

*Before the*

DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Advisory Neighborhood Commission 6A from the  
Administrative Decision of DCRA on  
Certificate of Occupancy Permit No. CO-106898

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BZA Appeal No. 17482

**Statement of the Appellant**

Advisory Neighborhood Commission 6A ("ANC 6A") hereby requests that the Board of Zoning Adjustment ("Board") GRANT its Appeal from the Administrative Decision of DCRA on Certificate of Occupancy Permit No. CO-106898, and in support of its appeal states as follows:<sup>1</sup>

**SUMMARY OF APPEAL**

The Department of Consumer and Regulator Affairs ("DCRA") erred in its decision to grant Certificate of Occupancy Permit No. CO-106898 to Adams Family Restaurants, Inc., trading as Birdland 4Sisters Cuisine ("Birdland") for two reasons. First, the Certificate of Occupancy allows use of the premises as a "restaurant," but Birdland is in fact a "fast food restaurant" as defined by 11 D.C.M.R. § 199.1 (2003). Second, DCRA granted a Certificate of Occupancy to Birdland, a fast food restaurant in a C-2-A District, without a special exception as required by 11 D.C.M.R. § 733.

<sup>1</sup> The Board of Zoning Adjustment has jurisdiction to hear and decide this appeal pursuant to 11 D.C.M.R. § 3100.2 and D.C. Code § 6-641.07(g)(4).

## DISCUSSION

On November 1, 2005, DCRA issued Certificate of Occupancy Permit No. CO-106898 to Birdland. The Certificate of Occupancy allows Birdland to operate a 48-seat “restaurant.” Birdland is located at 1118 H Street, Northeast. Birdland is in a C-2-A District and directly abuts residential property in an R-4 District.

I. DCRA erred in deciding that Birdland is a “restaurant” and not a “fast food restaurant.”

DCRA granted a Certificate of Occupancy for Birdland to operate a “restaurant” as defined by 11 D.C.M.R. § 199.1. However, residents have observed that Birdland in fact satisfies the definition of a “fast food restaurant” under 11 D.C.M.R. § 199.1 and Board Order No. 17214 (July 15, 2005). D.C. Municipal Regulations state that:

A restaurant will be considered a fast food restaurant if the floor space allocated and used for customer queuing for self-service for carry-out and on-premises consumption is greater than ten percent (10%) of the total floor space on any one (1) floor that is accessible to the public, and it exhibits one of the two following characteristics:

(a) at least sixty percent (60%) of the food items are already prepared or packaged before the customer places and order; and/or

(b) The establishment primarily serves its food and beverages in disposable containers and provides disposable tableware.

11 D.C.M.R. § 199.1. Moreover, a “fast food restaurant” is not a “restaurant.” See 11 DCMR § 199.1; Board, Order No. 17214 at 3. Therefore, a food establishment is necessarily a “fast food restaurant” and not a “restaurant” if it satisfies the floor space requirement and either the prepared/prepackaged food requirement or the disposable-container-and-tableware requirement.

Birdland satisfies the floor space requirement. The Board has interpreted the floor space requirement to mean that “if the total floor space for either customer queuing or on-premise consumption, or both, is more than ten percent of the total floor space that is available to the public on a particular floor, . . . then the establishment in question is a fast food restaurant.” Board, Order No. 17214 at 5 (vote in favor of order was unanimous). At Birdland, the floor space for customer queuing alone is substantially more than 10% of the publicly accessible floor space. Moreover, at Birdland, the sum of the floor space for customer queuing and the floor space for on-premises consumption exceeds the 10% threshold by a substantial amount. Any other calculation fails to comply with D.C.M.R. § 199.1. *Cf.* Board, Order No. 17214 at 5. Therefore, DCRA’s decision to grant Birdland the Certificate of Occupancy was erroneous. The Appellant will establish these facts with plans provided by DCRA, photographs, and statements from residents who have visited and/or observed Birdland.

Moreover, Birdland satisfies the disposable-container-and-tableware requirement. Birdland serves its food and beverages to customers primarily in disposable containers with disposable tableware. The Appellant will establish this fact through statements and photographs from residents who have visited and/or observed Birdland.

Also, Birdland satisfies the prepared/prepackaged food requirement. Birdland serves a substantial portion of food items that are prepared or packaged before customers place their orders. The Appellant will establish this fact through statements from both residents who have visited and/or observed Birdland.

II. DCRA erred in granting a certificate of occupancy to a fast food restaurant without a special exception.

Birdland is a fast food restaurant in a C-2-A District. Fast food restaurants are permitted in C-2-A Districts only by special exception. 11 D.C.M.R. § 733. However, DCRA granted Birdland a certificate of occupancy without a special exception. Therefore, DCRA erred in granting Birdland a Certificate of Occupancy.

