

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



June 1, 2017
Revised June 7, 2017¹

VIA ELECTRONIC MAIL

Frederick L. Hill, Chairman
Board of Zoning Adjustment
441 4th Street, NW, Suite 200 South
Washington, DC 20001
Frederick.hill@dcbc.dc.gov

VIA ELECTRONIC MAIL

Ms. Nefretiti Makenta



RE: #OMA OOG-0001_3.20.17_AO

Dear Chairman Hill:

The Office of Open Government (OOG) is in receipt of the electronic submission² of Director Bardin in response to the OOG-000_3.20.17 Notice of Complaint, alleging the Board of Zoning Adjustment (hereinafter BZA) failed to properly notice a December 14, 2016 hearing in which the BZA took official action on BZA Application Number 19387 (the Application) a contested case in violation of: (1) the Notice of meeting provisions of D.C. Official Code § 2-576; the Open meetings provisions of D.C. Official Code § 2-575(a); and, taking action in an improper closed session in violation of D.C. Official Code § 2-575(c)(1-2) and (d).

The purpose of the OMA is to provide the public with full and complete information regarding the affairs of government and any official actions taken by government officials.³ For that reason, public meetings must be properly noticed, including the intent to meet in a closed or executive session.

¹ OOG-0001_6.1.17_AO was originally issued by the OOG on June 1, 2017 to the complainant and the BZA. The OOG was informed by the complainant on June 3, 2017 that some of the dates noted in the original opinion were incorrect, and the *Motion to Stay* was improperly noted as a *Motion to Vacate*. Therefore, the OOG has included within this revised opinion the strikethroughs of the June 1, 2017 opinion dates, and the insertion of the correct dates so that the record is complete. The motion title is similarly corrected. The dates and motion title errors did not change the OOG's substantive finding of non-compliance with the OMA. The revised opinion was issued to the BZA on June 7, 2017.

² 3.31.17 email from DC Office of Zoning Director, S. Bardin, forwarding email correspondence with the complainant regarding Case Number 19387.

³ D.C. Official Code § 2-572.

As discussed below, the OOG’s findings in this matter are as follows: (1) the case on the Zoning Commission’s website as a “Continuation of Case No. 19387”⁴ was not a continuation of the matter, but a second public hearing on December 14, 2016; (2) the BZA did not properly notice this second public hearing as required under the OMA, and the lack of proper notice prevented the public from attending; (3) the second public hearing on December 14, 2016 was an improper closed session in violation of the OMA and 11-Y DCMR § 103.2; (4) the BZA failed to follow the established protocol in the regulations governing the conduct of its meetings to grant continuances; and, (5) the conduct of the BZA resulted in or created the appearance of violations of its Rules of Ethics, including creating the appearance that the BZA gave preferential treatment to legal counsel representing the applicant, a former BZA Chairperson.⁵ The OOG notes that the BZA’s June 14, 2017 agenda reflects a *Motion Vacate Stay Order, Pending Appeal* in this matter is on the docket for a decision.⁶ Therefore, it is not be ripe for the OOG to exercise its statutory authority to provide redress and relief, pending the outcome of the ruling on the *Motion*.

This binding opinion is intended to inform the BZA of its areas of non-compliance. The OOG remains available to assist the BZA in adhering to the requirements of the OMA.

Background

The OOG takes notice of the full record,⁷ including videos of the proceedings and the transcriptions of the proceedings in compliance with D.C. Official Code § 2-577(a)(2) and D.C. Official Code § 2-578(a)(b)(2), respectively. In order to make a determination on this matter, the OOG reviewed the December 14, 2016 hearing transcript (the Transcript); the December 21, 2016 hearing transcript (T-2); the January 18, 2017 hearing transcript; (T-3); documents published on the BZA and Zoning Commission’s websites; and the regulations governing the conduct of BZA hearings and meetings.

On the Office of Open Government Complaint Form the complainant lists both the BZA and the Office of Zoning (OZ) as the public body that is the subject of the complaint. While some may use the designations BZA and OZ interchangeably to refer to a single entity, the BZA and the OZ are two separate entities with different statutory functions. As the legal analysis below concludes, the OZ does not meet the statutory definition of a public body under the Open Meetings Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-571 *et seq.*) (OMA). Since the OZ is not a public body, the Office of Open Government (OOG) does not have legal authority to take enforcement measures against that entity. Therefore, the BZA, will

⁴ This information may be found at <http://view.earthchannel.com/PlayerController.aspx?PGD=dczoning&iID=4168>.

