

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

Appeal of Joseph Park

BZA Appeal No. 17902
ANC 6C
Public Hearing April 14, 2009

**APPELLEE'S RESPONSE TO THE
ANC'S MOTION FOR RECONSIDERATION**

Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully files with this Board of Zoning Adjustment ("Board") this Response to the Advisory Neighborhood Commission 6C's (the "ANC") Motion for Reconsideration pursuant to DCMR § 11-3126.5 in the above-captioned appeal. The District contends that the Appellant submitted documentary evidence to this Board without the knowledge of DCRA or the ANC and this documentary evidence directly contradicted the testimony of the Appellant at the hearing.

PROCEDURAL BACKGROUND

On April 14, 2009, the Board conducted a hearing on the Zoning Administrator's decision to revoke Certificate of Occupancy No. 167331 previously issued to Appellant Joseph Park ("Park") to operate a liquor store at 1179 3rd Street, N.E. (the "Property."). During the hearing, DCRA presented testimony from the Zoning Administrator, the Zoning Enforcement Officer and numerous residents who live in the vicinity of the property. A representative from ANC also testified regarding the issues and concerns of the neighborhood. In addition, DCRA had numerous pieces of documentary evidence admitted in support of its case. In response, Park testified on his own behalf but introduced no documentary evidence at the hearing. Over the objections of DCRA and

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the ANC, this Board decided to keep the record open to submit tax records for the business. See BZA Order No. 17902, p.1.

I. **ARGUMENT**

In reaching its decision, the Board relied on documentary evidence improperly submitted prior to and after the hearing that directly contradicts testimony given by Park at the hearing

As noted in the Order issued in BZA Appeal No. 17902, this appeal centers on Zoning Regulation DCMR § 11-2005.1 which states:

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.

This Board explained that proven discontinuance of operation of a nonconforming use for more than three years results in a presumption that the owner of such use has no intention to resume such use. This presumption, however, is rebuttable if the owner of the nonconforming use can make the appropriate showing that the owner did not intend to resume the use. See BZA Order No. 17902, p. 4.

In BZA Order No. 17902, Finding of Fact No. 10 states:

Through September 2006, the Appellant continued to operate his store only sporadically – one or two days a week, or less- as his health permitted.

See p. 2. In analyzing the facts, this Board notes that the operation of the liquor store, while greatly reduced, did not ever cease for a period of more than three years. In support of this assertion, this Board relied on the American Express Merchant Financial Activity Statement, the two unsworn affidavits from Terez White and James West and the

Unincorporated Business Franchise Tax Returns.¹ See Tr. May 12, 2009 Special Meeting pp. 11, 15-18. After disregarding the evidence submitted by DCRA and the concerns of the ANC, the Board then stated that both “separately and collectively, these actions rebut any presumption that Mr. Park had ‘no intention to resume active operation’ of the nonconforming liquor store use, but instead manifest an intention to continue the business.” See BZA Order No. 17902, p. 5.

However, if DCRA or the ANC had been properly notified that this documentary evidence was submitted prior to or after the hearing, Park could have been cross-examined about the inconsistencies between the documentary evidence and Park’s own testimony. As D.C. Code § 2-509(b) states “every party shall have the right to... conduct cross-examination as may be required for full and true disclosure of the facts.” See also DCMR § 11-3119.4. At the hearing, Park testified that he operated the store sporadically and kept the store open during 2006. Prior to the hearing, Park submitted two affidavits from Terez White and James West that state “that each patronized the store respectively in March ’06 for White and April ’06 for West.” See Tr. May 12, 2009 Special Hearing p. 11. This Board also states that the Merchant Financial Activity Statement also shows a transaction during the period of December 12, 2007 to January 11, 2008. See BZA Order No. 17902 p. 3. However, the Unincorporated Business Franchise Tax Returns show no income for the years 2005 through 2008. If DCRA was properly notified that these documents were being submitted into evidence at some point during or after the hearing,

¹ The BZA File in Case No. 17902 shows that Park submitted the Merchant Financial Activity Statement to the Board along with a letter dated March 31, 2009. There is no indication on the letter that Counsel for Park copied DCRA or the ANC. While DCRA was provided a copy of the Unincorporated Business Franchise Tax Returns after the hearing, no notice was provided to DCRA that they would be submitted to the Board.

these contradictions could have been brought out on cross-examination and refuted the Board's conclusion that Park did not intend to abandon his liquor store.

II. CONCLUSION

For the above stated reasons, the Appellant contends that the decision of this Board should be reversed.

Respectfully Submitted,

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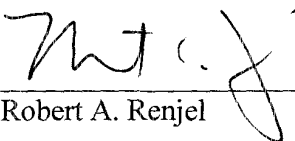
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CERTIFICATE OF SERVICE

I, Robert A. Renjel, hereby certify that on July 27, 2009, a copy of the Appellee's Response to the ANC's Motion for Reconsideration filed by Petitioner's Counsel was sent to Respondent's counsel by email to sgell@his.com and via first class mail to Stephen Gell, 1101 30th Street, N.W., Fifth Floor, Washington, D.C. 20007. A copy has also been sent to Ms. Anne Phelps, ANC 6C by email at anne.phelps@anc.dc.gov.



Robert A. Renjel