

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 13991-A of Curt Hansen, pursuant to 11 DCMR Subtitle Y § 704¹, for a modification of significance to revise BZA Order No. 13991, to permit the addition of an accessory fast food establishment to an existing retail grocery store, to expand the retail use to the basement, to change the operating hours, to increase the number of employees from two to seven, and to increase the number of seats from zero to eighteen in the RF-1 Zone at premises 522 ½ K Street N.E. (Square 830, Lot 56).

The original application (No. 13991) was pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 7106.11 to change a nonconforming use from drug store-food products, first floor and basement for storage, to grocery and delicatessen, first floor and basement for storage, in an R-4 District at premises 522 ½ K Street, N.E. (Square 830, Lot 56).

HEARING DATES (Case No. 13991):	July 20 and September 14, 1983
DECISION DATE (Case No. 13991):	October 5, 1983
FINAL ORDER ISSUANCE DATE (Case No. 13991):	November 9, 1983
MODIFICATION HEARING DATES:	September 20 and October 18, 2017 ²
MODIFICATION DECISION DATE:	October 18, 2017

SUMMARY ORDER ON REQUEST FOR MODIFICATION OF SIGNIFICANCE

BACKGROUND

On October 5, 1983, in Application No. 13991, the Board of Zoning Adjustment (“Board” or “BZA”) approved a request by Kwang B and In A Jeon, the then owner of the building located at

¹ The original application was filed under the Zoning Regulations (Title 11, DCMR) which were then in effect (the “1958 Zoning Regulations”) but which were repealed on September 6, 2016 and replaced with new text of Title 11, DCMR (the “2016 Regulations”). Also, all of the zone district names have been changed in the 2016 Zoning Regulations. Other than the description of the original application and its caption, the other references in this Order to provisions contained in Title 11 DCMR are to the 2016 Regulations. The repeal of the 1958 Regulations and change of zone district name has no effect on the validity of the Board’s decision in Application No. 13991 or the validity of this order.

² The hearing was originally scheduled for September 20, 2017; however, on September 6, 2017, the Board granted the request of the ANC to postpone the hearing (Exhibit 23) and postponed the hearing to October 18, 2017.

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522 K Street, N.E. and also at the time the proprietor of the retail business located at that address, for a special exception under Paragraph 7106.11 in the 1958 Zoning Regulations to allow a change from a nonconforming use of drug store-food products, first floor and basement for storage, to another nonconforming use of grocery and delicatessen (sandwiches and hot food) on the first floor and storage in the basement. The Board issued Order No. 13991 on November 9, 1983, approving the special exception requested.

As noted by the Office of Planning (Exhibit 28), Finding No. 10 in Order No. 13991 specified that the applicant at the time had proposed to limit the business' operations, as follows:

1. Hours of operation to be limited to 8:00 am to 8:00 pm Monday to Saturday and 8:00 am to 6:00 pm on Sundays;
2. The number of employees would remain at two;
3. Service would be carryout only;
4. There would be no tables or chairs for on-site sit down service.

(Order No. 13991, Finding No. 10, pg. 2.)

The approval in Case No. 13991 was subject to two enumerated conditions, namely:

1. Exterior signage shall be limited to one non-illuminated sign, located at the K Street entrance.
2. Two garbage cans shall be placed on the subject site, and all parts of the lot shall be kept free of litter and debris.

(Exhibit 3.)

According to the current owner who is the applicant in the modification request herein (the "Applicant"), this 100-year-old building has had commercial uses on the first floor and in the basement for at least 70 years. In the 1940s, the first floor and basement were used as a pharmacy and convenience store. By the 1970s, the store was being operated as a convenience store.

In 1983, the then building owner, Kwang B. Jeon and his spouse, In A. Jeon, applied to this Board for a special exception to change the use from a nonconforming use for drug store-food products to one for grocery store and delicatessen. That application was granted in October 1983 and Order No. 13991 was issued on November 9, 1983.

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Subsequent to the Board's 1983 approval, the ownership of the market changed but the uses continued. The Applicant and current owner of the building indicated that, based on the Board's 1983 order, the building was renovated to incorporate a small commercial kitchen with a wood/gas fired brick oven for pizza and a coffee bar. The market also continues to sell groceries.