⁵ Attorney Meredith Moldenhauer served as one the applicants’ legal counsel on the Application. Her “Linkedin” account lists her as previously serving with the BZA as Chairperson from July 2009 to April 2012. You may view this information at <https://www.linkedin.com/in/meridith-moldenhauer-97559a6>.

⁶ You may view this information at <https://app.dcoz.dc.gov/Content/Schedule/Calendar.aspx>.

⁷ The full DC Office of Zoning record regarding Case Number 19387 may be found online. https://app.dcoz.dc.gov/Content/Search/ViewCaseReport.aspx?case_id=19387. (Last accessed 4/10/17).

be the focus of this advisory opinion and any enforcement action that is necessary as it relates to the OOG's findings.

The BZA was established by Section 8 of An Act Providing for the zoning of the District of Columbia and the regulation of the location, height, bulk, and uses of buildings and other structures and of the uses of land in the District of Columbia, and for other purposes, approved June 20, 1938 (52 Stat. 799; D.C. Official Code § 6-641.07). According to information published on its website: “[T]he BZA is an independent, quasi-judicial body. It is empowered to grant relief from the strict application of the Zoning Regulations (variances), approve certain uses of land (special exceptions), and hear appeals of actions taken by the Zoning Administrator at DCRA. The Board's five members consist of three Mayoral appointees, a rotating member of the District of Columbia Zoning Commission, and a designated representative of the National Capital Planning Commission. Public Hearings and Meetings are held on Wednesdays beginning at 9:30 a.m. at 441 4th Street N.W., Washington, DC 20001 in Room 220 South.”⁸

The OMA provides the statutory framework which governs the conduct of District government public bodies. The OMA's definition of a “public body” and the OMA's legislative history leave no doubt that the BZA⁹ is a public body subject to the OMA. D.C. Official Code § 2-574(3) provides the OMA's definition of a public body:

“(3) "Public body" means any government council, including the Council of the District of Columbia, board, commission, or similar entity, including a board of directors of an instrumentality, a board which supervises or controls an agency, or an advisory body that takes official action by the vote of its members convened for such purpose . . .”

In addition to the BZA meeting the OMA's statutory definition of a public body, the committee report which contains the OMA's legislative history specifically identifies the BZA as being subject to the OMA. The committee report states:

Public Body would include any council, board, or commission of the District government established by statute, regulation, or order. This

⁸ While this information was taken from the BZA website at <https://dcoz.dc.gov/bza/about>, the OOG's finds it consistent with the BZA's enabling legislation (D.C. Official Code § 6-641.07).

⁹ The BZA's enabling legislation predates the enactment of the OMA by approximately 79 years. However, Congress in adopting this legislation in 1938 indicated the importance of transparency in government by requiring the BZA to have open meetings, keep meeting records and to make meeting records available for public inspection. These requirements are in D.C. Official Code § 6-641.07(c), which in relevant part states: “All meetings of the Board shall be open to the public. The Board shall keep minutes of its proceedings showing the vote of each member upon each question, or if absent or failing to vote indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Board and shall be a public record.” The regulations implementing the BZA are found in 11-Y DCMR 103. Subsection 103.2 reflects the applicability of the OMA to the BZA's meetings. Subsection 101.3, states where “there is a conflict between this subtitle and the Administrative Procedure Act, the Act shall govern.” The OMA added Titles IV and V of the Administrative Procedure Act. The OOG notes such a conflict with the OMA. 11-Y DCMR § 104.4 states, “[C]opies of the transcript shall be made available by the Office of Zoning fourteen (14) days after the public meeting or hearing.” D.C. Official Code § 2-578(2) requires copies of any “transcript to be made available as soon as practicable, but no later than 7 business days after the meeting.”

definition would include all boards and commissions defined under the D.C. Official Code {sic} section 1-523.016. . .

Report on the Committee on Government Operations and the Environment on Bill 18-716, the Open Meetings Act of 2010, at 5 (Council of the District of Columbia December 2, 2010) (Committee Report).