III. The Board of Zoning adjustment has jurisdiction over this case.

Under 11 D.C.M.R. § 3112.2, *as amended*, the Board may extend the time for filing if “there are exceptional circumstances beyond the appellant’s control and could not have been reasonably anticipated that substantially impaired the appellant’s ability to file an appeal to the Board . . . .” In this case, there were exceptional circumstances beyond the ANC’s control.

First, the ANC could not anticipate or determine whether Birdland would actually operate as a fast food restaurant until several weeks after it was in operation, because the factors that determine whether an establishment is a fast food restaurant are only observable when the establishment in question is actually in operation. These factors include the actual type of tableware in use, the actual type of food and beverage containers in use, and the actual time when the establishment prepares food. In the case of Birdland, it would be impossible for the ANC to bring its appeal in good faith without first observing whether Birdland’s actual operations complied with its Certificate of Occupancy.

Second, ANC 6A has been unable to obtain documents necessary to evaluate whether Birdland was in operation because of DCRA's delay. In late November 2005, ANC 6A requested construction documents and other materials from DCRA to evaluate whether Birdland complied with the zoning regulations. To date, DCRA has not provided all but one of those documents. ANC 6A attempted to obtain the following construction documents and relevant materials from DCRA through the following means:

- (1) Letter sent to Dr. Patrick J. Canavan, Director of DCRA, dated October 31, 2005, requesting the status of certificates of occupancy for all H Street eating establishments and highlighting ongoing construction at Birdland.
- (2) Electronic mail sent to Mr. Bill Crews, Zoning Administrator for DCRA, dated November 10, 2005, which specifically requests the status of the certificate of occupancy for Birdland; and
- (3) Electronic mail sent to Mr. Bill Crews, dated December 28, 2005, that notes that Birdland appears to be opening and requests the certificate of occupancy as well as all the plans and drawings used for the permit process.

In each case, DCRA did not answer ANC 6A's requests. The text of the letter and subsequent e-mails are attached.

Also, an extension will not prejudice the parties. An extension would not prejudice DCRA because the Zoning Administrator had notice that ANC 6A was interested in Birdland's compliance with the zoning regulations since late November 2005. An extension would not prejudice ANC 6A, because it is filing the appeal. An

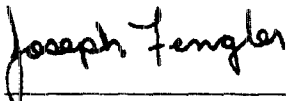
extension would not prejudice Birdland, because Birdland is and will remain in operation and generate income until the resolution of this appeal, even though its operation is in violation of the zoning regulations. The extension also benefits Birdland, because it has given Birdland an extended opportunity to bring its operations into compliance with the zoning regulations before ANC 6A filed its appeal. ANC 6A notes that, if the Board of Zoning Adjustment denies this extension, it would have the adverse effect of requiring ANCs to decide to file their appeals before an establishment has had the opportunity to establish and normalize its operations.

#### REQUEST FOR RELIEF

The Appellant requests that the Board ORDER the Department of Consumer and Regulatory Affairs to:

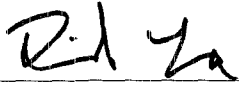
1. revoke Certificate of Occupancy Permit No. CO-106898;
2. treat Birdland's Application for a Certificate of Occupancy for a "restaurant" as one for a "fast food restaurant";
3. Initiate the special exception process pursuant to 11 D.C.M.R. § 733 within thirty (30) days of the date of the final order issuing from this appeal.

Respectfully submitted,



Joseph Fengler, ANC 6A Chair  
815 F Street, NE  
Washington, DC 20002

*as authorized agent for*  
Advisory Neighborhood Commission 6A  
P.O. Box 75115  
Washington, DC 20013



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Richard Luna  
1230 Linden Place, NE  
Washington, DC 20002-4455

*as authorized agent for*  
Advisory Neighborhood Commission 6.  
P.O. Box 75115  
Washington, DC 20013



District of Columbia Government  
Advisory Neighborhood Commission 6A  
Box 75115  
Washington, DC 20013



October 31, 2005

Dr. Patrick J. Canavan, Director  
Department of Consumer and Regulatory Affairs  
941 North Capitol Street NE, Room 2200  
Washington, DC 20002

Re: Overdue Report on Inspections of H Street NE Eating Establishments

Dr. Canavan:

On October 13, 2005, Advisory Neighborhood Commission 6A unanimously voted to request that DCRA honor its commitment to provide a report on this summer's inspections of eating establishments in the 200-1500 blocks of H Street NE. As you may recall, the report was: 1) to identify all eating establishments along H Street NE, 2) to determine what use their Certificates of Occupancy allows, 3) to specify what violations were identified at each establishment, and 4) to detail how violations have been addressed. Despite reminder emails from Commissioner Rice on September 16 and 23, the report has never been delivered.

