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SIMON M. OSNOS*
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*ADMITTED IN VA, MD, DC
°ADMITTED IN VA, DC

March 23, 2007

Board of Zoning Adjustment
441 4th Street, N.W., Suite 200/210-S
Washington, D.C. 20001

Attn: Jerrily R. Kress, FAIA
Director, Office of Zoing

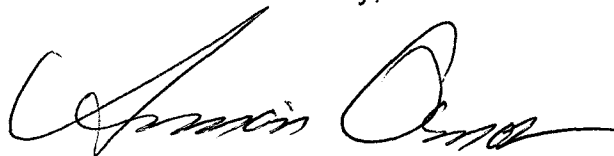
Re: 1417 17th Street, N.W. (BZA Appeal No. 17589)

Dear Director:

Enclosed please find an original copy of memorandum of appellant Salvatore Gorgone in the above referenced appeal to be held on April 10, 2007.

Should you have any questions, please call me. Thank you.

Cordially,



Simon M. Osnos

Enclosures

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17589

EXHIBIT NO. 17

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17589
EXHIBIT NO. 17

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
PUBLIC MEETING
APRIL 10, 2007

APPEAL OF SALVATORE GORGONE :
IN RE: 1417 17TH STREET, N.W. : BZA APPEAL NO. 17589
DENIAL OF OCCUPANCY PERMIT BY :
ZONING ADMINISTRATOR BILL CREWS :

BRIEF OF APPELLANT SALVATORE GORGONE

A. BACKGROUND

1. The appellant in this case Salvatore Gorgone is an owner of the four-story townhouse at 1417 17th Street, N.W. The property was formerly owned by a family partnership controlled by Mr. Gorgone, the Gorgone Investment Limited Partnership.

2. The property is zoned R-5-E for residential use. As shown by Gorgone's exhibits 1-4, previously filed with the BZA, a non-conforming delicatessen use was applied for and authorized on the first floor of the building by the Zoning Division.¹ Evidence of the District's authorization of the non-conforming use includes:

Certificate of occupancy B157402 issued August 3, 1989
Delicatessen—no seating (Woo Bong Sue)

Certificate of occupancy B171495 issued April 17, 1995
Food Deli (Tina Kim Scott)

Certificate of occupancy B173703 issued January 17, 1996
Deli (No Seating) (Fangji Chen)

Certificate of occupancy B00180991 issued June 4, 1998
Delicatessen No Seats (Ming Jin Zhang)

3. Pursuant to the authorized, non-conforming use, the aforementioned permit holders operated various delicatessen businesses under leases from Mr. Gorgone. At the hearing on this appeal, Mr. Gorgone will testify what types of delicatessen businesses were operated.

¹Gorgone submitted as exhibit 13 a list of earlier occupancy permits dating back to 1981. At the time, Gorgone was unable to obtain copies of those earlier permits. Attached hereto at Attachment A are copies of the earlier permits issued for delicatessen use.

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4. In the 2004 BZA Case No. 17075, involving tenant Ming Jin Zhang's application for a variance, the Office of Planning submitted a memorandum² making the following points regarding the property:

The existing 700 square foot space has accommodated various kinds of retail food operations since 1958. No changes to the use have been recorded since 1958.

The subject use should qualify as a neighborhood facility, because there are no seats, no parking spaces, and the space is specifically designed for food sales purposes.

There is documented proof that the basement space has been in continuous use for a delicatessen/carry-out purposes for over forty years.

The subject building was constructed in 1890 for commercial, residential and miscellaneous purposes. It has operated predominantly as a delicatessen (non-conforming) for over a forty-five year [period] under a number of different owners. This history is documented by a chronology of Certificates of Occupancies, dating back to 1958. **The Office of Planning cannot establish that the present use of the property is different from previous operations.**

5. Gorgone's exhibit 5 is a copy of a Master Business License issued by the Department of Consumer and Regulatory Affairs ("DCRA"), for operation of a delicatessen by Ming Jin Zhang during the license period September 1, 2003–August 31, 2005.³ At the hearing on this appeal, Mr. Gorgone will testify regarding the type of business operated at the premises during that period, i.e., a Chinese food carryout.

6. On October 17, 2005, DCRA issued a Notice of Intent to Deny License Renewal to Min Jin Zhang. The letter contains a footnote at p.2 stating "you may be operating outside the scope of the Certificate of Occupancy (C of O) issued to you on June 4, 1998." Thereafter, Zoning Administrator Bill Crews revoked the occupancy permit on the grounds that the business was not a delicatessen, but rather, a fast food restaurant. The discontinuance and revocation letters, which were not previously available to counsel, are enclosed herewith at Attachment 3. As Mr. Gorgone will testify, the District's refusal to re-license the premises resulted in an abandonment of the leasehold by Mr. Zhang.

²A copy of the memorandum is attached at Attachment B.

³Copies of earlier delicatessen licenses issued by DCRA to Mr. Zhang and the prior tenant Fangji Chen d/b/a Peking Tokyo Express are enclosed at Attachment 4.

7. On February 4, 2006, Mr. Gorgone, on behalf of the Gorgone Investment Limited Partnership, executed a lease to Paul Luna to use the property for delicatessen use. A copy of that lease was submitted as Gorgone's exhibit 7.

