March 23, 2020

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Frederick L. Hill, Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Suite 200S
Washington, DC 20010

Re: BZA Case No. 20221
Property Owner's Opposition to DCRA's Motion to Dismiss

Chairperson Hill and Honorable Members of the Board:

On behalf of Dorchester Associates, LLC ("Owner"), the owner of the property that is the subject of this appeal, please find enclosed an opposition to DCRA's Motion to Dismiss. Thank you for your consideration of this matter.

Sincerely,

COZEN O'CONNOR

BY: Meridith H. Moldenhauer

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2020, a copy of the foregoing Opposition to Motion to Dismiss was served, via electronic mail, on the following:

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Meridith H. Moldenhauer

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF **BZA CASE NO. 20221**
CHAIN BRIDGE ROAD/UNIVERSITY
TERRACE PRESERVATION COMMITTEE

DORCHESTER ASSOCIATES, LLC'S OPPOSITION TO DCRA'S MOTION TO DISMISS

Dorchester Associates, LLC ("Owner"), the owner of the subject property, files this opposition to Respondent Department of Consumer and Regulatory Affairs' ("DCRA") Motion to Dismiss. The Preservation Committee had knowledge of the Zoning Administrator's written determination letter dated January 7, 2019 ("Determination Letter") and, with or without the disclaimer, the plat of computation ("Plat") codifies and is a final act that is appealable. The Determination Letter and the Plat are appealable zoning decisions concerning the application of lot width and frontage requirements. The Board of Zoning Adjustment is authorized to review this zoning decision for compliance with the Zoning Regulations. Therefore, the Board is within its authority to adjudicate this appeal.[1]

If the appeal is dismissed, it will perpetuate uncertainty over the Owner's property while the Owner awaits an "appealable" zoning decision at some unknown later date. The Owner will be forced to spend time and money developing plans and obtaining permits with a cloud over the property and little assurance that the plans can come to fruition. Whereas, the Board has basic questions of lot width and lot frontage that it can resolve now.[2] There is a clear written decision by the Zoning Administrator applying the Zoning Regulations, a formal action taken by Office of

[1] As acknowledged in DCRA's Motion to Dismiss, the Owner opposes dismissal of three of the four claims asserted in this appeal concerning (1) lot width, (2) street frontage, and (3) theoretical lot subdivision. As to the fourth claim concerning tree protections in the R-21 zone, the Owner consents to dismissal, having filed its own Motion to Dismiss that claim. *See* Ex. No. 20.

[2] The Owner agrees with DCRA that compliance with other aspects of the Zoning Regulations, including tree protection, may be appealable in the future if there has been no zoning decision on such a matter. However, the lot dimensions should be resolved now and is ripe for a Board review.

Tax and Revenue ("OTR"), the necessary parties are participating, and the issues have been fully briefed. Accordingly, the Board should take one of the following two actions:

1. Find OTR's approval of the Plat and the Zoning Determination Letter represent an unambiguous zoning decision as to lot width and frontage that should be reviewed on its merits; or

2. In the alternative, the BZA could find the Determination Letter, on its own, is an appealable zoning decision, but that this appeal was not timely filed and should be dismissed.[3]

ARGUMENT

I. The Board Has Jurisdiction to Review Lot Width and Frontage

DCRA argues the Plat "is not a decision or order by the Zoning Administrator," but, instead, an action by OTR. DCRA posits that the appeal must be dismissed because the Plat does not reflect a zoning decision to be reviewed.

The Board can conclude the Plat is a first writing that can be appealed as to issues of lot width and frontage. The Board's decision as to whether there is an appealable "first writing" is a fact-specific inquiry that must be reviewed on a case-by-case basis. In *Basken v. D.C. Bd. of Zoning Adjustment*, the Court of Appeals reiterated that an appealable decision is not tied "to the issuance of a specified type of notice." *See Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 366 (D.C. 2008); *see also* BZA Case No. 18300. Under Subtitle Y § 302.1, the only requirement is that there is a decision or determination made by an administrative officer or agency in the administration or enforcement of the Zoning Regulations.

The Board has previously found it has jurisdiction to review zoning decisions that are made in connection with actions taken by other agencies. In BZA Case No. 19023 (the "River Inn

[3] In its Prehearing Statement (Ex. No. 21, pgs. 4-6), the Owner set forth the Preservation Committee's knowledge of the Determination Letter and its failure to timely file this appeal. Further, in DCRA's Motion to Dismiss, DCRA "opens the door" to the timeliness issue, noting the Determination Letter cannot be appealed because "it was drafted in 2018, far outside the 60-day limitation under Subtitle Y § 302.2." *See* Ex. No. 22, pg. 2.

