Docket Item #1
BZA Case #2010-0009

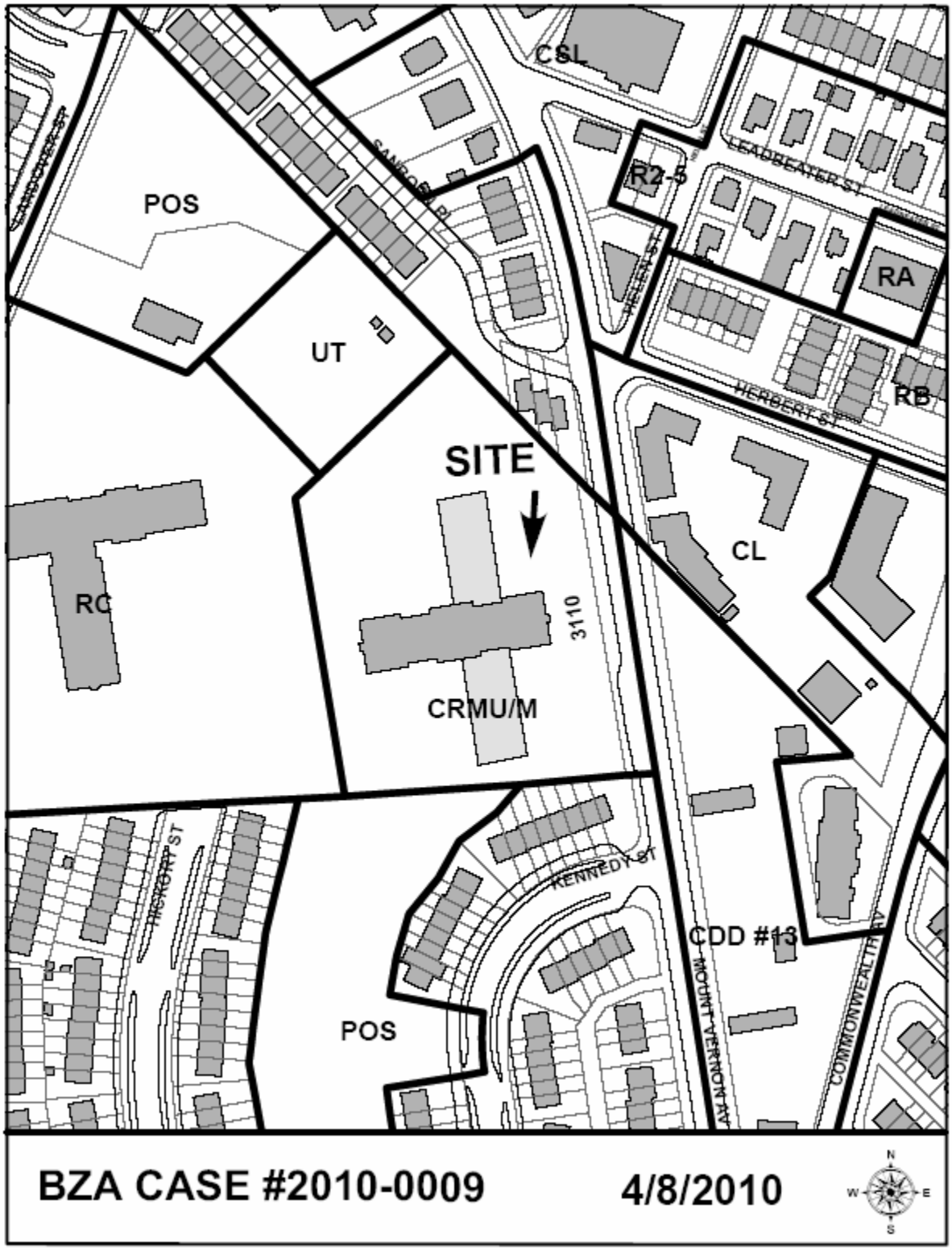
Board of Zoning Appeals
April 8, 2010

Address: 3110 Mount Vernon Avenue
Zone: CRMU/M
Appellant: Avenue Food Company, d/b/a Del Merei Grille

Issue: Appeal of a determination of the Director of the Department of Planning and Zoning ("Department") dated December 30, 2009 and posted on the Property on January 8, 2010 that the application for Master Plan Amendment 2009-0005, Rezoning #2009-0003, Development Special Use Permit 2009-0006, Transportation Management Plan #2010-0002, and Vacation #2009-0001 (collectively, the "Application") was complete.

