

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Appeal No. 16041 of Luis E. Rumbaut, Assistant Corporation Counsel, D.C. on behalf of the D.C. Department of Public Works, pursuant to 11 DCMR 3105.1 and 3200.5, from the decision of Sharon T. Nelson, Senior Administrative Law Judge, Office of Adjudication, D.C. Department of Consumer and Regulatory Affairs made on November 21, 1994, dismissing proposed revocation for nonconforming use of certificate of occupancy for a trash transfer facility in a C-M-2 District at premises 2160 Queens Chapel Road, N.E. (Square 4259, Parcel 154/72).

HEARING DATE: May 17, 1995  
DECISION DATE: May 17, 1995 (Bench Decision)

ORDER

THE MOTION TO DISMISS:

The subject appeal involves property located in a C-M-2 District at 2160 Queens Chapel Road, N.E. On March 1, 1994, the owner of the property, Michael Perkins, was issued Certificate of Occupancy No. B168010 to use the property as follows:

Light Manufacturing, Processing, Fabricating, Warehousing of Steel Products and office and retail construction industrial supplies; All material non-hazardous; not sexually oriented.

On May 5, 1994, the Department of Consumer and Regulatory Affairs (DCRA) notified the property owner of its proposal to revoke the certificate of occupancy (C of O) for failure to use the property in compliance with the permit.

On September 7 and 8, 1994, hearings were held on the matter before Sharon T. Nelson, Senior Administrative Law Judge (ALJ), in the Office of Adjudication (OAD). At the hearing, the property owner challenged the proposed revocation by DCRA, while DCRA argued in support of the validity of the proposed action to revoke the C of O.

On November 21, 1994, the ALJ issued the decision and order, dismissing the matter with prejudice.

On December 19, 1994, the Assistant Corporation Counsel filed the subject appeal on behalf of the Department of Public Works (DPW), appellant, challenging the decision of the ALJ.

The owner of the property, respondent/appellee herein, filed a motion to dismiss the appeal. At the public hearing before the

Board of Zoning Adjustment on May 17, 1995, the motion was taken as a preliminary matter for the Board's consideration.

The respondent moved to dismiss the appeal with prejudice on a number of grounds.

### The Board's Jurisdiction

The respondent argues that D.C. Code Section 5-424(f) does not authorize appeals of "contested" cases to the Board, that an appeal of an OAD decision can only be made to the District of Columbia Court of Appeals.

The respondent stated that the D.C. Code Sections 1-1510(a) and 5-524(f) make the point clear: Administrative decisions that relate to permit or zoning matters, and which are "uncontested," (i.e., made without a trial-type hearing) may be appealed to the BZA. See D.C. Code 5-424(f). D.C. Code section 5-424(f) refers to decisions of the "Inspector of Buildings" -- an official that presumably acts without the benefit of trial-type hearings.

The respondent stated that by contrast, appeals of "contested" decisions (those that are made after a trial-type hearing), must be made to the District of Columbia Court of Appeals. The Code states:

Any person suffering a legal wrong, or adversely affected or aggrieved by an order or decision of the Mayor in a contested case, is entitled to a judicial review thereof in accordance with this subchapter upon the filing in the District of Columbia Court of Appeals a written petition for review.

D.C. Code Subsection 1-1510(a). As the District Court remarked in Cheek v. Washington, 333 F. Supp. 481, 483 (D.C. 1971) the purpose of routing appeals of contested matters to the Court of Appeals is to "eliminate disorderliness and lack of uniformity in decisions" by centralizing the review of agency orders in one Court.

The respondent argued that the OAD decision in In the Matter of Mike Perkins, following a two-day trial, was a "contested case." Accordingly, an appeal of the OAD decision may only be made to the District of Columbia Court of Appeals, not to the Board. Therefore, this appeal should be dismissed.

Responding to this argument, the appellant stated that the BZA may, and does in fact, hear appeals from contested-case decisions.