Case"), the Board reviewed the Zoning Administrator's decision to allow the property owner to obtain a public space permit in connection with an outdoor café. A copy of BZA Order 19023 is attached at **Tab A**. DCRA sought to dismiss the appeal by arguing the appropriate forum to challenge the issuance of a public space permit is through the Public Space Committee. *See* **Tab A**, pg. 2. The Board in the River Inn Case rejected this argument, finding that the "Zoning Administrator often has overlapping jurisdiction with different agencies." *See id.* Since the issuance of the public space permit "triggered" a zoning review, the Board had jurisdiction to review the matter. *See id.*

The River Inn Case precedent contradicts DCRA's assertion that there is no zoning decision in this matter. It is undisputed that the Owner actively sought the Zoning Administrator's review of the Plat, including the lot dimensions, to ensure the proposed subdivision complied with the Zoning Regulations prior to submission to OTR. If the Owner did not have interest in obtaining a written zoning decision, then it could simply have gone directly to OTR without the Determination Letter. The Plat reflects a direct application of the Zoning Regulations because the subdivision reviewed by the Zoning Administrator is substantially similar to the Plat approved by OTR. Thus, the issuance of tax lots reflected in the Plat are a final agency action codifying the zoning decisions in the Determination Letter.

The Court of Appeals precedent and the River Inn Case dictate that the Board has jurisdiction over any agency provided there is a zoning decision to review. The Preservation Committee is not challenging a statute or regulation that governs OTR, but, instead, the Preservation Committee is challenging the validity of the zoning decisions made by the Zoning Administrator in connection with the approved Plat. The Plat is issued by a D.C. agency, shows the lot dimensions, and illustrates zoning compliance as outlined in the Determination Letter.

II. The Determination Letter and the Plat Create an Unambiguous Zoning Decision

Similarly, DCRA argues the Plat, on its face, is "ambiguous" as to a zoning decision. DCRA posits that the Determination Letter should be ignored. This position is incorrect in light of Board precedent.

BZA Case No. 18300 (the "Ausubel Case") is the Board's seminal case defining an "unambiguous writing." A copy of BZA Order No. 18300 is attached at **Tab B**. In the Ausubel Case, the appellants argued an email from the Zoning Administrator was ambiguous as to a zoning decision and they were entitled to wait until a building permit was issued to appeal the zoning decision. *See* **Tab B**. The Board rejected this argument, finding email was unambiguous because it expressed a zoning decision that "cleared the way for the issuance of a permit." *See* **Tab B**, pg. 7. The Board noted that the Zoning Administrator had sought input from the property owner, the appellants and other District agencies. *See* **Tab B**, pg. 8. As such, the Zoning Administrator had been "fully briefed" on the zoning issues and his email "unequivocally" stated he would approve plans submitted for the building permit application, which "effectively removed all zoning obstacles to permit issuance." *See* **Tab B**, pg. 7. This placed the appellants on notice that a clear zoning decision had been made "on the very issue" they had appealed. *See* **Tab B**, pg. 8. By comparison, the Board in the Ausubel Case pointed to *Basken* where the building permit "facially suggested" no zoning decision had been made. *See id.* at pg. 8. As such, the Board concluded the zoning decision was unambiguous and was appealable.

Together, the Determination Letter and the Plat represent an unambiguous writing concerning the Plat's zoning compliance with lot width and frontage requirements. The Zoning Administrator was "fully briefed" as reflected in the Determination Letter, which incorporates a

background and description of the Property, a review of relevant Zoning Regulations, and all required reasoning and logic to conclude the proposed subdivision complies with the Zoning Regulations, including as to lot width and street frontage. As in the Ausubel Case, the Zoning Administrator met with both the Owner and the Preservation Committee. In the Determination Letter, the Zoning Administrator "unequivocally" states

> The Project on the Property **complies** with the R-21 Zone District requirements, and the Project may be **permitted as a matter of right**. Accordingly, when the Subdivision application for the Project is filed, **my office will sign off on the plat** drawings that are consistent with the lot dimensions so as long as the plat is consistent with the plans attached to this letter. (emphasis added) *See* Ex. No. 21B.

