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Before the Board of Zoning Adjustment
of the District of Columbia

In the Matter of ANC 2A-05)
) BZA Appeal No. 17249
)

Prehearing Statement of
Appellee, District of Columbia Department of Consumer and Regulatory Affairs

Appellee, District of Columbia Department of Consumer and Regulatory Affairs, submits herein a prehearing statement in response to the Appeal filed by the Advisory Neighborhood Committee ANC2A-05 Commissioner, filed before the District of Columbia Board of Zoning Adjustment (BZA) and dated October 1, 2004. Appellant, Dorothy Miller, Commissioner ANC 2A-05, appeals the decision of the Zoning Administrator to issue Certificate of Occupancy No. CO81956 (on August 19, 2004) to Coggins Sandwich Shop ("Coggins" or "sandwich shop"). Coggins, a food service vendor operates a small restaurant in a dormitory on the George Washington university campus. Ms. Miller, the Appellant, argues the zoning regulations do not provide for a 'commercial' restaurant in a residential district. She further contends that any permits which rely upon the Certificate of Occupancy, such as the building permits approving a recently added sidewalk café, are also invalid.[1]

This appeal should be denied because the certificate of occupancy was not issued in error. The BZA approved the George Washington University campus plan which included, among other things, student housing and dormitories. Further processing of

[1] Ms. Miller also raises related issues that are not properly before the BZA. She claims the university failed to properly disclose the true nature of the restaurant by using the term 'food venue.' Since any legal issues contesting the adequacy of public hearing notices as it relates to the university's plans or the Zoning Commission's Order are not a part of the Zoning Administrator's role here. A response from DCRA is not required.

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campus plan by the Zoning Commission approved food venues in the dormitory at issue here. The Coggins restaurant operates one of the food venues in the dormitories authorized by that plan.

1. *The University Campus Plan identified approved permissible zoning uses.*

This appeal relies, in part, on the premise that the zoning regulations do not permit restaurant use in residential areas.

Universities, as a matter of right, are permitted in areas zoned for high density commercial use. 11 DCMR §§§ 302.2 & 507 (2004). For areas zoned residential, university use is permitted as a special exception. *See*, 11 DCMR § 3104 (2004). In the case of special exceptions, a two-stage application process exists to obtain approval for specific projects. In the first stage, the university submits a "campus plan" that describes its general intentions for new land use over a substantial period of time. The plan is approved by the BZA. Approval of the campus plan "establishes distinct limitations within which all future construction must occur," *Levy v. D.C. Bd. of Zoning Adjustment*, 570 A.2d 739, 748 (D.C. 1990), for a certain period of time. In the second stage, the BZA reviews individual projects that the university proposes to undertake, evaluating them both for consistency with the campus plan and the zoning regulations. *See Draude v. D.C. Bd. of Zoning Adjustment*, 527 A.2d 1242, 1247-48 (D.C. 1987). The BZA has delegated that authority to evaluate specific projects, modifications, or further processing of the campus plans to the Zoning Commission. 11 DCMR § 3035 (2004).

The most recent campus plan approved by the BZA for George Washington University covers the period from years 2000 - 2010. *See*, BZA Order 16553 A-E, dated March 29, 2001. The University sought a special exception to build a new dormitory on

university owned property. The new dormitory was located on a parcel known as Square 43; Lot 26 at 616 23rd Street, N.W.[2] Pursuant to Sections 210 and 3104.1, the Zoning Commission approved the construction and use of the property for a new dormitory building. ZC Order 958, dated January 14, 2002. In its Order, the Commission outlines the conditions which govern the project. Specifically, the Commission noted that:

> The dormitory will contain dormitory residence rooms for male and female underclassmen, 88 below grade parking spaces, *and spaces for three or four food venue services on the lower and first levels.* (emphasis added)

Id, No.7 at p.2.

Since "[a] college or university use permitted in R-4 District under § 332.2 shall be permitted as a special exception in an R-5 District if approved by the Zoning Commission under § 3104," no other BZA approval would be required for GW to establish the food venues authorized in the Commission's order. *See*, 11 DCMR § 352.3 (2004).

Coggins Sandwich Shop operates the food venue services. DCRA issued building permits to GW to perform interior work to construct the eating facilities. Upon completion of the work, the ZA issued certificates of occupancy approving the use as a food service facility. The certificate of occupancy issued to Coggins approved the food venue use of a 34-seat restaurant (No. CO81956, dated August 19, 2004).

2. *Coggins operates a 'food venue' that is consistent with the campus plan.*

Appellant argues the ZA erred when it issued a certificate of occupancy to Coggins Sandwich Shop. The error, she asserts, lies with the approval of a restaurant for commercial use by students and the public alike. Her argument rests on the assumption

[2] Square 43, Lot 26 was not originally part of the GW campus plan. However, it was added to the campus boundary by BZA Remand Order of December 21, 2001.

the BZA intended the food venues to be limited to students, such as cafeteria facilities. The record does not support that assumption.

A food venue, regardless of its patrons may be operated by a university on a university campus if it is an approved component of the campus plan. Here, the campus plan granted specific approval to operate 'food venues'. ZC Order 958 expressly states that dormitory will include food venues. While the term 'food venues' is not expressly defined in the zoning regulations, the ZA interprets the term to comprise food court eateries.