A footnote numbered “6” to the above Committee Report’s language lists the BZA¹⁰ among the entities subject to the OMA. The Committee Report also states that entities listed in section 2 of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01) (Confirmation Act) are public bodies which fall under the OMA’s regulatory scheme. The BZA is listed in the Confirmation Act at D.C. Official Code § 1-523.01(e)(4). Since the BZA meets the OMA’s definition of a public body, and its legislative history makes clear that the BZA is a public body, the BZA must strictly adhere to the OMA in the conduct of its meetings.

The OZ was established pursuant to section 2 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.01), as an independent agency of the District of Columbia. Its statutory function is “to provide professional, technical, or administrative assistance to the Zoning Commission for the District and the Board of Zoning Adjustment in the performance of their functions and any other duties provided by law.” The OZ’s providing of professional, technical or administrative assistance to the BZA, even in the context of the BZA’s public hearings; do not qualify the OZ as a public body under the OMA. Therefore, unlike the BZA, the OZ is not subject to provisions of the OMA.

Discussion

The Office of Zoning website has two (2) hearing entries for the taking of testimony on the Application on December, 14, 2016. The second entry is a “Continuation of Case No. 19387” which it lists as the last hearing of that day.

At the heart of the complaint is whether the BZA provided proper notice for the second hearing on the Application which took place during the afternoon of December 14, 2016. This hearing resulted in a substantive modification to the Application and the BZA changing the dates it had previously publically announced for taking future action on the matter. The BZA’s previous public announcement was that the record was to remain open until a December 21, 2016 hearing to receive supplemental records that the BZA had requested.¹¹ However, during the second hearing the BZA changed the December 21, 2016 hearing to receive these records, to a December 21, 2016 meeting.¹² During the December 21, 2016 meeting the BZA members deliberated upon and made a determination in application 19387 for a variance from the 900-

¹⁰ The BZA is the fourth entity in the list of public bodies.

¹¹ The BZA Chairman supplement records request was for architectural drawings justify a variance in the 900 foot requirement (See the Transcript page 111 lines 8-25 and lines 3-13 on page 112).

¹² The BZA uses “hearings” to receive testimony on applications and “meetings” to decide on applications. See 11-Y § DCMR 103.9.

square foot per dwelling unit requirement to convert a flat into a three-unit apartment house for a dwelling in the 3600 block of 11th Street NW.

The Application proceedings were initially taken up by BZA members on December 14, 2016 during its public hearing morning session.¹³ The December 14, 2016 Transcript reflects this on page 49 beginning with line 4. This entry is in conflict with information on the “Contents” page of Transcript¹⁴ which lists the Application as the last hearing before the BZA on that day, and as beginning on 154. During the morning session, the BZA announced that it would hold the record open until ~~December 21, 2016~~¹⁵ January 4, 2017,¹⁶ to receive specific information on the Application, and conduct a hearing on that date. It was also stated at that time that a meeting to vote on the Application was to occur on January 11, 2017. The complainant states she stopped observing the video streaming of the Application hearing after the BZA announcements of the aforementioned hearing and meeting dates and thought the matter had adjourned until ~~December 21, 2016~~ January 4, 2017. However, at the conclusion of hearing all matters on the agenda on December 14, 2016, the Application was again before the BZA and substantively amended by the applicants. During the subsequent dialogue and amending of the Application, it was determined that a meeting in lieu of a hearing would occur on December 21, 2016. This was at the request of Ms. Moldenhauer asking BZA members if “the case could go to decision on the 21st” and the BZA agreed.¹⁷ On December 21, 2016, the BZA granted the applicants the relief sought. After the filing a request to have the matter reconsidered by an ANC, the BZA was to consider the reconsideration on January 18, 2017. However, the ANC withdrew the letter requesting the reconsideration.

THE OMA REQUIRES THAT ALL PUBLIC MEETINGS, WHETHER OPEN OR CLOSED BE PROPERLY NOTICED TO THE PUBLIC.

The OMA’s “Notice of Meeting” provisions found in D.C. Official Code § 2-576, governs the advance public notice required to hold a public meeting. Public bodies must strictly adhere to these provisions before meeting in an open or closed session.

The “Notice of Meeting” provisions require: (1) public notice as early as possible, but not less than 48 hours or 2 business days, whichever is greater, before a meeting; (2) posting in the office of the public body or a location that is readily accessible to the public; and either on the website of the public body or the District Government; (3) publication of the notice of meeting in the District of Columbia Register; and (4) the notice must contain the date, time, location, and

¹³ BZA Chairperson Fredrick L. Hill, Board Member Carlton Hart, Zoning Commission representative Michael Turnbull and Board Secretary Clifford Moy were in attendance for this hearing. See Transcript pg. 2 lines 1-5.