At the current time, two additional eating establishments are under construction or near opening which may not have been inspected during the previous effort: Birdland at 1118 H Street NE and H Street Cafe at 1253 H Street NE. It is our hope that DCRA will make a timely and careful determination of whether these establishments meet the criteria established by the Board of Zoning Adjustment (BZA) for fast-food restaurants.

As new eating establishments open along the H Street NE Corridor, the need for DCRA to identify the fast-food restaurants prior to issuing building permits has become acute. Earlier in the summer, DCRA was notified of two new fast-food restaurants: Taste of Jamaica at 538 H Street NE and Cluck-U Chicken at 1123 H Street NE. The intent was to alert DCRA to the need for special exception hearings early in the process. Unfortunately, DCRA issued permits and allowed both establishments to open without the required special exception hearings at BZA. The Certificates of Occupancy for both establishments are now under appeal with BZA.

It would be preferable for all involved for DCRA to examine building permit applications more carefully to avoid this problem in the future. A more careful zoning review at the initial stages of permit application would create a level playing field and more regulatory certainty for business owners while preserving the right of residents to protect their neighborhoods from the litter, rodents, grease, traffic and noise that often come with fast-food restaurants.

Thank you for your attention. We look forward to receiving the report shortly.

Respectfully yours,

Joseph Fengler  
Chair, Advisory Neighborhood Commission 6A

cc: Councilmember Jim Graham, Chair of the Committee on Consumer and Regulatory Affairs  
Councilmember Sharon Ambrose  
Bill Crews, DCRA Zoning Administrator

**From:** Joseph Fengler

**To:** Bill Crews

**Date:** Thursday, November 10, 2005 7:51:31 AM

**Cc:** Cody Rice; Rich Luna

**Subject:** Re: Overdue Report on Inspections of H Street NE Eating Establishments

Bill,

To follow-up on the two specific properties mentioned below:

1. 1118 H Street, NE (Square 0981, Lot 0080. Building Plan Review Status Tracking Number 1493 E 5 and 2656 E 5). As you can see, there are two tracking numbers for this address. The first one indicates all disciplines have been approved. The second indicates that the structural and zoning disciplines are still under review. Can you clarify what the current discipline status is on this property? Also, can you find out if the certificate of occupancy was issued? And if so, what was the date? This is one of the applications we believe has been filed incorrectly. This clearly is a fast food restaurant (ala Blimpies) that has filed under a matter-of-right restaurant application.

2. 1253 H Street, NE (Square 1004, Lot 0809. Building Plan Review Status Tracking Number 145 TL 6 and 24 E 6. Again, as you can see, there are two tracking numbers. In this case, and for both, every discipline is still pending review. The first one has a proposed completion date of 11/18/2005 and the second one 10/14/2005. In either case, it is clear that the BLRA is still reviewing these applications. I would strongly suggest that an immediate review be completed to determine if this is a fast food restaurant before these disciplines are approved. Again, we strongly believe that this is a fast food restaurant.

In short, let me provide my own "lay" definition between a fast food establishment and a restaurant. While I recommend the use of the official criteria, this may be instructive. We know that McDonalds is a fast food restaurant. They have tables, bathrooms and plenty of room for folks to eat at the establishment. But, if McDonalds was to apply for a restaurant permit in a C-2-A, it would be denied -- because we know it is fast food.

The layout of McDonalds is that you walk in, order from a counter, pay at a register -- and can either eat-in or take-out. From a lay perspective (and a way to understand it), is that when an establishment uses a walk-up, order from a counter, pay at a register model -- it is a high volume, predominately carry-out, fast food restaurant. The number of tables, the size of the eating area doesn't change the model.

Both 1118 and 1253 use this model.

I know that is not the "official" definition. I prefer the official definition -- but this might help you understand how we "see" this problem. It might help you "challenge" your inspectors to understand the differences in approach between a fast food model and a restaurant model.

Please let me know on the status of the certificate of occupancy. We plan to appeal if they have been issued.

*Joseph Fengler <fengler6a02@yahoo.com> wrote:*

Dr. Canavan, please accept this electronic, signed copy until the original arrives by postal service. We really want to work with your team at DCRA. This report is critical to establish a baseline we can all work from. Regards, Joe.