Summary of Case on Appeal

This case concerns the appropriate and required information on a development application filed with the Department of Planning and Zoning. The Director determined that the Application, filed by the owner of 3110 Mt. Vernon Avenue (the "Property"), UDR Developers, Inc ("Owner"), requesting renovation and expansion of the residential and commercial building located on the property, was complete. The Appellant asserts that the completeness determination was incorrect because it, one of several commercial tenants on the ground floor of the building, was not identified on the Application as being part of the applicant proposing to redevelop the property. The Director rejects the argument, relying on section 11-407, which identifies those owners required to be included, but does not require the identity of all tenants in a building that is the subject of redevelopment. The Application was accepted and has been successfully and thoroughly processed. This particular development case was treated consistently in terms of application requirements, review and processing as all other development applications are and have been for twenty years. The Application is awaiting the outcome of this appeal in order to be heard by the Planning Commission and City Council. Public hearings have been delayed and are now scheduled for May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Discussion

A. The requirements of Section 11-406(A) requiring information about the applicant were met, and therefore, the Application was correctly deemed complete by the Director

Section 11-407(B)(2) of the Zoning Ordinance requires that no application shall be deemed complete unless all of the requirements of Section 11-406 have been met. The Appellant indicates that the requirements of Section 11-406(A) were not met and therefore the Application should not have been accepted. Section 11-406(A) states:

> "(A) An application for preliminary site plan approval shall be submitted by the owner, contract purchaser, lessee or other party having a legal interest in the subject property on such forms as the director shall prescribe. It shall include a clear and concise statement identifying the applicant and, if different, the owner of the property, including the name and address of each person or entity owning an interest in the applicant or owner and the extent of such ownership interest unless any of such entities is a corporation or a partnership, in which case only those persons owning an interest in excess of ten percent in such corporation or partnership need be identified by name, address and extent of interest. For purposes of this section 11-406(A), the term ownership interest shall include any legal or equitable interest held at the time of the application in the real property which is the subject of the application."

The Director of the Department, through her designee Katye Parker, Urban Planner, correctly deemed the Application complete in her letter to the Owner dated December 30, 2009. The Application was reviewed for completeness and it was determined that the requirements of Section 11-406 were met and that the Application was adequate for processing. The requirements of 11-406(A) were met for the following reasons.

First, Section 11-406(A) requires that the applicant for preliminary plan approval shall be an "…owner, contract purchaser, lessee, *or* other party having a legal interest in the subject property." (emphasis added) This section is tantamount to a standing requirement identifying those parties entitled to file an application. As the owner of the Property, the Owner was properly identified as a valid applicant.

Second, Section 11-406(A) requires additional information about the *applicant* including the "…name and address of each person or entity owning an interest *in the applicant* or owner and the extent of such ownership interest…." (emphasis added) This section then further defines ownership interest in the applicant to include …"any legal or equitable interest held at the time of the application in the real property which is the subject of the application." The information is typically only required from that person or entity who has control over the property as a whole which is typically the applicant on the application and the owner of the property if it is different from the applicant.

Appellant argues that its leasehold agreement gives it an "ownership interest" in the Property for the purposes of filing this Application. However, the Appellant's legal interest in the Property is a leasehold to a portion of the Property, not to the Property in its entirety. Its

legal interest does not control the use of the whole Property. Further, the Appellant's legal interest is a contractual interest between the Owner and the Appellant as a lessee. Regardless of whether the City Council approves the Owner's development application, the Owner is still legally required to abide by their contract with the Appellant. The approval of the Application does not change that obligation in any way.

As to the terms of the lease and whether this particular tenant has sufficient "ownership interest" to rise to the level of an owner for purposes of filing the application, the Department is ill equipped to make factual determinations on a tenant by tenant basis for this purpose. If the appellant's argument is correct, the Department would either have to require that all tenants be included in the application, a particularly unwieldy proposition and something clearly not required by the language of the ordinance, or the Department would be required to determine what level of ownership each tenant has and risk incorrect decisions on each application and as to each tenant. This burden is not intended to be on the Department.