¹⁴ The table of contents for T-2 and T-3 do not list Application. However, the BZA’s approval of the Application as Amended is found beginning on page 26 at line 24 of T-2. Discussion of the withdrawal of the Reconsideration for a Hearing on the Application is found at T-3 lines 1-16.

¹⁵ * December 21, 2016, was the initial date under consideration by the BZA to leave the record open to receive supplemental information. See the Transcript page 117 at lines 22-25.

¹⁶ The Transcript page 118 at lines 23-25, and page 119 at line 1.

¹⁷ The Transcript page 155 at lines 2-25; page 156 at lines 1-25; page 157 at lines 1-25; and page 158 at line 1-12.

planned meeting agenda (D.C. Official Code § 2-576). Proper notice¹⁸ was provided to the public for the hearing on the Application that was before the BZA during the morning session of the December 14, 2016 hearing.

However, at issue is whether the BZA provided proper notice to the public for the second hearing which took place later in the afternoon on that same day. The record shows that the BZA did not provide the requisite statutory public notice for what is clearly a second Application hearing. This is required by the OMA although the hearing was on the same day and on the same Application. Therefore, the OOG finds the BZA's second hearing on the Application on the afternoon of December 14, 2016, was not properly noticed to the public, effectively closing the hearing to the public in violation of the OMA Notice of Meeting provisions.

The BZA Officially Adjourned the Application hearing on the morning of December 14, 2016, and did not grant a continuance of the matter for that same afternoon.

There is an abundance of dialogue in the Transcript which unequivocally shows that the BZA officially adjourned the hearing on the Application on the morning of December 14, 2016. The BZA officially adjourned the Application hearing without providing any notice that a continuance of the matter would occur on the afternoon of December 14, 2016. What follows are excerpts from the Application hearing Transcript that proves this contention.

Regarding establishing a future hearing or meeting date for the BZA to take action on the Application, Board Member Turnbull states, "I think we – I don't think we need a continued hearing." In response Chairman Hill says, "So, just a meeting." To which Board member Turnbull states, "Just a meeting." The aforementioned discussion was not in anticipation of the BZA taking any action on the Application later that same day but as discussed below on a future date, December 21, 2016. This is because the BZA had indicated that the hearing record would remain open on the Application to receive supplemental documents until December 21, 2016. (See Transcript, pg. 112 lines 3-13, and pg. 115 lines 14- 21).

The dialogue then moves to a discussion of when the applicant would be able to provide the BZA records to supplement the Application as requested. (Transcript pg. 117, line 19 through page 119 line 1). Page 117 of the transcript states on lines 19-25 that the BZA's next hearing "is next Wednesday the 21st." Finally the BZA decides that once the record is supplemented on ~~December 21st~~ January 4, 2017, a decisional meeting would occur on January 11, 2016. (Transcript, page 119, line 1). Nothing in the record remotely suggests that additional action would be taken on the Application later that day by the BZA.

What follows is language that unequivocally shows an adjournment took place on the Application hearing on the morning of December 14, 2016. First, Mr. Smith, one of the applicants, thanks Chairman Hill for his time. (Transcript 119, lines 18-19). Secondly, and

¹⁸ The OOG notes that the BZA provides public notice of its meetings and hearings on the DC Office of Zoning website, <https://app.dcoz.dc.gov/Content/Schedule/Calendar.aspx>, and the Central Meeting Calendar found at Open-dc.gov.

immediately after the receipt of thanks, Chairman Hill dismisses the parties from the proceedings. This is clearly evident in Chairman Hill's statement: "[N]ow Mr. Moy,¹⁹ I'm going to let them clear out" (Ibid lines 20-22). This statement by Chairman Hill refers to the two applicants and their legal and architecture representatives. As discussed below, Chairman Hill's language does not reflect that a continuance was to occur in the matter. Rather, it is an official adjournment of the Application hearing. Additionally, and immediately after Chairman Hill's statement in which the parties are dismissed, Mr. Moy calls forward a witness to offer testimony on Application 19355, the next item for consideration by the BZA.