8. Some time in February 2006, Mr. Luna applied to the Zoning Division for a certificate of occupancy for delicatessen use. While it appears that the Zoning Division has lost the application, the undersigned attorney had numerous contacts with Zoning Administrator Bill Crews regarding the application, including an e-mail inquiry on February 27, 2006 (Gorgone's exhibit 8), a meeting with Mr. Crews, Mr. Luna and Mr. Gorgone on March 9, 2006 regarding the details of Mr. Luna's proposed operation, and follow-up telephone calls.

9. On June 11, 2006, Mr. Crews sent an e-mail to Mr. Luna (Gorgone's exhibit 13) stating that the intended to issue a letter of decision that the non-conforming delicatessen use had been "discontinued."

10. Thereafter, Mr. Crews sent undersigned counsel a letter on June 13, 2006 stating that he had prepared a "Notice of Discontinuance under 11 DCMR 2005.1 for the non-conforming prior use as a delicatessen" which was under "internal review." (Gorgone exhibit 14) The regulation referred to by Mr. Crews, 11 DC ADC §2005, provides:

Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for a period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located.

11. Subsequently, Mr. Crews told undersigned counsel to contact Jill Stern regarding the status of the internal review. Counsel contacted Ms. Stern by e-mail on August 11, 2006 (Gorgone exhibit 15) and was informed by reply e-mail from Ms. Stern on August 16, 2006 that DCRA had no record of Mr. Luna's occupancy permit application (Gorgone exhibit 17).

12. On September 22, 2006, Mr. Luna applied for an occupancy permit to allow use of the premises as a "gourmet shop." That application, which is the subject of this appeal, was denied by Bill Crews for the reason that "previous non-conforming use was discontinued for more than 3 years (11 DCMR 2005). Mr. Crews has never issued the promised opinion letter explaining how continued operations under a certificate of occupancy for delicatessen use, and a DCRA Master Business License for delicatessen operation, can be construed as the discontinuance of the non-conforming delicatessen use.

B. LEGAL ISSUES

13. Mr. Crews decided that Min Jin Zhang's Chinese carryout, although operated under a delicatessen license issued by DCRA was not a "delicatessen." The answer to the question "when is a delicatessen not a delicatessen" lies within the office of the Zoning Administrator, but it is apparent that his re-definition of the term "delicatessen" reverses decades of established zoning and licensing practice.

14. The District has historically licensed all carry-outs which do not have customer seating as "delicatessens" due to the fact that there have been only four (4) types of DCRA business licenses for food service operations: food products, grocery, delicatessen, and restaurant.

15. The terms "delicatessen" and "restaurant" were defined under former 23 DCMR §2499.1 governing retail food sales as follows:

Delicatessen – any business where food, drink or refreshments are cooked, prepared and sold for consumption other than on the premises.

Restaurant – a place where food, drinks or refreshments are sold, or prepared and sold, to be consumed by persons on the premises where sold: Provided, however, that this definition shall not be interpreted to include boarding houses and private homes.

16. Under the Streamlining Regulation Act of 2003, Act 15-146, codified at D.C. Code §47-2851.01 *et seq.*, food products, grocery, delicatessen and restaurant licenses were eliminated "as separate license categories" in favor of a "Public Health: Food Establishment Retail license endorsement." D.C. Code §47-2851.03a(f)(2)(A).

17. As indicated by Gorgone exhibit 5, the Master Business License issued to Ming Jin Zhang for delicatessen operations at the premises, DCRA now issues food service licenses with the generic endorsement "PUB HEALTH: FOOD EST. RET" but continues to use the terms food products, grocery, delicatessen and restaurant as sub-endorsements to the Master Business License.

18. It appears that the terms "delicatessen" and "restaurant" are no longer defined in the District's municipal regulations, but are still in use. Food operations are subject to Title 25 of the administrative code, promulgated June 6, 2003. At 25 DC ADC §9901, a food establishments is defined, in relevant part, as:

(a) An operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption, including but not limited to the following:

(1) An operation that relinquishes possession of food directly to a consumer. Such operations include a restaurant, a grocery store, a convenience store, a bakery, a delicatessen, a caterer, a hotel or a bed & breakfast operation where food is provided.

19. The terms “delicatessen” and “restaurant” as used in former 25 DCMR §2499.1 clearly differentiate food establishments which serve prepared food into two categories: those that sell food for off-premises consumption, i.e., delicatessens, and those that serve food for on-premises consumption, i.e., restaurants. There is no indication that the Streamlining Regulation Act of 2003 or the June 6, 2003 regulations at Title 25 of the D.C. administrative code have supplanted these long-established, common-sense definitions of food service operations. It is likewise obvious that former tenant Ming Jin Zhang operated a delicatessen as that term has been defined, understood and applied by DCRA.

20. Mr. Crews’s position is based on his interpretation of the term “delicatessen” as used in the District’s zoning ordinance. His rationale for re-defining the word arise from his efforts to distinguish between a by-right restaurant use, and a fast food restaurant use, permitted in a C-2-A zone only by special exception.

21. The terms “ restaurant” and “restaurant, fast food” are defined at 11 ADC §199. These definitions impact delicatessens only because the zoning definition of a fast food restaurant specifically excludes a delicatessen, which is not a defined term within the zoning ordinance, and because Mr. Crews has sought to define this term in such a way that the Chinese carryout formerly operated at Mr. Gorgone’s property can be retroactively defined as something other than a delicatessen.