According to the Applicant, shortly after Application No. 13991 was granted, Kwang Jeon, who had been operating the store, sold the store, but not the building, to the Kim family, who operated the store as a convenience store with a deli counter, selling hot and cold sandwiches and soup. It is from this approval that the Applicant is seeking a modification.

In the early 1990s, the Applicant, Curt Hansen, acquired the property from Kwang Jeon, but continued to rent the store to the Kims who continued to operate it. The Kims then sold the business to Khalid Ibnoujala, who continued to operate the business as a convenience store through 2014. Subsequently, the Applicant and Mr. Ibnoujala planned a joint venture, wherein the Applicant would renovate the store and still produce hot food, but this time in a wood fired stove. The Applicant noted that prior to beginning the renovations, he met with District officials, including zoning, to confirm that the renovations and intended use were compliant with the existing Certificate of Occupancy.

The approval in Case No. 13991 allowed the then owner to cook and prepare food in the market. As noted above, the market continued to operate under that ownership from 1983 to 2015. In 2015, the market that had been trading as the ABC Market closed for renovations and re-opened under a new name, Old City MAO, LLC, trading as Old City Market and Oven. Old City Market and Oven opened for business in November 2016 and has been in continuous operation since that date. The Applicant stated that prior to Old City Market and Oven's opening in November 2016, a District zoning inspector came and inspected the premises regarding all aspects of the store, and as a result, a Certificate of Occupancy was issued.

The Applicant indicated that prior to the latest renovations, the operator of the business used the first floor of the building for retail sales and the basement level contained a bathroom and storage rooms. After the market closed for renovations, the basement was renovated and the pre-existing bathrooms were completely gutted and renovated to be accessible for persons with disabilities. The modification application requests expansion of the retail use to the basement.

The Applicant also noted that the building has two bays that are original to the building. During the time Mr. Ibnoujala operated the store, he used the 6th Street bay as a point of sale space and sat behind a plywood and Plexiglas wall. The K Street bay held a freezer. After the Applicant completed the renovations, the windows were restored in the bays and a nine-inch counter installed just below each picture window. The Applicant indicated that the intended purpose of the counters was to allow patrons to have a space to stand and drink their coffee while waiting for their food to be prepared. The Applicant set up three small tables with seating downstairs. Also, four stools were brought in so patrons could sit at the bay windows.

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After installing the seating described above, the Applicant was informed by the Zoning Administrator's office that the eight chairs and four stools were not permitted under the current Certificate of Occupancy and that the Applicant would need to apply for a modification of significance to the approval in Order No. 13991 in order to add seating and provide any other changes to how the store was operated. The Applicant removed the chairs and stools and applied for this modification of significance.

MOTION FOR MODIFICATION OF SIGNIFICANCE

On June 13, 2017, Curt Hansen, the current owner of the property, (the "Applicant"), submitted a request for a Modification of Significance to the approval granted by the Board in Order No. 13991. (Exhibit 1-9.) The Applicant is seeking a modification to Order No. 13991 to:

1. Add an accessory fast food use to an existing retail grocery store/deli;
2. Expand the retail grocery use to the basement; and
3. Modify the conditions of Order No. 13991 to:
 - a. Change the hours of operation;
 - b. Increase the number of employees from two to seven; and
 - c. Increase the number of seats from zero to 18.

The modification application was accompanied by a memorandum from the Zoning Administrator ("ZA"), dated May 10, 2017, in which the ZA referred the Applicant to the Board for a Modification of Significance for the following revisions:

1. Addition of accessory Fast Food Establishment to Retail Grocery Store/Deli;
2. Expansion of the retail use to the basement (*identified as storage facilities under Paragraph 4 of the Findings of Fact*)³;
3. Change the operating hours from 8:00 am to 8:00 pm Monday through Saturday and 8:00 am to 6:00 pm on Sundays (*Paragraph 10 of the Findings of Fact*) to 9:00 am to 9:00 pm Monday through Saturday and 9:00 am to 6:00 pm on Sundays;
4. Increase the number of employees form two (*Paragraph 10 of the Findings of Fact*) to seven; and

³ The Findings of Fact referenced by the ZA are to Order No. 13991.