The final support that the Application hearing had adjourned during the morning session is the statement uttered by Ms. Moldenhauer one of the applicant's Attorneys. Ms. Moldenhauer states, during the second improper closed hearing on the afternoon of December 14, 2016, that: "[W]e had a brief discussion with our clients at the end of the hearing. . . ." (Transcript, page 155 lines 2-10). Based on all of the foregoing, there is no doubt that the BZA's hearing on the Application adjourned on the morning of December 14, 2016.

Once the morning Application hearing adjourned the complainant²⁰ and possibly the public that was physically present with an interest solely in the Application hearing, either left the proceedings or discontinued to view the proceedings online because the conduct and express language of the BZA signaled it had adjourned and no further proceedings would occur regarding the Application until ~~December 21, 2016~~ January 4, 2017.

On the afternoon of December 14, 2016, the BZA held its second hearing on the Application but without first providing the requisite statutory notice under the OMA to conduct a public meeting. Due to the lack of advance public notice to members of the public, including the complainant, the public was unaware the second hearing on the Application was taking place. The BZA took the following official action on the Application during the second hearing on December 14, 2016: (1) substantively amending the Application; and, (2) changing the nature of the December 21, 2016 proceeding from a hearing to a decisional meeting. These substantive changes were not known by the complainant until well after the decision meeting took place on December 21, 2016. This is because the BZA did not properly notice this second hearing to the public in violation of the Notice of meeting provisions of D.C. Official Code § 2-576.

Courts have Held in Similar instances that a Closure of a Public Meeting Occurs Where the Public was not Given the Requisite Statutory Notice.

D.C. Official Code § 2-575(a) and 11-Y DCMR § 103.2, require, subject to stated exceptions, that BZA hearings and meetings shall be open to the public. In the instant matter, the BZA did not provide the OMA statutory required public notice of what was a second hearing on the Application that same day. The following cases make abundantly clear that a closed meeting occurs unless the public body provides the requisite statutory notice.

¹⁹ Mr. Moy was serving as Secretary to the BZA at this time.

²⁰ This is not speculation on the part of the OOG and reflects statements made by the complainant and are stated in the complaint.

In *Board of Trustees v. Board of County Commissioners*, 606 P.2d 1069 (1980), the appellant questioned, *inter alia*, whether a telephone conversation among members of a public body constituted a valid telephone meeting. That is because notice was not provided to the public of the meeting's time or place as required by the statute. The appellant further argued that the open meeting statute must be liberally construed²¹ and that it is inconceivable that an open meeting can be held without prior notice and still accomplish the legislative purpose of the Open Meetings Law.

The appellant court held that the appellee failed to comply with the statutory public notice requirements of the Open Meetings Law. In remanding the case to the court below, the appellant court held:

It is difficult to envision an opening meeting held without public notice that still accomplishes the legislative purpose of the Montana open meeting statutes. Without public notice an open meeting is open in theory only, not in practice. This type of clandestine meeting violates the spirit and letter of the Montana Open Meeting Law. *Board of County Commissioners*, at 1073.

Additionally, in a 2006 decision a Florida state court held: “[A]s a hallmark of open meeting law, a covered governmental entity must provide reasonable notice of, and continuing public access to, its "meetings . . . at which official acts are to be taken." § 286.011(1), Fla. Stat. (2006). *Grapski v. City of Alachua*, 31 So. 3d 193 (2010) at 198.

It must be noted that the *Grapski* Court discusses “the continuing public access to its meeting.” It is clear the BZA did not provide continuing access to the public meeting on the Application that was resumed upon the closure of all hearings on December 14, 2016.

In modifying an order granting injunctive relief, in a different decision, a Florida court held: “[A]lthough F.S. § 286.011 F.S.A. does not specifically mention such a requirement, as a practical matter in order for a public meeting to be in essence “public,” we hold reasonable notice thereof to be mandatory.” After reaching this holding the court modified a provision of the summary judgment to read:

That the City of North Miami, Florida through its elected and appointed officials, are permanently enjoined from holding any meeting wherein public business is discussed or contemplated or enacted without first providing reasonable notice to the public. *Hough v. Stembridge*, 278 So. 2d 288, 291 (Fla. 3d DCA 1973).

²¹ The OMA’s Rules of Construction at D. C. Official Code § 2-573 contains a similar requirement to the Montana open meeting statute for the liberal construing of their provisions.

