter contains a conspicuous and explicit disclaimer stating it may not be considered a “final decision” under Subtitle Y § 302.1.³

² The Appellant is not appealing the Zoning Administrator’s Determination letter, and for reasons stated below, the Appellant is unable to appeal that letter, *see infra*.

³ BZA Appeal 20221 Exhibit- 2B Statement of Appeal: Tab B (DCRA Ltr. Nov. 13, 2018): “DISCLAIMER: This letter is issued in reliance upon, and therefore limited to, the questions asked, and the documents submitted in support

As stated by the Appellant, the A&T Plat rests solely on a separate and independent governmental agency—OTR. Subtitle X §1100.2 states:

The Board of Zoning Adjustment shall hear and decide zoning appeals where it is alleged by the appellant that there is an **error in any order, requirement, decision, determination, or refusal made by the Zoning Administrator** or any administrative officer or body, including the Mayor, in the administration or enforcement of the Zoning Regulations. Subtitle X §1100.2 (emphasis added).

Turning to this matter, the A&T Plat is not a decision or order by the Zoning Administrator. (*See*, Subtitle § Y 1600(a)). OTR is a separate entity from DCRA, of which the Office of the Zoning Administrator is a part. (*See*, Subtitle § Y 1600(a)). Further, there is no determination or refusal by the Zoning Administrator contained in the A&T Plat at issue.

As the Appellant plainly states, the A&T Plat was “issued” by OTR not the Zoning Administrator. The Zoning Administrator did not create, draft, review, or record the A&T Plat and the Appeal is devoid of any factual claim in that respect. Nor is there any indicia on the document that the Zoning Administrator was involved in its creation or approval. In fact, in creating the A&T Plat Application, there is no reference anywhere to any zoning review or zoning approval. (*See*, DCRA Exhibit 1-OTR Division of Lots Request Application).

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.”

C. The Appeal Must be Dismissed as the A&T Plat Is Ambiguous and Not a “First Writing” Under Subtitle Y § 305.1,

Under Subtitle Y § 305.1, in order to serve as the “first writing” of an administrative decision for review by the Board, that decision must be an **unambiguous determination**.⁴ (*See, Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008) (finding revised building permit ambiguous and, therefore, not the administrative decision complained of because it contained language “subject to zoning approval”); *see also*, BZA Appeal No. 18300, Lawrence M. and Kathleen B. Ausubel (finding email to be the administrative decision complained of because “[t]he wording of the [Z.A.’s] email was crystal clear”); BZA Appeal No. 18793, Neighborhood Commission 2A (the issuance of a sign permit was an appealable decision, rather than the earlier issuance of a prior determination letter and building permit, because neither the letter nor building permit clearly signified a decision with regard to the sign’s compliance and approval); BZA Appeal No. 18522, Washington Harbour Condominium Unit Owners’ Association (dismissing an appeal of Z.A.’s determination letter as it did not contain 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).

In determining whether a decision is a “first writing,” the Board has considered factors such as whether the decision is specific to the property at issue, whether the writing is unambiguous in communicating the decision, and whether the language of the writing suggests that the decision is subject to change. *See*, BZA Appeal No. 19374 of Dupont Circle Citizens’ Association.

⁴ Subtitle Y § 302.5 states: A zoning appeal may only be taken from the first writing that reflects the administrative decision complained of to which the appellant had notice. No subsequent document, including a building permit or certificate of occupancy, may be appealed unless the document modifies or reverses the original decision or reflects a new decision.

In this instance, the Board cannot find that the A&T Plat contains an unambiguous “zoning decision” by the Zoning Administrator. It was prepared and drafted by OTR, an entirely different governmental agency. The Zoning Administrator did not review, comment on, or approve the A&T Plat. The record is devoid of any evidence that the OTR made an independent “zoning determination” to warrant an appeal to this Board.

In fact, it is unclear on its face that the A&T Plat contains *any* relevant zoning decision. *See, Schonberger v. D.C. Bd. of Zoning Adjustment*, 940 A.2d 159, 161 n.2 (D.C. 2008) (BZA’s determination that a building permit “contained the relevant zoning decision”). Accordingly, the Appeal must be dismissed.

D. The Appeal must be Dismissed as the Appellant’s Requested Relief is not mandated by Any Zoning Regulation.

In its prayer for relief, the Appellant asks that the DCRA “revoke” the A&T Plat. However, as has been stated and supported by the evidence, the Zoning Administrator did not prepare the A&T Plat or record it. Moreover, the Appellant has not cited to any code provision or zoning regulation that empowers the Zoning Administrator to “revoke” an A&T Plat drafted and approved by the OTR. Accordingly, the Appeal must be dismissed.

CONCLUSION

For the foregoing reasons, DCRA respectfully requests that the Board dismiss this appeal.

Respectfully submitted,

/s/ Esther Yong McGraw

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General Counsel

Department of Consumer and Regulatory Affairs

Date: 3/11/20

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CERTIFICATE OF SERVICE

I certify that on March 11, 2020 a copy of the foregoing was served via electronic mail to:

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