To begin with, the BZA has authority to make final administrative determinations concerning issues that involve the zoning rules of the District of Columbia. D.C. Code Subsection 5-424(f), cited by the respondent, provides as follows:

Appeals to the Board of Zoning Adjustment may be taken by...any officer or department of the government of the District of Columbia...affected by any decision of the Inspector of Buildings [the Director of the Department of Consumer and Regulatory Affairs]...or any other administrative officer or body in the carrying out of or enforcement or any regulation adopted pursuant to Subsection 5-413 to 5-432. (Emphasis added).

The appellant argued that the statutory provisions more than suffice to permit the Board to hear the appeal at issue.

The appellant argued that appellee's presumption that the "Inspector of Buildings...acts without the benefit of trial-type hearings" is unfounded and wholly unsupported by the appellee. In fact, the Director of the Department of Consumer and Regulatory Affairs, successor to the Inspector of Buildings, may and did delegate to OAD his authority to make decisions in cases such as the case under appeal. That the decision of OAD was made after a contested-case hearing in no way voids the BZA's jurisdiction over zoning matters or over the particular decision at issue. Similarly, the appellant argued, the fact that the District's Administrative Procedures Act (DCAPA) authorizes appeals of contested-case decisions to go to the District of Columbia Court of Appeals does not void the BZA's jurisdiction over zoning matters. The appellee cites Cheek v. Washington, 333 F. Supp. 481, 483 (D.D.C. 1971) to highlight the purpose of " 'eliminat[ing] disorderliness and lack of uniformity in decisions' by centralizing the review of agency orders." A similar purpose underlies the assignment of all zoning matters to the BZA, which is the sole administrative body in the District that can rule definitively on such matters.

The applicant stated that if the appellee's argument were to prevail, neither the BZA nor the Board of Appeals and Review would be able to consider appeals from decisions made in contested-case hearings; but both boards do so. In the case of the BZA, for example, the Board is also authorized by law to hear appeals from decisions made by OAD concerning fines issued under the Civil Infractions Act. That law specifies that "appeals involving infractions of...the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment." D.C. Code Subsection 6-2721 (1994 Supp.). Such decisions are to be reviewed by the BZA after contested-case proceedings, as is made clear not only by the practice of OAD and

the BZA but by law: D.C. Code Subsection 6-2713 (1994 Supp.) requires that civil infraction hearings at OAD be conducted in accordance with Title 1, Chapter 15 of the D.C. Code; i.e., as contested-case hearings.

Finally, the appellant argued, not only is the BZA authorized to conduct the instant review upon appeal, but it would be contrary to policy and common sense to permit decisions of OAD based upon the zoning regulations to proceed to the District of Columbia Court of Appeals without the prior intervention of the body mandated to rule on zoning matters, the BZA.

Responding to the appellant's arguments, the appellee stated that the appellant fails to support his position with cases or legislation. The appellee notes that while the Civil Infractions Act provides an exception to the Board's jurisdiction in contested case appeals, the subject case does not arise out of a civil infraction. Therefore, the Civil Infraction Act, (D.C. Code Section 6-2701 to 6-2715) does not apply in this case.

The Board determines that its appellate jurisdiction in this case arises under D.C. Code Section 5-424(f) and 11 DCMR 3105.1.

The Board's Authority with Regard to the Illegal Dumping Enforcement Act (IDEA)

The appellee argued that the Board has no authority to set aside the Superior Court's rulings regarding IDEA I and IDEA II or the commerce clause.

The BZA is only authorized to review three types of administrative decisions:

- (1) "granting or withholding a building permit";
- (2) "granting or withholding a Certificate of Occupancy";
- (3) "any other administrative decision based in whole or in part upon any zoning regulation or map adopted under Subsection 5-413 to 5-432."

D.C. Code Subsection 5-424(f).

Because the Superior Court's holdings do not fit into any of these three categories, the BZA is without jurisdiction to entertain DPW's attack upon the decision of the court.

In addition, the appellee argued that DPW is collaterally estopped from asserting that IDEA I or II may be applied to the

activities at 2160 Queens Chapel Road, N.E., because this matter has previously been settled by the Superior Court.

The appellee also argued that DPW is barred by a court order from charging that Mr. Perkins, the property owner, is violating IDEA I or II. The Superior Court has forbidden DPW from "issuing notices, citations, or warnings regarding violations of the Illegal Dumping and Enforcement Act of 1994 by [Mr. Perkins]."