The BZA's failure to publically notice the second Application hearing on December 14, 2016, was an improper closure in violation of D.C. Official Code §§ 2-575(a); 2-575(c)(1-2) and (d)²², 11-Y DCMR § 103.2 and established case law.

The BZA did not follow the established protocol in the regulations governing the conduct of its proceedings to grant a continuance.

On May 17, 2017, OOG Attorney Advisor Johnnie Barton sent electronically to Sara Bardin, Director, Office of Zoning, a request to provide answers to the following: (1) Are there any provisions in the BZA regulations which govern continuances; and, (2) Does the BZA utilize Robert's Rules or any other parliamentary procedure in the conduct of hearings or meetings? On May 18, 2017, electronic correspondence was sent to Esther Bushman, Counsel to D.C. Office of Zoning and Ms. Bardin posing the similar questions to Ms. Bushman. These questions were: (1) How was Case # 19387 brought back before the Board at the conclusion of all other matters on December 14, 2016; (2) Are there any provisions in the BZA regulations which govern continuances (besides 11- Y DCMR §§ 103.11, 103.120), these provisions were not include in the questions to Ms. Bardin); and, (3) Does the BZA utilize Robert's Rules or any other parliamentary procedure in the conduct of hearings or meetings.

On May 18, 2017 Director Bardin²³ responses to the OOG's questions are as follows:

1. Are any provisions in the BZA regulations which govern continuances?

The rules regarding continuances of hearings on applications (as opposed to appeals) are as follows and are all from Title 11-Y DCMR:

102.3 Three (3) members of the Board shall constitute a quorum. A quorum is necessary to conduct a hearing or meeting, but a lesser number may publicly announce a postponement or adjournment. If necessary, the Director may announce a postponement.

103.11 When postponing or continuing a contested case, the Board shall make reasonable efforts to schedule the public hearing within thirty (30) days.

103.12 If the time and place of resumption is publicly announced when a postponement, continuance, or adjournment is ordered, no further notice shall be required. For the purposes of this section, the form of the public announcement may be a sign placed at the entrance to the Board's hearing room.

402.11 If the Board finds a failure or defect in the notice of public hearing, the Board shall determine whether to postpone, continue, or hold the public hearing as scheduled based on the following considerations:

(a) The nature and extent of the actual notice received by the parties and

²² D.C. Official Code § 2-575 specifies the reasons why a public body may meet in a closed or executive session. None of these exceptions are applicable to the instant matter.

²³ By electronic correspondence earlier on May 18, 2017, Ms. Bardin indicated that several issues prevented her from responding to the OOG's request earlier and that her intention was to do so that afternoon. The OOG found Ms. Bardin to be very cooperative in providing information to this office when requests were made for her to do so.

the public from all sources;

(b) Attendance or lack thereof at the public hearing; and

(c) The nature and extent of the construction and/or use proposed under the application.

407.5 The presiding officer may decide any procedural motion including motions to continue without holding a hearing.

408.1 The presiding officer at a public hearing on an application shall have the authority to:

(f) Adjourn a public hearing and establish the date when the public hearing will be continued;

2. *Does the BZA utilize Robert's Rules or any other parliamentary procedure in the conduct of hearings or meetings?*

The conducts of the Board's meetings are governed by its rules of procedure set forth in Subtitle Y and the District of Columbia Administrative Procedure Act. When those provisions are silent on issues {sic} (such as whether a tie vote results in a Board action) the Board has referred to the Robert's Rules. *See Application No. 16566-B of the President and Directors of Georgetown College*, 49 DCR 834, 835 (2002).

However, Robert's Rules are not binding on the Board, whereas for example the rules of the Taxicab Commission provide:

103.7 Matters not covered by these rules or other District of Columbia law or regulation shall be decided in accordance with Robert's Rules of Order, Newly Revised.

3. *How was Case # 19387 brought back before the Board at the conclusion of all other matters on December 14, 2016?*

The Transcript contains the following:

CHAIRMAN HILL: Okay, Mr. Moy. You had some issues that somebody wanted to come forward and address?

MR. MOY: Yes. Not so much issues as it is

to continue on a post -- well, I was going to say post-hearing, but not really. This hearing hasn't been completed but to complete the testimony from the applicant as to the relief and drawings to Application No. 19387 of Smith and Diao, D-I-A-O.