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5. Increase the number of seats from 0 seats (*Paragraph 10 of the Findings of Fact*) to 18 seats total (10 seats in the basement, and eight seats on the first floor).

(Exhibit 4.)

The Applicant filed submissions and testified as to how the proposed modification of significance meets the burden of proof for the additional relief requested. (Exhibit 5.)

The Merits of the Request for Modification of Significance

Pursuant to Subtitle Y § 704.1, any request for a modification that does not meet the criteria for a minor modification or modification of consequence⁴ requires a public hearing and is a modification of significance. The Applicant's request complies with 11 DCMR Subtitle Y § 704, which provides the Board's procedures for considering requests for modifications of significance.

In the current case, the Applicant, based on the ZA's referral, submitted an application for a modification of significance to revise BZA Order No. 13991, to permit the addition of an accessory fast food establishment to an existing retail grocery store, to expand the retail use to the basement, to change the operating hours, to increase the number of employees from two to seven, and to increase the number of seats from zero to eighteen in the RF-1 Zone. As the ZA referral required the Applicant to seek a modification of significance and that was how the application was stated, it met the definition of a modification of significance and a public hearing was held.

Pursuant to Subtitle Y § 704.6, a public hearing on a request for a modification of significance shall be focused on the relevant evidentiary issues requested for modification and any condition impacted by the requested modification. Pursuant to Subtitle Y § 704.7, the scope of a hearing conducted pursuant to Subtitle Y § 704.1 is limited to the impact of the modification on the subject of the original application, and does not permit the Board to revisit its original decision. Pursuant to Subtitle Y § 704.8, a decision on a request for modification of plans shall be made by the Board on the basis of the written request, the plans submitted therewith, and any responses thereto from other parties to the original application. Finally, pursuant to Subtitle Y § 704.9, the filing of any modification request under this section does not act to toll the expiration of the underlying order and the grant of any such modification does not extend the validity of any such order.

Notice. Pursuant to Subtitle Y §§ 704.4, and 704.5, all requests for modifications of significance must be served by the moving party on all parties in the original proceeding at the same time that the request is filed with the Board. The Applicant served the Office of Planning ("OP") and the affected Advisory Neighborhood Commission ("ANC"), ANC 6C. (Exhibit 5.)

⁴ See, Subtitle Y §§ 703.3 and 703.4.

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Also, pursuant to Subtitle Y § 400.4, the Office of Zoning provides notice upon its acceptance on behalf of the Board of an application requiring a public hearing to the Applicant, the affected ANC, the affected Single Member District ANC Commissioner, in this case ANC 6C06, OP, the District Department of Transportation (“DDOT”), and the Councilmember for the ward within which the property is located. Pursuant to Subtitle Y § 402.1, the Board also provides notice of the public hearing to the applicant, the affected ANC, the affected Single Member District ANC Commissioner, all owners of property within 200 feet of the subject property, any leaseholders on the subject property, OP and all other appropriate government agencies, and the Councilmember for the ward within which the property is located.

Proper and timely notice of the application was provided to ANC 6C, the only other party to Application No. 13991, the ANC Commissioner for Single Member District 6C06, OP, DDOT, the Ward Councilmember for the Property, and the Council Chairman and the At Large Councilmembers. Also, notice of the public hearing was provided to the Applicant, ANC 6C, all owners of property within 200 feet of the subject property, and the Ward Councilmember. (Exhibits 10-21.)

Reports. ANC 6C originally filed a motion to postpone the hearing, which was granted on September 6, 2017. (Exhibit 23.) Subsequently, ANC 6C submitted a report dated October 16, 2017, in support of the application for a modification. The ANC report indicated that at a regularly scheduled, properly noticed public meeting on October 11, 2017, at which a quorum was present, the ANC voted 6:0 to support the application subject to conditions. The ANC noted in its report that its “chief concern is to ensure that this business – whether under the ownership of the applicant or any successor – retains its principal use as a grocery store, with the proposed fast-food use remaining ‘clearly and subordinate to’ that principal use.” As to the conditions, the ANC noted that:

1. ANC 6C supports the request for 18 indoor seats so long as they are not served by wait staff. They expressed concern that adding an equal number of outdoor seats would cause the fast-food use to be so significant an operation so that it would no longer be secondary to the principal grocery use. Thus, they support authorization for up to six additional seats outside, subject to DDOT/Public Space approval.
2. The ANC supports expanding the hours of operation to 7:00 am to 9:00 pm Monday – Saturday and 7:00 am to 6:00 pm Sunday.
3. ANC 6C supports allowing delivery service during the full hours of operation, subject to limitation, as recommended by the Office of Planning, that all deliveries be made by bicycle or on foot.
4. ANC 6C supports the application’s request, as proposed, to expand the retail use to the basement and the increase in the number of employees.

(Exhibit 31.)

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ANC Commissioners Edelman and Eckenwiler testified in support and provided further discussion of the ANC's proffered conditions.

OP submitted a timely report. The report, dated October 6, 2017, recommended approval of the requested modification with nine conditions. (Exhibit 28.) The Board accepted seven of the nine conditions.

DDOT submitted a report stating that it had no objection to the granting of the request with one condition. (Exhibit 27.)

A petition of support (Exhibits 8 and 9) as well as five letters of support from neighbors for the application were submitted to the record. (Exhibits 25, 30, 32, and 33.)

Burden of Proof. As directed by 11 DCMR Subtitle X § 901.2 and Subtitle Y § 704, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case for a modification of significance to revise BZA Order No. 13991, to permit the addition of an accessory fast food establishment to an existing retail grocery store, to expand the retail use to the basement, to change the operating hours, to increase the number of employees from two to seven, and to increase the number of seats from zero to eighteen in the RF-1 Zone at premises 522 ½ K Street N.E.. With its application, the Applicant submitted the required documents in conjunction with the application, including a statement demonstrating how the application meets the burden of proof for the Modification of Significance. (Exhibit 5.) The Applicant also provided testimony as to how the application meets the burden of proof.

The only parties to the case were the ANC and the Applicant. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party. Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board also concludes that in seeking a modification of significance to Case No. 13991, the Applicant has met its burden of proof under 11 DCMR Subtitle Y § 704.

As noted, the only parties to the case were the ANC and the Applicant. Accordingly, a decision by the Board to grant the request would not be adverse to any party and therefore an order containing full finding of facts and conclusions of law need not be issued pursuant to D.C. Official Code § 2-509(c) (2012 Repl.). Pursuant to 11 DCMR Subtitle Y § 101.9, the Board has determined to waive the requirement of 11 DCMR Subtitle Y § 604.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

It is therefore **ORDERED** that this application for modification of significance of the Board's approval in Application No. 13991-A is hereby **GRANTED SUBJECT TO THE APPROVED PLANS AT EXHIBIT 7 AND TO THE FOLLOWING CONDITIONS:**

1. Exterior signage shall be limited to one non-illuminated sign, located at the K Street entrance.

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2. At least two garbage receptacles shall be placed on the subject site, and all parts of the lot shall be kept free of litter and debris. Commercial trash pick-up shall be a minimum of two times per week.
3. There shall be a maximum of seven full-time employees.
4. Hours of operation shall be limited to 7:00 AM to 9:00 PM, Monday to Friday; 9:00 AM to 9:00 PM, Saturdays; and 7:00 AM to 6:00 PM on Sundays.
5. Deliveries to the market shall be between the hours of 9:00 AM and 5:00 PM.
6. Seating is limited to 18 seats, anywhere in the building.
7. If seating is allowed in the public space, it will be in addition to the seating allowed in Condition 6.

In all other respects, Order No. 13991 remains unchanged.

VOTE ON ORIGINAL APPLICATION ON OCTOBER 5, 1983: 5-0

(Maybelle T. Bennett, Carrie Thornhill, William F. McIntosh, Douglas J. Patton, and Charles R. Norris to GRANT.)


VOTE ON MODIFICATION OF SIGNIFICANCE ON OCTOBER 18, 2017: 4-0-1

(Frederick L. Hill, Anthony J. Hood, Lesylleé M. White, and Carlton E. Hart to APPROVE; one Board seat vacant.)

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

A majority of the Board members approved the issuance of this order.

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: October 27, 2017

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.