Restaurant -- a place of business where food, drinks, or refreshments are prepared and sold to customers primarily for consumption on the premises. This term shall include but not be limited to an establishment known as a cafe, lunch counter, cafeteria, or other similar business, but shall not include a fast food restaurant. In a restaurant, any facilities for carryout shall be clearly subordinate to the principal use providing prepared foods for consumption on the premises. (32 DCR 4374)

Restaurant, fast food -- a place of business devoted to the preparation and retail sale of ready-to-consume food or beverages for consumption on or off the premises. A restaurant will be considered a fast food restaurant if it has a drive-through. 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 (1) of the two (2) following characteristics:

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

(b) The establishment primarily serves its food and beverages in disposable containers and provides disposable tableware. (This definition does not include an establishment known as a retail grocery store, convenience store, ice cream parlor, delicatessen, or other business selling food or beverages as an accessory use or for off-premises preparation and consumption.) (32 DCR 4374- 4375)

22. The Zoning Administrator has apparently decided that certain carry-outs, which have historically been licensed by DCRA as delicatessens pursuant to regulatory authority, will now be considered as fast food restaurants under the zoning ordinance, not delicatessens, because some carry-outs share some of the characteristics of a fast food restaurant, *i.e.*, service of food in disposable containers, even though the carry-out does not prepare or package food items before the customer places an order.

23. Based on communications with Mr. Crews, it is apparent that the Zoning Administrator has used the dictionary definition of a delicatessen as the starting point to differentiate carry-outs which can be considered as delicatessens, and carry-outs which will not be considered delicatessens. The definition of “delicatessen” in Webster’s Third New International Dictionary is as follows: “ready to eat food products (as cooked or processed meats, cheeses, prepared salads, canned foods, preserves, relishes), and “a store where delicatessen are sold either to be taken out or to be eaten on the premises (as in sandwiches).”

24. The zoning administrator has apparently concluded that a carry-out which does not serve sandwiches is not a delicatessen as defined under the zoning ordinance, even though it clearly is a delicatessen as that term has been employed by the licensing division of DCRA. This is the only possible explanation for Mr. Crews’s determination that a Chinese carry-out business operated under a delicatessen occupancy permit and a delicatessen business license was not a carry-out, resulting in the purported “discontinuance” of the non-conforming delicatessen use.⁴

25. Mr. Crews’s interpretation constitutes a rule under D.C. Code §2-502(6)(A), which was not adopted in accordance with agency rule-making requirements, and, as a further matter, this interpretation violates Mr. Gorgone’s due process rights since it is being applied retroactively to invalidate a use which was clearly authorized by the District government.

⁴Since the occupancy permit issued to Ming Jin Zhang indicates there was no seating it is unclear how Mr. Crews reached the decision that the customer queuing self-service area exceeded 10% of the floor area. Unless such were the case, the establishment could not be considered a fast food restaurant at all under the zoning ordinance.

26. Mr. Crews's interpretation fits the definition of a rule because it has general applicability, future effect and is designed to implement, interpret or prescribe law or policy. His interpretation affects all potential and existing food service establishments within C-2-A zones throughout the city. Thus, his prospective and retroactive definition of the term "delicatessen" so as to exclude carry-out which do not serve sandwiches is more than an interpretation of the zoning ordinance of the type upheld as being a proper exercise of agency discretion in Keefe Co. v. District of Columbia Board of Zoning Adjustment, 409 A.2d 624 (D.C.1979).

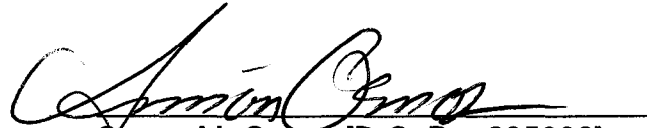
27. In the Keefe Co. case the Zoning Administrator and BZA determined that an applicant for an occupancy permit in an SP zone was not a professional person similar to an architect, dentist, doctor, engineer or lawyer, and was ineligible to obtain an occupancy permit, since the applicant was not licensed, bound by a code of ethics and professionally educated. the agency's interpretation of the term "similar professional person" was clearly reasonable as the agency "based its decision on "sound reason and precedent." Id., at 409 A.2d 626.

28. By contrast, Mr. Crews's definition would have the unsound and unreasonable effect of excluding from delicatessen ownership numerous proprietors of ethnic food establishments which do not feature the sandwich as typical ready-to-eat food. Under Mr. Crews's unreasonable definition, a business which sells primarily sandwiches would be a delicatessen, but not a business which sells primarily tacos, or burritos, or sushi, for example. Mr. Crews's position will convert innumerable carry-outs, licensed throughout the city as delicatessens, into ordinance-violating fast food restaurants.

29. In Mr. Gorgone's case, the Zoning Administrator has given no reason for the decision that "a delicatessen is not a delicatessen" and the ostensible justification for this decision is (a) not tied to any agency precedent, (b) stands in contrast to the city's decades-long practice of licensing carry-outs as delicatessens, and (c) ignores the Webster's definition of a delicatessen which, while it plainly extends to stores selling ready-to-eat foods "such as" sandwiches, is not limited to establishments which feature sandwiches. Furthermore, Mr. Crew's decision lacks any written explanation in spite of his prior statements that his intended decision had been put in writing and was under internal review.

30. Whether Mr. Crews's decision to deny an occupancy permit to Mr. Luna was merely interpretation, or instead a rule subject to rule-making procedures, retroactive application of this brand-new, unpublished definition of a delicatessen violates Mr. Gorgone's due process rights. Reichley v. District of Columbia Department of Employment Services, 531 A.2d 244 (1987).

31. For all of the foregoing reasons, the decision of the Zoning Administrator is incorrect and must be reversed.

A handwritten signature in black ink, appearing to read "Simon Osnos", written over a horizontal line.