Thus, the Determination Letter "removed all zoning obstacles" for the Plat. Upon issuance of the Determination Letter, the Owner submitted a substantially similar subdivision to OTR, which was ultimately approved and issued as the Plat. A clear line can be drawn between the Determination Letter and the Plat in terms of a decision on lot width and frontage. The combined action taken by the Zoning Administrator to issue the Determination Letter and OTR to issue the Plat is unambiguous and represents a clear zoning decision.

Further, DCRA misapplies Board precedent, attempting to utilize the "ambiguity" rule as a shield. However, these cases were argued in the context of whether an appeal was <u>timely</u> filed, not whether the Board had <u>jurisdiction</u> to review a zoning decision. *See* BZA Case Nos. 18300 (Ausubel); 18793 (ANC 2A); 18522 (Washington Harbour Condo Assoc.); and 19374 (Dupont Circle Citizens Assoc.). The appellants argued against dismissal for timeliness because an earlier writing was "ambiguous," and did not begin the time-frame to file a zoning appeal. The "ambiguity" rule is not meant to protect the Zoning Administrator from an appeal, but, instead, is meant to avoid penalizing a member of the public where it is unclear when a formal zoning decision has been made.

Here, there is no such concern because the Preservation Committee is not asserting any ambiguity. Instead, the Preservation Committee is able to challenge a clear and direct application of the Zoning Regulations set forth in the Determination Letter and reflected in the Plat. In response, DCRA's prehearing statement only incorporates substantive arguments that are expressed in the Determination Letter. Thus, the Determination Letter and the Plat are unambiguous and validly depict the lot width and frontage as it concerns the application of the Zoning Regulations. Together, the Determination Letter and Plat are an unambiguous first writing representing an appealable zoning decision.

III. The Determination Letter is an Appealable First Writing Because the Disclaimer on the Determination Letter Is Not Enforceable

DCRA argues the Zoning Administrator did not make a "decision" under Subtitle Y § 302.1 because there is a disclaimer on the Determination Letter. Yet, the Zoning Regulations are clear that the Board has the authority to look at the global facts of a particular decision and decide whether it constitutes an appealable first writing under Subtitle Y §§ 302.1 and 302.5. Here, the Board should disregard the disclaimer and find the Determination Letter can be appealed.

The Zoning Administrator's authority is limited to interpreting and applying the Zoning Regulations, as written, in connection with applications submitted to DCRA, including for building permits, certificates of occupancy and subdivisions. *See Kalorama Citizens Assoc. v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393, fn. 5 (D.C. 2007); *see Tenley and Cleveland Park Emergency Committee v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, fn. 22 (D.C. 1988). The Zoning Act and the Zoning Regulations expressly establish the Board of Zoning Adjustment has jurisdiction to review the Zoning Administrator's decisions. *See* D.C. Code § 6-641.07(f); *see* Subtitle Y § 302.1. This jurisdiction is reiterated by the D.C. Court of Appeals, stating "our case law specifically recognizes that a letter from DCRA or the Zoning Administrator conveying a zoning

decision may be an appealable decision." *See Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 366 (D.C. 2008).

In the context of an appeal, the Zoning Regulations give the Board the authority to determine what constitutes the "first writing that reflects the administrative decision complained of." *See* Subtitle Y § 302.5. To allow the Zoning Administrator to determine what is and is not subject to an appeal would be contrary to the plain language of the Zoning Act and the Zoning Regulations and would infringe on the Board of Zoning Adjustment's ability to review the Zoning Administrators decisions. Therefore, it is the Board's duty in each and every case to evaluate the generic disclaimer and determine if in that case the disclaimer applies. We submit that here, the Board can find the decision made by the Zoning Administrator in the Determination Letter has not and will not change from 442 days ago when the Determination Letter was issued, 287 days when the Plat was approved, and into the future if and when a building permit is filed. Further, where a statute or regulation does not allow for a waiver of statutory rights, such a waiver is not permissible. *See Borger Mgmt. v. Nelson-Lee*, 959 A.2d 694, 697 (D.C. 2008). In the *Borger* case, the D.C. Court of Appeals considered an analogous situation where a landlord claimed a tenant waives its right to a second notice to cure for a repeated violation. The Court rejected this argument, clarifying that "neither the statute nor the regulations provide for such a waiver of the tenant's opportunity to correct a violation once the tenant has sufficiently cured." *See id.*

Here, DCRA argues that it can unilaterally waive the Preservation Committee's right to appeal the Determination Letter.[4] Yet, the Zoning Act nor the Zoning Regulations give the Zoning Administrator the authority to do so. As such, the waiver in the Determination Letter is not

[4] This argument is made despite at least four recent cases where the Board has found a determination letter or email from the Zoning Administrator is an appealable writing. *See e.g.* BZA Appeal Nos. 19374, BZA Case No. 18300, BZA Case No. 18469, BZA Case No. 19049.

enforceable on its face (or needs to be evaluated on a case-by-case basis in each individual case by the BZA) and cannot be used to limit the Board's jurisdiction to review zoning decisions made in connection with the Determination Letter and the Plat without a specific review by the Board.