Lastly, as a practical matter, even if the Appellant (and every other tenant in this Property) is required to be disclosed on the Application, there is no provision in the Zoning Ordinance that requires a valid applicant to get the consent of any other person or entity that may have an ownership interest in a portion of the property. Therefore, the result of requiring the Appellant to be disclosed on the Application in this case will be the refilling of the Application with Appellant listed in the disclosure section, and the Application would then proceed as it currently is. Additionally, if Owner is required to disclose this lessee, it would also be required to disclose all other lessees on the Property including the lessees of the 187 residential rental units within the existing building as well as several retail tenants. This result would be impractical, unnecessarily burdensome and contrary to the intent of the application requirements.

Appellant also argues that a factor to be considered by the Planning Commission when considering development applications comes from Section 11-410(U) of the Zoning Ordinance and requires, as Appellant notes, that "[a]dequate provision shall be made to protect other lands, structures, person and property." While this is indeed a factor to be considered by the Planning Commission in its consideration of an application, it is not relevant to the question of whether this Application is complete.

B. Standard of Review: Deference to the Director

The City Charter and Zoning Ordinance delegate to the Director the authority and responsibility to administer and enforce the Zoning Ordinance. Under settled principles of administrative law, the interpretation given a legislative enactment by public officials charged with its administration and enforcement is entitled to be given significant weight by the courts. *See Payton v. Williams*, 145 S.E.2d 147 (1965). In Virginia, it is settled law that a presumption of correctness attaches to the actions of state and local officials. *See Hladys v. Commonwealth*, 366 S.E.2d 98 (1988). Such actions are presumed to be valid and will not be disturbed by a court absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals or general welfare. *See County of Lancaster v. Cowardin*, 391 S.E.2d 267, 269 (Va. 1990); *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525 (2003)(discussing the presumption of reasonableness attached to the Board's legislative acts).

Thus, the Director's determination under the Zoning Ordinance is entitled to substantial deference. Unless the Board can find that the Director's decision was made without reasonable basis, the Board should uphold that decision.

The City Attorney's Office has also stated that "substantial deference" to a Director's determination is the appropriate standard of review. The City Attorney's Office has found that the Board of Zoning Appeals stands in the same relationship to the Director as a reviewing court when it reviews an administrative interpretation or decision. Thus, the Director's determination is entitled to substantial deference, both by this Board and a reviewing court. *See* Opinion to the Chairman and Members of the Board of Zoning Appeals, at 2-3 (April 12, 1989)(available for review).

In this particular case, concerning the Planning and Zoning Department's internal workings in processing applications, and the zoning ordinance requirements for applications, it is particularly important to defer to the decisions of the Director, attach a presumption of correctness to her decision in this case, and find that there has been a reasonable basis for the Director's approach in processing applications over the last twenty years.

C. Additional Procedural Matters

The Owner raised two additional procedural points regarding the Department of Planning and Zoning's acceptance of this appeal for processing and decision. In accordance with Virginia State Code Section 15.2-2311, an appeal to the Board of Zoning Appeals may be taken by "…any person aggrieved…by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article or any ordinance adopted pursuant thereto." Additionally, Virginia State Code Section 15.2-2311 states that "the appeal shall be taken within 30 days after the decision appealed from …"

The meaning of aggrieved has been addressed by the Virginia Supreme Court and defined as the following:

> "The word 'aggrieved' in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally."

Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals, 231 VA 415, 419-20 (1986)(citations omitted) Without conceding that the Appellant satisfies this standard, the staff made a determination that the appeal should go forward to allow this issue to be heard by the Board of Zoning Appeals so that this procedural matter can be clarified.

Additionally, the Appellant's appeal was filed within the required 30 day appeal period. The appeal was filed on February 5, 2010. The decision it is appealing from is deemed effective as of the date the public notice sign indicating that the application was deemed complete was posted which was January 8, 2010.

D. Conclusion

Therefore, because the Owner is a valid applicant pursuant to the Zoning Ordinance and the Owner has disclosed the information required by Section 11-406(A) of the Zoning Ordinance, the designation that the Application was complete was correct and this appeal should be denied.