The appellee maintains that because this appeal cites IDEA I and II and states that the processing of solid waste at 2160 Queens Chapel Road, N.E. is an "illegal activity," the appellant is in violation of the Superior Court injunction.

The appellant argued that DPW's entitlement to prosecute an appeal based on the illegal dumping Enforcement Act, as amended, is irrelevant to this action. This is because DPW is not asking the Board to set aside the decisions of the court. As the appellant's notice of appeal clearly states, the appeal is of a decision of OAD, not of the court. The action before OAD was a regulatory action--the proposed revocation of a certificate of occupancy based on a use not in conformity with the approved use. OAD ruled that the appellee's operation was in compliance with the certificate of occupancy and DPW appeals that decision. A review on appeal of that decision is clearly within the jurisdiction of the BZA. As the appellee himself sets forth in his motion, the Board is authorized to review, inter alia, any administrative decision based in whole or in part upon the zoning regulations or map. This is the case here.

The appellant argued that the motion was submitted before the appellant's detailed statement was filed, causing the appellee to attack arguments and assertions that DPW has not made. Nevertheless, the appellant believes that the appellee should have been able to discern that the basis of the appeal is the OAD decision, not the court order, based on the summary notice of appeal filed with the Board.

With regard to the injunction, the appellant stated that the court order limited the injunction to parties that were licensed but not under the scope of the illegal dumping laws. The appellant stated that a certificate of occupancy is a license to use a particular location. If the appellee holds a certificate of occupancy illegally, or if the proposed revocation of his certificate should be made final, he cannot be deemed licensed to operate.

#### DPW's Status as an Aggrieved Party

The appellee challenges the DPW's status as an aggrieved party, noting that under the D.C. Code, only persons that are

"aggrieved" by an administrative permit or zoning decision may appeal to the BZA. The appellee stated that on BZA Form 1, all appellants are required to state the "manner in which [they are] aggrieved by [the] administrative decision." DPW responded as follows:

- (1) DPW is the agency responsible for solid waste management in D.C.
- (2) [The] decision ignores and is contrary to 7/7/94 amendments to Illegal Dumping [Enforcement] Act of 1994 which [makes] unlawful disposal of waste in unauthorized buildings;
- (3) [The decision] is contrary to solid-waste industry definitions of processing.

The appellee maintains that the injuries claimed by DPW in its appeal form are insufficient to qualify it as an "aggrieved person." DPW does not have the necessary standing to appeal the OAD decision in In the Matter of Mike Perkins for a number of reasons.

First, the OAD decision in In the Matter of Mike Perkins, does not displace DPW's responsibility for local solid waste managements. DPW was, and continues to be, the agency responsible for solid waste management in D.C. The OAD decision does not and could not, alter this fact. Therefore, DPW has not suffered an injury in this regard.

Second, the appellee argued that DPW cannot be aggrieved by OAD's unwillingness to apply statutes in contravention of a court order. The appellee noted that in the proceeding before the OAD, the Department of Consumer and Regulatory Affairs asserted that processing solid-waste was not a permitted use in the District of Columbia as a result of IDEA I and IDEA II. However, Senior Judge Nelson understood that the Superior Court's injunction in Perkins v. District of Columbia barred any District official from making such a claim. Judge Nelson wrote:

Petitioner argues that Respondent was in violation of the Illegal Dumping Enforcement Act of 1994 or Chapter 7, Subpart 700 of 21 DCMR. However, between the time that this matter was filed and heard, Judge Mitchell-Rankin ruled in Perkins v. District of Columbia, Civil Action No. 94-CA-6736 that the District could not enforce that Act or Chapter to preclude a private trash hauler from operating in the solid waste transfer business.

Conclusion of Law No. 50 (emphasis added). The appellee argued that if the District is barred by a court order from applying IDEA I or IDEA II to preclude "operations in the solid waste transfer business," DPW cannot be "aggrieved" by OAD's unwillingness to apply the statutes in this fashion. DPW is not "aggrieved" by OAD's refusal to violate an order of the Superior Court.