Simon M. Osnos [D.C. Bar 295006]

Osnos & Associates, LLC

7700 Leesburg Pike, #434

Falls Church, Virginia 22043

703-356-8233

703-356-8428

ATTACHMENT 1

CERTIFICATE OF OCCUPANCY

No. B 14104

14104

Washington, D.C., NOVEMBER 21, 1958

Permission is hereby granted to VERNON & ARVELL LEEto use the BASEMENT floor(s) of the building located on lot 149 Square 787known as premises 1417 17TH ST., N.W. for the followingpurpose(s) RETAIL DELICATESSEN (NON-CONFORMING)

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID ONLY TEMPORARILY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s) indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGES 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.

DEPT. OF HEALTH & INSPECTIONS, GOVT. OF DIST. OF COL.

ZONE R-3-D

FEB 3 1959

Superintendent of Permits.

OFFICE COPY

CERTIFICATE OF OCCUPANCY

No. **8117646**

Washington, D.C., **12- 6**, 19 **79**

Permission is hereby granted to Dupont Station, Inc.
to use the 1st floor(s) of the building located on lot 149 Square 181
known as premises 1417 17th St. NW for the following
purpose(s): Retail Delicatessen

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES
AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated,
ONLY for the premises, 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 herefor, will render this Certificate VOID and a NEW
Certificate must be obtained.

DEPARTMENT OF LICENCES, INVESTIGATIONS AND INSPECTIONS GOV'T. OF DIST. OF COL.
OFFICE COPY.

ZONE

FEE \$ **1** 20.00

R-3aD

By [Signature] Chief, Permit Branch
Permit Clerk

CERTIFICATE OF OCCUPANCY

No. **B123950**

Washington, D.C., **2/18/81**, 19**81**

Permission is hereby granted to **D. C. Fish Co., Inc.**

BASEMENT
to use the _____ floor(s) of the building located on Lot **149** Square **181**
known as premises **1417 17th Street, N.W.** for the following
Retail Deli & Sausages
purpose(s): _____

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, 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.

ZONE **R-5-D**

FEE \$ **27.00**

DEPARTMENT OF LICENSES, INVESTIGATION AND INSPECTIONS GOVT. OF DIST. OF COL.

OFFICE COPY

Chief, Permit Branch

[Signature]
Permit Clerk

CERTIFICATE OF OCCUPANCY

No. 5127860

Washington, D.C., NOV. 13, 198

Permission is hereby granted to Michel G. Beaulieu
to use the Basement floor(s) of the building located on Lot 149 Square 181
known as premises 1417 17th n.w for the following
purpose(s) RETAIL DELICATESSEN

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES
AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated,
ONLY for the premises or part thereof and for the purposes 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 therein, will render this Certificate VOID and a NEW
Certificate must be obtained.

DEPARTMENT OF LICENSES, INVESTIGATIONS AND INSPECTIONS GOVT OF DIST OF COL

OFFICE COPY

ZONE

R/5/D

FEE \$ 27.00

Chief, Permit Branch

BY

Permit Clerk

CERTIFICATE OF OCCUPANCY

No. **B131190**

Washington, D.C., **June 24, 1982**, 19

Permission is hereby granted to **Michel Restaurants, Inc.**
to use the **Basement** floor(s) of the building located on lot **149** Square **181**
known as premises **1417 17TH St. N.W.** for the following
purpose(s): **Retail Delicatessen-no seating.**

Due to error on Original permit new permit typed.

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES
AT ALL TIMES. IT IS VOID INDEFINITELY UNLESS AN EXPIRATION DATE IS STATED,
ONLY for the premises, or part thereof, and for the purposes 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.

ZONE

FEE \$ **27.00**

6/5/82

By

Chief, Permit Branch

Permit Clerk

DEPARTMENT OF LICENSES INVESTIGATIONS AND INSPECTIONS GOVT OF DIST OF CO.

OFFICE COPY

ATTACHMENT 2

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING



Office of the Director

MEMORANDUM

TO: Board of Zoning Adjustment

FROM: Andrew Altman, Director
Office of Planning

DATE: February 24, 2004

SUBJECT: BZA Case No. 17075

APPLICATION

The application by Ming Jin Zhang pursuant to 11 DCMR 3104.1, for a special exception to allow the continuation of a Chinese Food Carry-Out not meeting the convenience stores in apartment houses requirements (Section 354) in the DCOD/R-5-E Zone District, located at 1417 17th Street, N.W., Square 181, Lot 149.

RECOMMENDATION IN BRIEF

The Office of Planning can't make a recommendation, pending information from the property owner.

SITE AND AREA DESCRIPTION

The subject premise is in the Dupont Circle Neighborhood in Square 181. The Square is bound by P Street to the north, O Street to the south, 16th Street to the east and 17th Street to the west. The subject site is on Lot 149, and contains a three-story row dwelling with basement. The subject carryout is located in the basement, with street level access to 17th Street. The subject structure is the northern end unit of a three-townhouse set. There is a 48-unit mid-rise apartment building at the northeast intersection of the square (17th & P Streets), which abuts the subject structure on the south side. The nine-story Richmond Apartments is at the south end of the square, located at the southeastern intersection of 17th & O Streets. There is a north south alley that extends from P Street, and ends at the rear of the subject property.