CHAIRMAN HILL: Okay. Great. Could the applicant please come to the table?

MS. MOLDENHAUER: Thank you so much for recalling this case for a very brief moment...

The BZA's conduct of meetings is governed by 11-Y DCMR. The regulations contain specific provisions that must be strictly adhered to by the BZA to grant continuances of hearings. The provisions that are relevant to this matter state the following:

103.11 When postponing or continuing a contested case, the Board shall make reasonable efforts to schedule the public hearing within thirty (30) days.

103.12 If the time and place of resumption is publicly announced when a postponement, continuance, or adjournment is ordered, no further notice shall be required. For the purposes of this section, the form of the public announcement may be a sign placed at the entrance to the Board's hearing room.

408.1 The presiding officer at a public hearing on an application shall have the authority to:

(f) Adjourn a public hearing and establish the date when the public hearing will be continued;

However, Director Bardin's response to the OOG's inquiry "[H]ow was Case # 19387 brought back before the Board at the conclusion of all other matters on December 14, 2016?" does not refer to these BZA regulations just cited for granting continuances, but the section of Transcript which states:

CHAIRMAN HILL: Okay, Mr. Moy. You had some issues that somebody wanted to come forward and address?

MR. MOY: Yes. Not so much issues as it is to continue on a post -- well, I was going to say post-hearing, but not really. This hearing hasn't been completed but to complete the testimony from the applicant as to the relief and drawings to Application No. 19387 of Smith and Diao, D-I-A-O.

CHAIRMAN HILL: Okay. Great. Could the applicant please come to the table?

The aforementioned language does not reflect a continuance. Neither does the following statement made by Chairman Hill's moments before the second hearing begins:

And there might be one more thing coming up. Let me just chat with you for A moment. (See Transcript page 153 lines 18-20).

The OOG is hard pressed to find any support in the entire record that the BZA followed the protocol in its regulations to continue the second public hearing on the Application on the afternoon of December 14, 2016. This is because there is no language in the record showing that the BZA: (1) made reasonable efforts to schedule the continued public hearing within thirty (30) days (11-Y DCMR § 103.11); publically announced the continuation of a public hearing, including the place, time and date (11-Y DCMR § 103.12); or, (3) established the date when the public hearing was to be continued (11-Y DCMR § 408.1(f)).

The BZA's Actions in this matter have resulted in and created the appearance that preferential treatment was accorded to the Applicant's Legal Counsel and has affected adversely the confidence of the public in the integrity of government.

The Transcript and the video of the proceedings do not conclusively indicate that the BZA took part in any ex parte communications with Attorney Moldenhauer for the Application to reappear before the Board on December 14, 2016. But what is certain is that some communication had to occur at some point after the adjournment of the Application hearing for the matter to be brought to the BZA's attention for the second hearing. This is evident from the following statement of Chairman Hill, which reads: "[A]nd there might be one more thing coming up. Let me just chat with you for a moment." Transcript page 153 line 18-20." The video switches from the Chairman to Mr. Moy so it is unclear who Chairman Hill speaks with. After which the following dialogue between Chairman Hill and Mr. Moy takes place:

CHAIRMAN HILL: Okay, Mr. Moy. You had some issues that somebody wanted to come forward and address?

MR. MOY: Yes. Not so much issues as it is to continue on a post -- well, I was going to say post-hearing, but not really. This hearing hasn't been completed but to complete the testimony from the applicant as to the relief and drawings to Application No. 19387 of Smith and Diao, D-I-A-O.

CHAIRMAN HILL: Okay. Great. Could the applicant please come to the table.

After this dialogue occurs, counsel for applicants, including, Ms. Moldenhauer appear at the witness table and begin dialogue with members of the BZA. If members of the BZA did receive or were participate in communications with the Applicant's counsel regarding the application "off the record", such dialogue would be in clear violation of 11-Y DCMR 105.5. This provision states:

In any proceeding before the Board, all members of the Board shall be prohibited from receiving or participating in any ex parte communication relevant to the merits of the proceeding.