Third, the appellee argued that DPW is not aggrieved by the fact that OAD and DPW disagree about the definition of "processing." The appellee noted that the Zoning Regulations allow terms that are undefined in the Regulation to be defined according to Webster's Unabridged Dictionary. This is what the OAD used to define processing and DPW has no enforceable right to have the "solid waste industry's" definition used in construing that term. Without such an enforceable right, DPW is not "aggrieved" by OAD's decision to follow the direction contained in the Zoning Regulations.

Finally, the appellee argued that DPW cannot be an aggrieved person because it did not comply with OAD Orders. The appellee stated that during the pendency of the OAD proceeding, DPW refused to produce documents subpoenaed by OAD. Consequently, the ALJ ruled that certain DPW witnesses would not be allowed to testify.

The appellee argues that DPW should not be allowed to ignore the orders of the ALJ only to allege "error" on appeal.

In response to the appellee, the appellant argued that DPW is aggrieved by OAD's decision. As the appellee concedes, DPW is the agency responsible for waste management in the District of Columbia. Accordingly, the appellant argued, any decision that impedes the full and effective action of DPW in this field impedes the fulfillment of its legislative mandate. A decision that would permit waste transfer or disposal businesses to operate under color of a certificate of occupancy obtained through fraud, or to operate out of conformity with their certificates of occupancy, practically by definition affects DPW negatively and makes that agency a party aggrieved by the decision. A decision that would force DPW to follow incorrect definitions and interpretations of concepts essential to the task of waste management similarly affects DPW.

The appellant noted that according to the ALJ's decision, the Superior Court ruling meant that the District could not enforce the illegal dumping laws to preclude a private business from operating in the solid waste transfer business. But neither the ALJ nor the court argued - and in fact, could not argue - that the Court's decision exempted such a category of businesses from the zoning laws of the District. It is one thing to determine that a particular application of a District law runs contrary to the Commerce

Clause. It is quite another to maintain that certificates of occupancy are no longer required for a particular class of businesses, or that such businesses may operate anywhere in the District irrespective of zoning considerations. Indeed, the Court noted in its corrected order that "[t]he Court will not address whether the occupancy permit obtained by plaintiff Perkins in March 1994 permits the use, i.e., [sic] actually engaged in at the Queens Chapel Road facility. That issue is currently before the Office of Adjudication." Therefore, the appellant maintains that the zoning laws still affect the subject property and can be addressed in this appeal.

With regard to the appellee's argument that the government failed to produce certain documents through discovery prior to the OAD hearing, the appellant argued that the appellee did not explain which documents were involved or on what basis they may have been produceable. Nor did the appellee show that OAD was not in error in directing such discovery, or cite any reasons advanced by the government in not producing such documents. In any event, and according to the brief transcript extract cited by the appellee, Judge Nelson excluded certain witnesses as a remedy for the asserted failure to produce documents. That action by Judge Nelson disposed of the matter. If she permitted the hearing to go forward, with full knowledge of the relevant facts, there is no reason why the BZA should prevent the appeal from going forward on the basis of these allegations set forth by the appellee. In the appellee's view, the BZA should be more concerned about "the integrity of OAD's fact-finding and dispute resolution processes" than OAD itself was. The appellant maintains that this argument deserves no consideration.

#### The Board's Authority

The appellee's final argument in support of the motion to dismiss was that the Board lacks the authority to provide the relief requested by DPW. The appellee stated that one of the errors complained of by DPW is that the OAD decision "incorrectly assigned improper motives for the revocation." (BZA Form 1) While the appellee disputes this allegation, even if it were true, the Board does not have the authority to provide the requested relief.

The appellee stated that pursuant to the D.C. Code Sections 5-424(g)(i) and (g)(4), in an appeal, the Board has the authority to reverse, affirm or modify those orders that are made by administrative officers "in carrying out or the enforcement of any regulation adopted pursuant to Sections 5-413 to 5-432." Any views that OAD might have expressed as to the motives of agency personnel did not impact its "carrying out or enforcement of any regulation."

Because the BZA's powers are limited to those "orders", "requirements," "determinations" and "rulings" that impact upon the enforcement of the zoning regulations, the BZA is without the authority to modify obiter dicta in OAD opinions. Therefore, the appellee argues, the appeal should be dismissed.