PROPOSAL

The applicant proposes to continue using the basement level of the subject premise to operate a Chinese Delicatessen/Carryout with no seating provided. The carryout is

BZA

Case No. 17075

Exhibit No. 35

approximately 700 square feet, located in the basement level of the premise, with a four-step walk-down at the entrance.

ZONING ANALYSIS

Referral From Zoning Administrator

After reviewing the application to establish the carryout under Section 354.1 of the Zoning Regulations, the Office of Planning disagrees with the Zoning Administrator's referral to Section 354 because the provisions are for a convenience store in an apartment house, in the R-5-E District as an adjunct use to an apartment building.

Section 354 Convenience Stores in Apartment Houses (R-5)

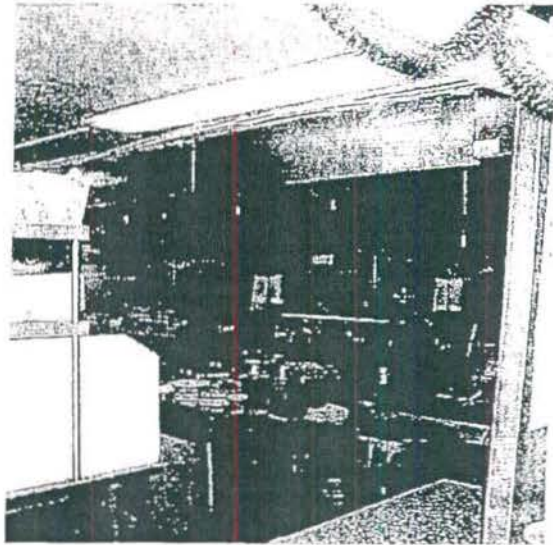
354.1 Sale of convenience commodities and services, as accessory uses and appropriate adjuncts to an apartment house that are designed to serve the tenants' daily living needs shall be permitted as a special exception in an R-5 District if approved by the Board of Zoning Adjustment under § 3104, subject to the provisions of this section:

- (a) Food, drugs, and sundries; and
- (b) Personal services.

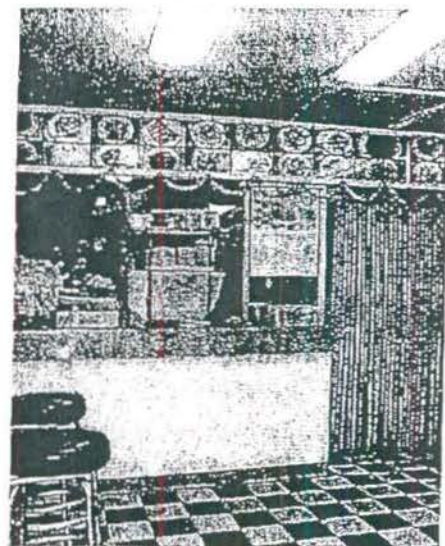
The delicatessen/carryout is on the basement level of a three-story apartment house. The basement, which is partially above grade, has direct access to 17th Street, but no direct connection to the upper floors of the apartment house. The deli/carry-out principally caters to walk-in customers as opposed to the tenants' in the building.

History of Use

The subject building was constructed in 1890 for commercial, residential, and miscellaneous purposes. The basement has operated predominantly as a delicatessen for over forty-five years under a number of different owners. This history is documented by a chronology of Certificate of Occupancies, dating back to 1958. The Office of Planning cannot establish that the present use of the property is different from previous operations. Prior to the current applicant, each of the previous operators was permitted to operate (without Board action) as a non-conforming use.



Kitchen area.



Customer area.

Zoning Regulations Lack Definition for Delicatessen or Food Carry-Out

The previous Certificate of Occupancies designated the subject basement use as "Retail Delicatessen" (Non-Conforming). However, no definition exists in the Zoning Regulations for a **delicatessen** or food carryout.

The applicant applied for a Certificate of Occupancy to use the subject premises as a "Chinese Carry-Out." The Zoning Administrator (ZA) office disapproved the application, because in their judgment, the Board of Zoning Adjustment should review the application for approval.

In discussions with the ZA office, as to why the current application was being referred to the Board for zoning purposes, after a succession of previous owners had been permitted to use the space as a deli – a non-conforming use, the ZA did not make a determination on how the use should be classified as a "restaurant" or a "fast food".

OP cannot determine on behalf of the ZA what the appropriate zoning category would be for the carryout food business, but provides the following analysis:

OP has analyzed the application in terms of a special exception subject to Section 2003.

Food delivery service - a restaurant, delicatessen, or fast food restaurant in which the principal use is delivery of prepared food by motor vehicle to customers located off the business premises. Seating and tables for customers may or may not be provided for on-premises consumption, but if present are clearly subordinate to the principal use of delivering prepared food to off-site customers. Any establishment that derives more than seventy-five percent (75%) of its sales from delivery orders will be considered a food delivery service in all cases. This definition does not include catering establishments.

Section 199.2 (g) refers undefined words to the meaning given in *Webster's Unabridged Dictionary*. Referring to *Webster's Ninth Collegiate Dictionary* a delicatessen is defined as follows:

Delicatessen - ready to eat food products (as cooked meats and prepared salads).

If the Board accepts the use as a delicatessen, it is still difficult to define the use as a "Food delivery service" because the applicant reports that the food is not principally delivered by motor vehicle, but rather is picked up by customers.

Because no use category has been determined for the business, OP has reviewed the application in terms of both a use variance and the special exception criteria of §2003 **Changing Uses Within Structures**, as changing from a food delivery service (first permitted in the C-2-B zone districts by §721.3) to a "Other service or retail use similar to that permitted" in the C-2 zone district (§721.4).