The aforementioned and what follows are the basis of the ethical violations raised by the complainant. A March 26, 2017 electronic communication from the complainant to the OOG states the following:

"Since this transpired, I not only learned that the lawyer who accelerated the dates for the previously concluded, yet undecided case, and [sic] also represented 2 previous case as the BZA on that day is a former BZA Commissioner. But I have also learned that the BZA has a [sic] quite a reputation for being an unfair body teeming with cronyism. Even reputable, long-time expert DC real estate attorneys refuse to represent parties with zoning cases before the BZA because of this reputation and past direct professional experience of manifest injustice meted out at the BZA."

In addition, the complaint states:

“I would have filed this complaint sooner, but unfortunately though I asked the Office of Zoning repeatedly which government agency dealt with this kind of complaint, I was not informed about the Office of Open Government. On my own, I learned of the existence of the OOG and the Open Meeting Act in March 2017. . . .”

It is evident from the complainant’s statements that the BZA actions have created the appearance of preferential treatment. The complainant clearly believes Attorney Moldenhauer was afforded special treatment by the BZA due to her previous tenure as Chairperson of this public body. The complainant’s statements also express a lack of confidence in the integrity of government, specifically in the BZA. Based on the totality of the circumstances in this matter the OOG must agree with complainant and find the BZA in violation of 11-Y DCMR 105.3(b) and (f) which states:

105.3 Members of the Board shall avoid all actions which might result in, or create the appearance of, the following:

- (a) Using public office for private gain;
- (b) *Giving preferential treatment to any person;*
- (c) Impeding government efficiency or economy;
- (d) Losing complete independence or impartiality;
- (e) Making a government decision outside official channels; or
- (f) *Affecting adversely the confidence of the public in the integrity of government.*

(Emphasis added).

Recommendations

Regardless of the BZA’s ruling on the *Motion to Stay Vacate Order, Pending Appeal* docketed for June 14, 2017, the OOG recommendations to the BZA are as follows: (1) Strictly adhere to the OMA Notice of meetings provisions in all future matters; (2) Strictly adhere to the established protocol for granting continuances in the regulations governing its proceedings; (3) avoid all actions that may result in or create the appearance of giving preferential treatment to any person; (4) avoid all actions that may result in affecting adversely the confidence of the public in the integrity of government and its proceedings; (5) amend its regulations to correspond with the OMA requirement that a transcript be available no later than seven (7) business days after the hearing or meeting, and, (6) for the Office of Zoning Executive Director, its legal counsel, Secretary to the BZA and members of the BZA attend an open meetings training within 90 days of the issuance of this binding opinion.

Conclusion

The OOG opines as follows: (1) that the case on the Zoning Commission’s website as a “Continuation of Case No. 19387” was not a continuation of the matter, but a second public hearing on December 12–14, 2016; (2) the BZA did not properly notice this second public hearing as required under the OMA and the lack of proper notice prevented the public from attending; (3) the second public hearing on December 14, 2016 was an improper closed session in clear violation of the OMA and BZA regulations; (4) the BZA failed to follow the established protocol in the regulations governing the conduct of its meetings to continue the December 14,

2017 hearing; and, (5) the conduct of the BZA has resulted in or created the appearance of violations of its Rules of Ethics, including creating the appearance that the BZA conferred preferential treatment on a former BZA Chairperson in bringing the Application to the Board for a second hearing, which, *inter alia* has adversely affected the confidence of the public in the integrity of government.

The complainant in this matter request for relief includes: (1) the BZA staying the order and be required to reopen the Application for further testimony; (2) reimbursement of attorney fees incurred from the complainant having to file an appeal in the D.C. Court of Appeals estimated to be in the \$5000 to \$10,000 range; (3) and, injunctive relief to stay the BZA's order in the Application.

The OMA does not empower the OOG to order a public body to reimburse a complainant for attorney fees that are expended in litigating a matter that involves violations of the OMA. Currently, the OMA does not authorize a private right of action by the complainant under its provisions (D.C. Official Code § 2-579(1)). As the Application is currently pending before the BZA on a *Motion to Vacate Stay Order, Pending Appeal*, it is not a ripe matter for the OOG to seek injunctive relief at this time. The OOG will continue to monitor the outcome of the *Motion to Vacate Stay Order, Pending Appeal* and all other administrative matters regarding the Application. The OOG reserves its right to exercise its enforcement authority to seek injunctive relief under D.C. Official Code § 2-579.

Sincerely,



TRACI L. HUGHES, ESQ.
Director, Office of Open Government
Board of Ethics and Government Accountability

cc: Sara Bardin, Director
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