In response to this argument, the appellant stated that the OAD hearing was convened to consider the proposed revocation of the appellee's certificate of occupancy on the ground that the use of appellee's premises was not the use authorized by the certificate. OAD ruled that the appellee was "in compliance with C of O," based on its interpretation of the applicable zoning and other related considerations. The appellant comes now before the BZA to ask that the BZA reverse the decision of OAD, in effect permitting the revocation of the appellee's certificate of occupancy. This relief is plainly within the authority of the BZA to grant.

The appellant stated that the appellee's argument to the contrary may be summarily dismissed because the appellee does not cite anything to show that the relief requested by the appellant is anything but that which is summarized above. Instead, he points to one of the several allegations of error noted by the appellant. Such allegations go to the validity of the decision at issue, and not to the relief requested. Therefore, the motion should be denied and the appeal should be heard.

#### The Board's Findings/Responses

Upon consideration of the arguments set forth by both parties with regard to the motion to dismiss, the Board has made the following determinations:

1. Under D.C. Code Subsection 5-424(f) the Board has authority to hear appeals from contested case decisions.
2. The Board understands that the appellant is seeking review of a decision of an ALJ in the Office of Adjudication on an issue that arises out of the Zoning Regulations. The Board's authority extends to such matters under Subsection 5-424(f) of D.C. Code. DPW is not seeking reversal of a court decision, or seeking to have IDEA I and II applied against a court order. Nor is DPW charging violation of IDEA I and II. Therefore, whether they have already litigated this issue and would otherwise be collaterally estopped from addressing it here is irrelevant. Also, whether the motives of OAD are improper is not a substantive issue raised by the appellant.
3. The Board concludes that DPW is aggrieved by the decision of the ALJ. DPW is charged with implementing the laws related to solid waste management. The ALJ's decision has an impact on

how DPW carries out that mission as it relates to processing materials (what materials may be processed), especially as it relates to the subject property.

4. The Board disagrees with appellee's view that DPW cannot be aggrieved since its responsibility for waste management remains in place in spite of the court and ALJ decisions.
5. The ALJ's interpretation of a word defined in the Zoning Regulations need not be that of the solid waste industry, however, DPW has a right to challenge that interpretation before this Board.
6. The Board believes that DPW's failure to submit documents below has no bearing on this appeal. The matter was handled by OAD.

SUMMARY OF EVIDENCE OF RECORD:

The appellant in the subject appeal, the Department of Public Works (DPW), is the executive agency responsible for the disposal of solid waste in the District of Columbia. It administers such laws as the Hazardous Waste Management Act of 1977; the Solid Waste Management and Multi-Material Recycling Act of 1988; the Illegal Dumping Enforcement Act of 1994, the Recycling Fee and Illegal Dumping Emergency Amendment Act of 1994, which amended the two laws last cited above; the Solid Waste Facility Permit Emergency Act of 1994, which regulates the operation of solid waste facilities and amended the Illegal Dumping Enforcement Act of 1994; and the Recycling Fee and Illegal Dumping Amendment Act of 1995.

DPW is affected by administrative decisions that improperly interpret the zoning rules applicable to solid waste collection, processing and disposal, and, in particular, to provisions of the zoning rules governing certificates of occupancy for premises used in the collection and transfer of solid waste. For example, the Illegal Dumping Enforcement Act of 1994 makes it unlawful for any person to cause or permit solid waste "to be disposed in or upon any [site] unless the site is authorized for the disposal of solid waste by the Mayor (D.C. Code Subsection 6-2912(a) (1994 Supp.)). The issuance of a certificate of occupancy is part of the process of authorization for the operation of such a site. The Solid Waste Facilities Permit Emergency Act of 1994 makes it unlawful to operate a solid waste facility "except in accordance with a solid waste facility permit issued for that facility by the Mayor." D.C. Act 10-384, December 28, 1994, Sec. 4(a). The facility's permit is dependent, inter alia, upon compliance with the zoning rules.

By this appeal, DPW requested that the Board of Zoning Adjustment review the OAD decision at issue insofar as it interprets uses permitted under relevant provisions of the zoning rules of the District of Columbia.