The delicatessen/carryout is on the basement level of a three-story apartment house. The basement, which is partially above grade, has direct access to 17th Street, but no direct connection to the upper floors of the apartment house. The deli/carry-out principally caters to walk-in customers, as opposed the tenants' in the building.

Food Delivery Service (721.3)

If the Board determines the use is a food delivery service, then the most restrictive zone in which a food delivery service is permitted is C-2-B, subject to certain criteria.

Section 2002 Nonconforming Uses Within Structures.

2002.2 Where the nonconforming use occupies only a portion of the structure, the restrictions of this section and §§ 2003 and 2004 shall apply only to that part of the structure devoted to the nonconforming use.

Section 2003 Changing Uses Within Structures.

2003.1 If approved by the Board of Zoning Adjustment, as authorized in §§ 3103 and 3104 for variances and special exceptions respectively, a nonconforming use may be changed to a use that is permitted as a matter of right in the most restrictive district in which the existing nonconforming use is permitted as a matter of right, subject to conditions set forth in this section.

C-2-B is the most restrictive district, in which a food delivery service is permitted. Other permitted similar uses in the C-2-B Districts are catering bakeries and restaurants.

2003.2 The proposed use shall not adversely affect the present character or future development of the surrounding area in accordance with this title. The surrounding area shall be deemed to encompass the existing uses and structures within at least three hundred feet (300 ft.) in all directions from the nonconforming use.

The subject business (under a number of different operators) has been at the same location before the enactment of the current Zoning Regulations in 1958, however the commercial food operation is not consistent with the present character of the area.

2003.3 The proposed use shall not create any deleterious external effects, including but not limited to noise, traffic parking and loading considerations, illumination, vibration, odor, and design and siting effects.

OP is unaware of any traffic or parking concerns but the community residents have expressed concerns about noise and rodent problems.

2003.4 When an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming use or less restrictive use.

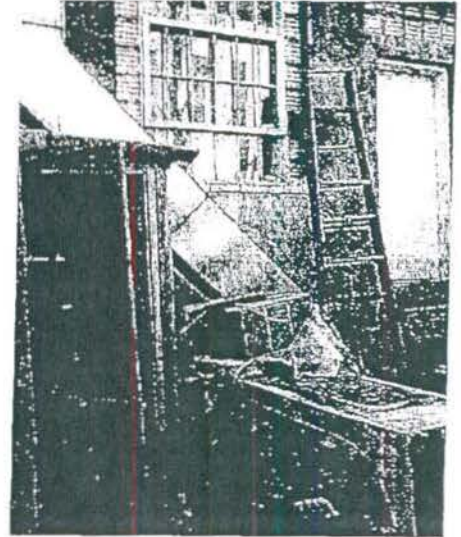
The existing 700 square foot space has accommodated various kinds of retail food operations prior to 1958. No changes to the use have been recorded since 1958.

2003.5 In residence Districts, the proposed use shall be a dwelling, flat, apartment house, or a neighborhood facility.

The use is located in a residence district (DCOD/R-5-E). The subject use should qualify as a neighborhood facility, because there are no seats, no parking spaces, and the space is specifically designed for food sales purposes. There are exhaust ducts at the rear of the subject basement space, which runs up the rear of the

three-story building, to the roof for emission.

Additionally, when the building was built in 1890, commercial use was one of the original anticipated purposes. There is documented proof that the basement space in the building has been in continuous use for delicatessen/carry-out purposes for over forty years.



Rear area.

Potential For Use Variance

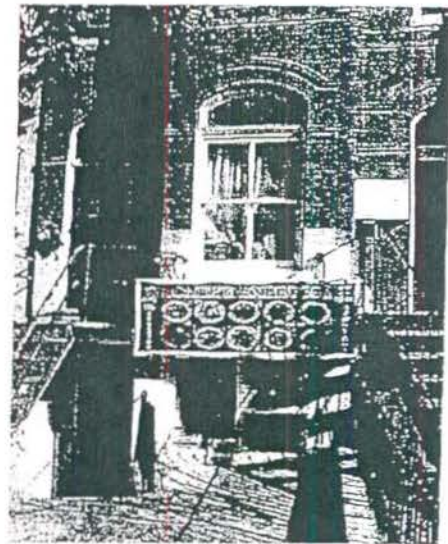
If the Board determines that the use is not permitted in the DCO/R-5-E, then a use variance is warranted.

3103 Variances

Is the property unique by reason of its exceptional narrowness, shallowness, shape, topography or other extraordinary or exceptional situation or condition?

Yes. The property is unique because of its exceptional situation and condition. The property was developed in 1890 for commercial, residential, and miscellaneous purposes. It has operated predominantly as a delicatessen (non-conforming) for over a forty-five year under a number of different owners. The building is one of a set of three semi-detached apartment houses that fronts on 17th Street.

The basement level of the building (location of the subject use) is partially below grade.



Front view of subject site.

There are four steps at the restaurant entrance, which provides direct access to 17th Street. The space is specifically designed for commercial use, and contains a 700 square foot food business. There is institutional kitchen equipment, overhead exhaust ducts, food storage areas, and refrigeration equipment. There is also a bay window area at the front of the site with commercially designed windows.

By reason of the aforementioned unique or exceptional condition of the property, will the strict application of the Zoning Regulations result in peculiar and exceptional practical difficulties or exceptional and undue hardship upon the owner of the property?