Typically, in cases where the zoning terms are not defined by the regulations, the Board applies the Webster dictionary meaning. ("Words not defined in this section shall have the meanings given in the Webster's Unabridged Dictionary."). 11 DCMR §199.2(g)(2004). One of the several meanings applied to 'venue' in the dictionary include 'a locality of a gathering, a convention.' Webster's Dictionary. Similarly, the Commission has only used the term to refer to food court eateries, as exemplified in other commission orders explaining food operations. *See* ZC Order 746-C, effective August 16, 2002.

Coggins operates as a food court eatery. The food court includes three other restaurant type businesses and is completely contained within the confines of the dormitory. It provides food service to the university students and exists in that location to perform that service. The food service use was contemplated and approved by the BZA and the Zoning Commission as part of the campus plan.

3. *A University Campus Plan can include accessory uses.*

Appellant, although not explicitly, alleges that a restaurant is impermissible use because it cannot be approved as part of the campus plan. A university, such as George Washington University may only engage in academically-centered uses. It is the academically centered uses which should comprise the campus plan. The legal issue framed precisely is whether a university is permitted to use its premises for activities that arguably may not support the academic mission. The BZA and the D.C. Court of Appeals have resolved that issue affirmatively.

Generally, a use which is not permitted as a matter of right must be exceptionally approved. If the use is incidental to an approved use, then no further approval is needed. If the restaurant is not allowed as a matter of right then it needed special approval. Here the restaurant was specially approved. However, the restaurant use is also incidental to the larger university use and, therefore, a valid addition to the campus plan.

Accessory use, defined by the regulations, comprises a "use customarily incidental and subordinate to the principal use," and located on the same lot with the principal use. 11 DCMR § 199 (2004). The accessory use is incidental to permitted uses. *Id.*, at 352.2. The determination of what constitutes an accessory use is a two-pronged inquiry. The overarching question - - Does the use serve the University population and support the University's educational mission?

The first prong focuses on whether the restaurant use can be defined as an accessory use within the meaning of the zoning regulations. The second prong is whether the accessory use is permissible under a campus plan designation of "mixed use main

campus education/educational support" where additional BZA approval is not needed. Both questions can be answered in the affirmative.

It is important to note that the D.C. Court of Appeals provided the BZA with wide latitude in its interpretation of the accessory uses. For instance, in *Citizens Coalition v. District of Columbia Board of Zoning Adjustment*, 619 A.2d 940 (D.C. 1993), the Court upheld the BZA's conclusion that an addition to a power plant located on the Georgetown campus was an accessory use to the University. The Board noted that "like food sold in a cafeteria to students, the energy generated by the facility, used to heat dormitories, classrooms, a hospital, and other campus buildings, would also be for the benefit of the students, and thus serve as an accessory use to the principal function of the University." *id.* at 951, 956. [3]

Applying the same reasoning, the ZA has concluded that the existence of a food venue in a dormitory is incidental to the mission of educating students and faculty. The restaurant provides food to university students that enhance campus life. The dormitory is used exclusively by University students, and "for the benefit" of those persons. It is early

[3] *See, e.g.*, *National Cathedral Neighborhood Ass'n v. District of Columbia Board of Zoning Adjustment*, 753 A.2d 984 (D.C. 2000) (athletic facilities deemed accessory to school's main purpose); *Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment*, 749 A.2d 1258 (D.C. 2000) (permitting accessory uses to other permitted accessory uses); *Citizens Coalition, supra* note 12 (power plant on university campus held to be an accessory use to the university); *Dietrich v. District of Columbia Board of Zoning Adjustment*, 320 A.2d 282 (D.C. 1974) (high school gymnasium deemed an accessory use); *see also Hilton Hotels Corp. v. District of Columbia Board of Zoning Adjustment*, 363 A.2d 670 (D.C. 1976) (laundry facility was not an accessory use to a hotel because it was not on the same lot as the hotel).

subordinate; incidental, and related to the principal use of the University. The accessory use is both reasonable and consistent with the regulations.[4]

4. *An appeal of the public space permit authorizing the Sidewalk Café is not properly before this Board.*

Coggins obtained a public space permit to occupy a portion of the sidewalk as a café. A public hearing was held before the Public Space Committee of the D.C. Department of Transportation to discuss the merits of the application. The permit was granted contingent upon the issuance of the certificate of occupancy. The Appellant asserts this appeal should encompass the public space permit relies upon its validity. The issue raised here, however, is not properly before the BZA. The ZA has no role in the issuance of the public space permit. An appeal of that decision then cannot be properly raised here.

Conclusion

For these reasons discussed above, the Zoning Administrator's decision to issue

[4] Accessory use to a dominant principal use is also evaluated by location. In other words, the accessory use is should be located on the same lot as the dominant principal use. While Square 43 is not within the same lot as the other housing faculties, the ZA interprets the "lot" in this context to mean the entire University, not just the record lot, for the purpose of its consideration as an accessory use. *See* 11 DCMR § 199 ("A lot may or may not be the land so recorded on the records of the Surveyor of the District of Columbia"). This interpretation is consistent with other cases such as *Citizens Coalition*, 619 A.2d at 955 (holding that, because the proposed power plant was on a remote part of the University campus, the "same lot" requirement for accessory uses was satisfied) and *Georgetown Residents Alliance v. District of Columbia Board of Zoning Adjustment*, 802 A.2d 359, 366 (D.C. 2002) (distinguishing between "lot" and "lot of record").

Certificate of Occupancy CO No. 81956 should be affirmed.

Respectfully Submitted,

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Dated: January 14, 2005

Certificate of Service

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