The process of obtaining the occupancy permit at issue in this appeal was described in the findings of fact of the OAD decision and order. The pertinent facts are set forth below:

The appellee, Mr. Perkins, and his associates were interested in a business venture involving a solid waste transfer station. They went to the Department of Consumer and Regulatory Affairs (DCRA) and searched the records for property with a certificate of occupancy suitable for their proposed use. Mr. Perkins determined that the word "processing" had to be in the certificate of occupancy.

The premises at issue herein were identified as a potential site for the business. A C of O for those premises issued in either 1953 or 1965 permitted the following uses:

"Light manufacturing, processing, fabricating and warehousing of steel products and office & retail or ammunition...."

A later C of O, issued to a subsequent owner on December 8, 1992, had been limited to the following uses:

"Office/warehouse & Retail of Contractor, Industrial Supplies[.]...."

On February 9, 1994, Mr. Perkins' agent applied for a new C of O, essentially combining the prior uses, except for the retail of ammunition, as follows:

"Light manufacturing, processing, fabricating, warehousing of steel products and office and retail construction industrial supplies, All material non-hazardous."

However, Mr. Perkins and his associates actually intended to use the premises for a trash transfer station. The C of O that was eventually issued permitted the following uses:

"Light Manufacturing, Processing, Fabricating, & Warehousing Steel Products and Office and Retail Construction Industrial Supplies; All Material Non-Hazardous...."

In setting forth her analysis of the case, the ALJ noted that DCRA cited 12 DCMR Subsection 119.4 as the authority for revoking the C of O, and that authority is undisputed. The ALJ then focused on the issue - whether the proposed revocation was proper, i.e.

whether the use of the appellee's property as a solid waste dumping site conforms with the use permitted in the certificate of occupancy.

The ALJ determining that the actual use was permitted under the term "processing," a broad use description that encompasses many uses including the subject use. The ALJ determined that the Zoning Regulations allow for broad general descriptions of land uses and that it was unnecessary for the C of O applicant to list specifically what he intended to do especially in light of the fact that the intended use - "trash transfer station" is not designated in the Zoning Regulations.

In interpreting the uses listed on the C of O, the ALJ determined that the words "steel products" only applied to the "warehousing" use, not to the other uses that precede warehousing, specifically, "manufacturing," "processing" and "fabricating." Because she determined that processing at the subject site is not limited by the "steel products" description, the actual use is not inconsistent with what the C of O allows. Consequently, the ALJ overturned the proposed revocation of the subject C of O.

#### Issues and Arguments

The issue in the subject appeal is whether the ALJ erred in concluding that the use at the subject site complies with the uses permitted in the C of O.

The appellant, DPW, argues that the ALJ's decision is in error and should be reversed by this Board. The appellant sets forth a number of arguments in support of this position.

First, the appellant argued that the rules of grammar and syntax require that the term "steel products" be read to modify each of the preceding uses, i.e. manufacturing, processing, fabricating and warehousing. Failure to read the C of O in this manner would lead to manufacturing, processing and fabricating of materials that are prohibited in the regulations because the use of these general terms unmodified would fail to alert authorities that specifically prohibited materials were being handled.

Second, the appellant noted that the interpretation adopted by the ALJ would completely circumvent the requirements of 11 DCMR 804 referred to in 11 DCMR 801.7. Subsection 801.7(j) is the provision which permits "any light manufacturing, processing, fabricating..." as a matter of right in C-M Districts. The relevant portion of Subsection 801.7 provides as follows:

801.7           The following additional uses shall be permitted as a matter of right in a C-M District, subject to the

standards of external effects set forth in Subsection 804:

. . .

- (j) Any light manufacturing, processing, fabricating or repair establishment

Subsection 804.1 provides that:

All uses established in a C-M District under authority of Subsection 801.7, and any uses accessory to those uses, shall be operated so as to comply with the standards of external effects set forth in this section.