OP informed the operator of the food business, that only the owner of the property could request variance relief. OP is waiting for information from the owner regarding undue hardship.

Can the requested relief be granted without substantial detriment to the public good and without substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map?

OP cannot determine the impact on the zone plan until the owners has submitted information explaining any undue hardship.

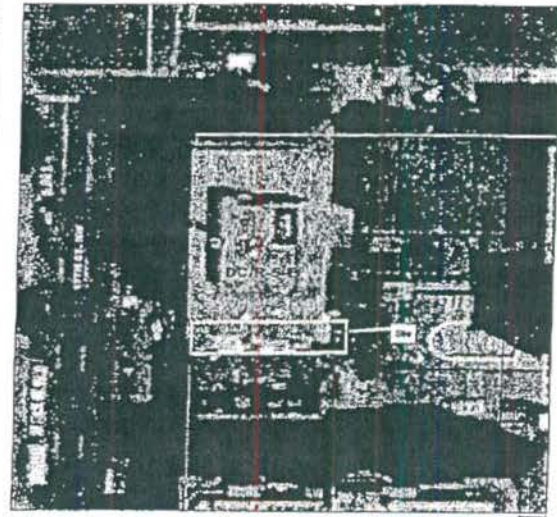
COMMUNITY COMMENTS

At its January 14, 2004 meeting, Advisory Neighborhood Commission (ANC) 2B, the ANC voted to oppose the application. The ANC cited the following issues:

- The current use is unapproved and not in compliance with the Zoning Regulations.
- The use has significant negative impact on the properties on Square 181.
- Residents have consistently complained to the Commission that the establishment has reduced the peace, order, and quiet of the area.
- The applicant did not address the hardship that would be caused should the application not be approved.

RECOMMENDATION

The Office of Planning analyzed two options for the Board to consider in its deliberations regarding the application of Ming Jin Zhang for the continuation of a restaurant in the R-5-E District. OP can't make a recommendation, pending information from the property owner.



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ATTACHMENT 3

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs



Business and Professional
Licensing Administration

VIA PERSONAL SERVICE,
U.S. FIRST CLASS MAIL, and
U.S. FIRST CLASS CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Ming Zhang
1417 17th Street, N.W.
Washington, D.C. 20036

NOTICE OF INTENT TO DENY LICENSE RENEWAL

This is official notice that the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Business and Professional License Administration (BPLA), intends to deny your application for renewal of your business license. This action is being taken pursuant to D.C. Official Code § 47-2862(a) (2001) which provides as follows:

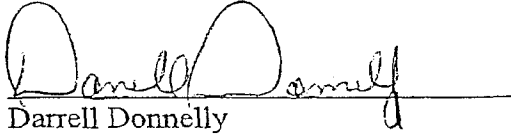
Notwithstanding any other provision of law, the District government shall not issue or reissue any license or permit to any applicant for a license or permit if the applicant owes more than \$100.00 in outstanding debt to the District as a result of:

- 1) Fines, penalties, or interest assessed pursuant to Chapter 8 of Title 8;
- 2) Fines or penalties assessed pursuant to Chapter 9 of Title 8;
- 3) Fines, penalties, or interest assessed pursuant to Chapter 18 of Title 2;
- 4) Past due taxes; or
- 5) Past due District of Columbia Water and Sewer Authority service fees.

DCRA's consideration of your application disclosed that you owe an outstanding debt to the District government. Specifically, District of Columbia Office of Tax and Revenue records disclose that you owe more than \$100.00 in taxes to the District government and that you are not in compliance with the Clean Hands Act. Under such circumstances, and absent evidence of the following: 1) that the amount of outstanding debt over \$100.00 is subject to dispute; 2) that the applicant has properly and timely appealed the assessment, tax, or basis for the alleged debt, and the appeal is pending; or 3) that the applicant has

agreed to a payment schedule to eliminate the outstanding debt, See, D.C. Official Code § 47-2862 (b), DCRA is prohibited by law from renewing your license.

Any questions about this notice, or licensing requirements, may be directed to the Business and Professional License Administration at 202 442-4307.¹


Darrell Donnelly
Program Manager

Date: 10/17/05

¹ You are alerted that review of your application disclosed that you may be operating outside the scope of the Certificate of Occupancy (C of O) issued to you on June 4, 1998. The C of O is for a delicatessen, rather than a carry out or fast food restaurant. You should contact the Zoning Administrator, Bill Crews, at 941 North Capitol Street, N.E., Suite 2000, Washington, D.C. 20002, regarding your Certificate of Occupancy. The application review also disclosed that the Food Supervisor's Certificate issued to one of your staff expired on July 29, 2005. You should contact the District of Columbia Department of Health, Food Protection Division, at 202-535-2180, to ensure that all your employees are properly and currently licensed.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



VIA PERSONAL SERVICE,
U.S. FIRST CLASS MAIL, and
U.S. FIRST CLASS CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Ming Zhang
1417 17th Street, N.W.
Washington, D.C. 20036

**NOTICE OF REVOCATION OF
CERTIFICATE OF OCCUPANCY NUMBER B00180991**

This is official notice that the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) revokes Certificate of Occupancy #B00180991, effective ten (10) days from the date of service of this notice. This action is taken pursuant to 12A DCMR §110.5.1 which authorizes the Director to revoke a Certificate of Occupancy (C of O) when the actual occupancy does not conform to the occupancy permitted.