Therefore, in this situation and based on the facts before the Board, the Determination Letter is, indeed, an appealable first writing. The Determination Letter incorporates a detailed review of the Owner's proposed subdivision as well as the direct application of the Zoning Regulations. Absent the unenforceable disclaimer, the Board has jurisdiction to review the zoning decisions in the Determination Letter, and DCRA's Motion should be denied. In turn, the Board should find that the appeal of the Determination Letter was not timely filed.

IV. The Office of Zoning Gave Proper Notice

The Office of Zoning gave proper notice of this appeal in accordance with Subtitle Y §§ 500.4 and 504.1(c). The Zoning Regulations require that notice be given to the "administrative official or government agency whose decision is the subject of the appeal." *See* Subtitle Y §§ 500.4 and 504.1(c). Here, the Zoning Administrator is the administrative official whose decision is the subject of the appeal. Although OTR took an "official action" to record the Plat, the Zoning Administrator is the only official who has interpreted and applied the Zoning Regulations with respect to lot width and frontage. The Zoning Administrator made the substantive decision as to how many lots could be created through the Plat. The substance of the appeal arises from the Zoning Administrator's decision in the Determination Letter, which was reinforced by the filing of the Plat. Thus, notice was properly issued to the Zoning Administrator, and is not required to be sent to OTR.

V. DCRA Can Provide the Relief Requested by the Preservation Committee

DCRA argues the appeal should be dismissed because DCRA cannot "revoke" the Plat. This argument is incorrect for two reasons. First, the Board has broad authority to provide relief in the event it determines the Zoning Administrator erred. Under Subtitle X § 1101.1, the Board

> may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from, or may make such order as may be necessary to carry out its decision or authorization, and to that end shall have all the powers of the officer or body from whom the appeal is taken.

Therefore, the Board is not limited to any relief requested by the Preservation Committee. Instead, the Board can "make such order as may be necessary to carry out its decision."

Second, the Board can determine the Zoning Administrator erred and the Plat is not compliant with the Zoning Regulations. DCRA outlines in its own prehearing statement how the Plat complies with the Zoning Regulations. *See* Ex. No. 23. Functionally, the result of such a ruling will be that the Owner must either proceed with a subdivision that is not compliant with zoning or revise the subdivision and submit a new plat of computation to OTR. As such, the Preservation Committee can obtain the relief requested.

VI. If This Appeal is Dismissed, the Preservation Committee Will Be Time-Barred From Filing Another Appeal

If the Board dismisses this appeal, then it is conflicting with its own regulations because the Plat is the first agency decision that codifies the zoning decisions complained of. As outlined in DCRA's Prehearing Statement, "though the lots may be asymmetrical, they fully comply with the zoning regulations." *See* Ex. No. 23, pg. 2. Therefore, DCRA stands behind its substantive zoning decision and this is the proper time to address the decision concerning lot width and frontage on their merits.

If the Board delays a decision on the merits, then the Preservation Committee may lose its ability to challenge the merits of the zoning decisions. In the event this appeal is dismissed, and the Owner later obtains a building permit for the subdivision, the Preservation Committee would have already known of the zoning decision complained of for more than 60 days. Thus, under Subtitle Y § 302.2, any subsequent challenge to the zoning decisions in the Determination Letter and Plat would be time-barred.

CONCLUSION

The Determination Letter and the Plat are, separately and together, appealable first writings because they represent a clear and unambiguous application of the Zoning Regulations as to lot width and frontage. As a result, the Board has jurisdiction to review the Determination Letter and the Plat for compliance with the lot width and frontage requirements. Any delay on an adjudication of this appeal creates unreasonable and unnecessary uncertainty for the Owner, and removes the Preservation Committee's ability to challenge the zoning decision on its merits. Accordingly, The Board should take one of the following two actions:

1. Find OTR's approval of the Plat and the Zoning Determination Letter represent an unambiguous zoning decision as to lot width and frontage that should be reviewed on its merits; or

2. In the alternative, the BZA could find the Determination Letter, on its own, is an appealable zoning decision, but that this appeal was not timely filed and should be dismissed.

Respectfully submitted,
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