The appellant noted that the standards set forth in Section 804 cover emissions of noise, gases, steam, fumes, smoke, dust, heat, and vibrations. These standards, as specified at Subsection 804.1, are applicable in the operation of an enterprise under a permitted use - that is, in the actual operation after a C of O has been issued. But additional rules require consideration of the standards at the time that the application is made, as follows:

805.1 When filing an application for a permit for a use permitted under Subsection 801.7, the applicant shall submit with the application three (3) copies of the following:

- (a) A site plan showing buildings and other structures, roadways, drainage, and sanitary facilities, parking spaces, loading berths, landscaping, and exterior lighting (if any); and
- (b) A description of any operations that would be affected by the standards of external effects as provided in Section 804.

805.2 The applicant shall submit such other information as may be necessary to determine compliance with provisions of Subsection 804.

The appellant argued that the rules require that consideration be given to a variety of external effects - including the emission of noxious gases, and of odorous gases along the boundaries of the district - at the time that an application for a C of O is made for a light manufacturing, processing, or fabricating use. The rules thus contemplate that a C of O for any of the uses noted shall be

issued only after consideration of the specific character of the activity proposed, to the point of requiring an applicant to "submit such other information as may be necessary to determine compliance with provisions of Section 804."

In this context, the ALJ's conclusion that a C of O may be issued for a general use of "processing," without specifying the character of that activity, cannot stand.

Counsel for the appellee argued that the C of O should remain in effect for a number of reasons. First, he maintains that rules of grammar provide the least desired method of construing documents. The appellee maintains that the validity of this business should not depend on the placement of words and commas on a C of O.

Second, the appellee argued that trash transfer station is not a use listed in the Zoning Regulations. Therefore, he should not have been required to apply for a C of O using that term. He argued that the Court of Appeals decision in Kalorama Citizens Association v. BZA supports this position. Kalorama stands for the proposition that a C of O applicant need not select the use category that most closely describes the proposed use as long as the actual intended use meets all of the requirements or comes within all of the limitations of the Zoning Regulations governing that use. The appellee argued that describing the use as processing is consistent with the decision in Kalorama.

The appellee argued that Subsection 801.7(j) allows "light processing in C-M Districts and based on the Court of Appeals' decision in Citizens of Brentwood v. BZA, it was proper to describe the proposed use in this manner. Brentwood involved the denial of a C of O for light processing of recyclable materials because the Zoning Administrator (ZA) determined that the applicant would be recycling and the Zoning Regulations had no provisions for recycling facilities. The applicant appealed the ZA's decision to the Board and the Board granted the appeal because the applicant demonstrated that the use did fit the "light processing" definition found in the dictionary. Area residents appealed the Board's decision. The Court of Appeals upheld the Board's decision, holding that the Board did not err in finding that the proposed use met the definition of "light processing." The appellee maintains that his use is similar to that of the owner in Brentwood, and in view of the precedent set in Brentwood, the use at issue in the subject case clearly should be allowed as consistent with light processing under Subsection 801.7(j).

In response to the appellee's use of the Brentwood case to support his argument, the appellant stated that Brentwood involved a C of O denial where the ZA was apprised of the proposed use,

rather than a proposed revocation where the actual use was not in conformity with the authorized use.

The appellant argued that Brentwood is not dispositive of this case because the question is not whether Mr. Perkins engages in processing, the issue raised in Brentwood; the question is whether he is handling the types of material allowed in his C of O, i.e. "steel products."

With regard to the appellant's argument that uses under Section 801 must meet the requirements of Sections 804 and 805, the appellee maintains that this issue was not brought up as part of the proposed revocation process. Therefore, it is improper for the appellant to raise the matter at this stage or for the Board to consider it in deciding the case.

The appellee acknowledged that additional information would have to be provided to government officials if they were going to analyze a C of O application in light of Sections 804 and 805. However, the appellee stated that the DCRA officials that reviewed the subject C of O application were satisfied with the information provided to them by the applicant about the proposed use. If they needed more information they would have asked. The appellee maintains that it is not fair for the Board to undo the C of O if the officials had enough information to grant it.

Other parties with an interest in the case testified at the hearing in support of the appeal.

Councilmember Harry Thomas, Sr., testified that this case differs from Brentwood because the owners in that case were recycling; this owner has a C of O for processing steel. However, the property is not being used for this purpose. He noted that there had been a facility at the site for processing steel. It moved out and then steel products were stored at the site. The current owner is not handling steel products at the site.