**From:** Joseph Fengler

**To:** Bill Crews (ZA DCRA); Eric (DCRA ANC) Rogers

**Date:** Wednesday, December 28, 2005 6:15:08 PM

**Cc:** Cody Rice (6a03); Rich Luna

**Subject:** Birdland + Overdue Report on Inspections of H Street NE Eating Establishments

Bill and Eric,

It appears that Birdland is ready to open on December 30, 2005 - per the big banner hanging on the outside of the building. That reminded me of the overdue report promised to our ANC. Also, if Birdland has been issued a certificate of occupancy, please let us know when we can pick up a copy of the certificate as well as all the plans and drawings used for the permit process. While it pains me to be in an adversary role, it appears our ANC will need to keep appealing this type of establishment until either DCRA inspectors figure out the zoning code or we lose an appeal.

Happy Holidays, Joe.

PS - Here is the extract on Birdland from a previous e-mail:

1253 H Street, NE - Birdland. (Square 1004, Lot 0809. Building Plan Review Status Tracking Number 145 TL 6 and 24 E 6. Again, as you can see, there are two tracking numbers. In this case, and for both, every discipline is still pending review. The first one has a proposed completion date of 11/18/2005 and the second one 10/14/2005. In either case, it is clear that the BLRA is still reviewing these applications. I would strongly suggest that an immediate review be completed to determine if this is a fast food restaurant before these disciplines are approved. Again, we strongly believe that this is a fast food restaurant.

PSS - What is that status of Rib Rit?

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## CERTIFICATE OF OCCUPANCY

PERMIT NO.

CO 106898

THIS PERMIT IS VALID ONLY FOR THE PREMISES  
OF THE PROJECT ADDRESS.

DATE: 11/1/2005

|                          |                     |                                       |
|--------------------------|---------------------|---------------------------------------|
| ADDRESS<br>1118 H ST. NE | FLOOR(S)<br>1ST FL. | PERCLID<br>(Square)<br>WARD:<br>ZONE: |
|--------------------------|---------------------|---------------------------------------|

|                                                                                                  |                                           |
|--------------------------------------------------------------------------------------------------|-------------------------------------------|
| PERMISSION IS HEREBY GRANTED TO:<br>CORPORATION: ADAMS FAMILY RESTAURANTS INC.<br>ID No.: 250405 | TRADING AS:<br>BIRDLAND 4 SISTERS CUISINE |
|--------------------------------------------------------------------------------------------------|-------------------------------------------|

|                              |                                           |
|------------------------------|-------------------------------------------|
| APPROVED USES:<br>RESTAURANT | PREVIOUS USES:<br>OTHER - SEE DESCRIPTION |
|------------------------------|-------------------------------------------|

|                    |         |                               |                   |                         |
|--------------------|---------|-------------------------------|-------------------|-------------------------|
| TYPE<br>USE CHANGE | BZA NO. | OCCUPIED SQ. FOOTAGE<br>1,280 | OCCUP. LOAD<br>48 | EXPIRATION DATE<br>NONE |
|--------------------|---------|-------------------------------|-------------------|-------------------------|

|                                            |                |
|--------------------------------------------|----------------|
| DESCRIPTION OF USE:<br>RESTAURANT 48 SEATS | FEE<br>\$75.00 |
|--------------------------------------------|----------------|

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, VALID ONLY for the premises at the above address or part thereof, and for the purpose(s) indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

|                                        |                                 |
|----------------------------------------|---------------------------------|
| Patrick J. Caravan, Psy.D.<br>DIRECTOR | PERMIT CLERK:<br>ADEMOLA SHITTU |
|----------------------------------------|---------------------------------|

DEPT OF CONSUMER & REGULATORY AFFAIRS  
941 NORTH CAPITOL STREET, N.E.  
WASHINGTON, DC 20002  
(202)442-4460

# CERTIFICATE OF OCCUPANCY

Report Date 11/01/2005 04:03 PM

Submitted By

Page 1

A/P # 106898 Type CERT OCCUP Issued Date 11/01/2005 Issued By D0702

Address 1118 H ST NE  
WASHINGTON DC 20002-

Location

Owner

Phone

Address

Country

☐ Foreign

Applicant's Full Name ANGIE ADAMS

Day Phone

Fax

Address

Pager

WASHINGTON DC

## Fees

(CERTIFICATE OF OCCUPANCY FILING FEE)

33.00

(CERTIFICATE OF OCCUPANCY ISSUANCE FEE)

42.00

Total Paid

75.00

Declared Value 0.00

Type of Work

Calculated Value 0.00

Square Footage

Actual Value 0.00

0.00

## Comments

RESTAURANT 48 SEATS

D.C. TREASURER

Signature of Owner ( If Owner Builder )

Date

Signature of Contractor or Authorized Agent

Date