On June 4, 1998, DCRA issued to Chef's Express Certificate of Occupancy #B00180991. The C of O authorized Chef's Express to utilize the property located at 1417 17th Street, N.W. exclusively as a Delicatessen. However, DCRA's investigations have disclosed that Chef's Express has been operating as a Chinese Carry-Out- Restaurant (fast food) instead of a Delicatessen. The property located at 1417 17th Street, N.W., is zoned R-5-E which does not allow a use as a restaurant (fast food).

In addition, as early as August 21, 2003, through the issuance of Notice of Infraction #050164, DCRA has attempted to have Chef's Express come into compliance with District law. Chef's Express has failed to comply, and continues to engage in activities that do not conform to the location and use permitted in the existing C of O.

Accordingly, DCRA revokes C of O #B00180991. Chef's Express is directed to discontinue the unauthorized activities, effective ten (10) days from the date of service of this notice. Should it be discovered that Chef's Express is continuing to operate after the effective date of this revocation, DCRA will initiate legal proceedings against it without further notice.

You are invited to submit comments and/or objections to the subject Notice of Revocation at least two (2) days prior to the effective date of the revocation by delivering

them to the Zoning Administrator, Bill Crews, 941 North Capitol Street, N.E., Suite 2000, Washington, D.C. 20002. Notwithstanding the delivery of comments and/or objections, your C of O is revoked ten (10) days from the date of service of this notice unless you are notified by the Zoning Administrator that the revocation is rescinded.

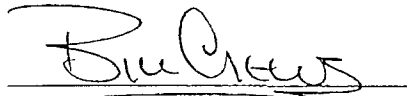
RIGHT TO APPEAL

You have the right, pursuant to 11 DCMR § 3200.2 (2003) and 12A DCMR § 110.6 (2004), to appeal this decision to the BZA. Should you decide to appeal DCRA's decision, your appeal must be made pursuant to the requirements set forth in the District of Columbia Zoning Regulations, D.C. Mun. Tit. 11 (2004), and must be filed at the Office of Zoning, Board of Zoning Adjustment, 441 Fourth Street, N.W., Suite 210S, Washington, D.C. 20001.

If you decide to appeal, please send a copy of your appeal, pleading or written communication to the Zoning Administrator at DCRA, Office of the Zoning Administrator, 941 North Capitol Street, N.E. Suite 2000, Washington, D.C. 20002.

If you have any questions, you may contact my office at (202) 442-4576.

Date: 11.04.05


Bill Crews
Zoning Administrator

Received 11/8/05 JWC

ATTACHMENT 4



GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

74583

Sales & Use Tax

CERTIFICATE OF REGISTRATION

ISSUED PURSUANT TO DISTRICT OF COLUMBIA SALES AND USE TAX ACTS

REISSUED

THIS CERTIFIES THAT

ZHANG MING JIN
CHEF'S EXPRESS
1417 17TH STREET NW
WASHINGTON DC 20036

CERTIFICATE NUMBER

5490-0234344-001

DATE ISSUED

08/17/98

REFER TO THIS NUMBER
WHEN REPORTING SALES TAX

THIS CERTIFICATE IS
NONTRANSFERABLE

Is hereby authorized and empowered to collect reimbursement for the
District of Columbia Sales and Use Taxes.

THIS CERTIFICATE MUST BE POSTED IN A CONSPICUOUS PLACE

★★★ GOVERNMENT
OF THE
DISTRICT OF COLUMBIA

Department of Consumer and Regulatory Affairs
Business Regulation Administration
Business Services Division
614 H Street, N.W., Room 100
Washington, D.C. 20001

LICENSE
29730932

DATE ISSUED: 93-11-05

LICENSE TYPE, APPLICANT'S NAME AND ADDRESS FOR WHICH ISSUED

DELICATESSEN
104 39600083
FANGJI CHEN

VALID FOR THE PERIOD

09/01/1997 TO 08/31/1998

1417 17TH ST NW
WASHINGTON DC 20036

MAILING NAME AND ADDRESS

PEKING TOKYO EXPRESS
1417 17TH ST NW
WASHINGTON DC 20036

It is a violation of DC regulation 73-22 "Human Rights Law" to discriminate for any reason other than that of individual merit, including but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business. Failure or refusal to comply with the above shall be a proper basis for the revocation or suspension of this license.

48168

THE LAW REQUIRES THIS LICENSE TO BE POSTED

W. David Watts

M 053024

DIRECTOR

BZA

Use No. 17075
Unit No. 11

D.C. 20001
3:32

★ ★ ★ GOVERNMENT

OF THE

DISTRICT OF COLUMBIA

Department of Consumer and Regulatory Affairs

Business Services Division

Business Regulation Administration

941 N. Capitol St. N.E. Room 1100

Washington, D.C. 20002

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LICENSE TYPE, ISSUED NAME AND ADDRESS

DELICATESSEN

104 39804848

LICENSEE NAME AND ADDRESS

ZHANG, MING

1417 17TH ST NW

WASHINGTON DC 20036

MAILING NAME AND ADDRESS

CHEF'S EXPRESS

MING JIN ZHANG

1417 17TH STREET NW

WASHINGTON DC 20036

LICENSE 31016489

DATE ISSUED 2001/09/12

VALID FOR THE PERIOD

2001/09/01 - 2003/08/31

the violation of the DC regulation 6-222 Human Rights Law to discriminate for any reason other than that of individual merit including but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business. Failure or refusal to comply with the above shall be a cause for the revocation or suspension of this license.

TTH79095

THE LAW REQUIRES THIS LICENSE TO BE POSTED DIRECTOR

374
No. 17275
File No. 10