The Chairman of Advisory Neighborhood Commission 5A testified that the C of O should not have included the processing use. The permit was improperly issued and should be revoked. The ANC maintains that the ALJ improperly allowed the trash transfer use to continue although the Zoning Administrator's position was that such a use would need a use variance. The ALJ's decision denied the Board an opportunity to hear the case which would allow the ANC and neighbors to comment on the facility's impact on the community.

The ANC testified that the ALJ erred in comparing the subject use to the recycling facility in Brentwood because recycling has less of an impact on the neighborhood than a trash transfer

station. For these reasons, the ANC argues that the C of O should not have been upheld by the ALJ.

The Chairman of the Woodridge Civic Association testified that a C of O applicant should be as specific as possible in describing the proposed use. He testified that the property owner was dishonest with the residents when he left out the term "trash transfer station" - even though that wording is not required.

A neighbor residing at 1975 Channing Street, N.E., testified that the C of O guidelines should have been adhered to.

Another neighbor residing at 3225 Walnut Street, N.E. was concerned that government officials would issue a C of O based solely on what the applicant stated about the proposed use. The officials failed to make a determination about the truth of the applicant's statements. She stated that once it was determined that the facility was operating under false pretenses it should have been automatically closed down.

No one from the neighborhood testified in opposition to the appeal.

**FINDINGS OF FACT:**

Based on the evidence of record, the Board finds as follows:

1. The appellee's proposed use under Subsection 801.7(j) was also subject to the provisions of Sections 804 and 805.
2. There is no evidence that the appellee submitted information to DCRA to address the external effects issues raised in the Zoning Regulations.
3. Proper procedures were not followed in issuing the subject certificate of occupancy.
4. The ALJ did not consider these procedures in deciding not to revoke the certificate of occupancy.

**CONCLUSIONS OF LAW AND OPINION:**

In this appeal, the Board is presented with the question whether the Administrative Law Judge erred in deciding not to revoke the certificate of occupancy issued on March 21, 1994 for use of the site located at 2160 Queens Chapel Road, N.E. The Board concludes that that decision was in error and that the C of O should have been revoked for the reasons below.

The Board notes that the use relevant to this appeal, "processing," is permitted in the C-M District by Subsection 801.7(j) of the Zoning Regulations. The introductory paragraph to Subsection 801.7 indicates that all uses permitted under that subsection shall be "subject to the standards of external effects set forth in Subsection 804." In addition, Section 805 of the Zoning Regulations requires that the applicant for a C of O submit whatever information is necessary to determine compliance with the provisions of Section 804.

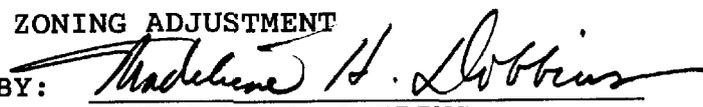
The appellee argued that DCRA officials were satisfied with the completeness of the documents submitted for the C of O application, that the officials did not request any further documentation on the proposed use of the property. Therefore, the C of O applicant should not now be penalized for alleged flaws in the application process.

The Board disagrees with the appellee and is of the view that the C of O applicant must take the initiative to provide the appropriate information to DCRA officials rather than waiting for officials to request further information.

The Board concludes that the Zoning Regulation requirements for C of O applications were not met in this case. The Board concludes that the ALJ failed to examine whether the process had been properly followed. Consequently, the ALJ decided to deny the revocation and uphold the validity of the C of O. In the Board's opinion this was error, therefore, the appeal in this case is GRANTED and the decision of the ALJ is hereby REVERSED.

VOTE: 4-0 (Susan Morgan Hinton, Angel F. Clarens, Laura M. Richards and Craig Ellis to GRANT the appeal and REVERSE the decision of the Administrative Law Judge; William L. Ensign not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:   
MADELIENE H. DOBBINS  
Director

FINAL DATE OF ORDER: DEC 12 1995

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 16041

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on DEC 12 1995 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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A handwritten signature in cursive script, reading "Madeliene H. Dobbins", written over a horizontal line.

MADELIENE H. DOBBINS  
Director

DATE: \_\_\_\_\_

DEC 12 1995