Government of the District of Columbia
Advisory Neighborhood Commission 6C

2009 OCT 22 AM 11:03

OFFICE OF ZONING

October 16, 2009

Board of Zoning Adjustment
441 4th St NW
Suite 210 South
Washington DC 20001

RE: BZA Application No. 17902, response to the Board's granting of ANC 6C's motion for reconsideration (in part)

Dear Chairman Loud and Board Members:

At Advisory Neighborhood Commission 6C's duly noticed, regularly scheduled monthly meeting on October 14, 2009, ANC 6C again discussed the following matter:

> **BZA Application No. 17902**
> Appeal of Joseph Park from an August 29, 2008 decision of the Zoning Adminsitrator ("ZA"), to revoke Certificate of Occupancy No. 167331, for a liquor store (Oasis Liquors) in the R-4 District at premises 1179 3rd Street NE (Square 773, Lot 277).

In July, ANC 6C filed a motion for reconsideration regarding BZA No. 17902; on September 14, 2009, the Board discussed the motion and reopened the record on a limited basis as to Findings of Fact 16, to allow the ANC an opportunity to receive, review, and respond to Appellant's tax records. The Board ordered the Appellant to serve the ANC with all tax records submitted to the Board and allowed the ANC to respond by October 21. On September 15, 2009, Commissioner Anne Phelps, the named ANC 6C representative in this case, received (for the first time) copies of the Applicant's D-30 SUB Unincorporated Business Franchise Tax Returns for the years 2003-2008.

Accordingly, at ANC 6C's duly noticed, regularly scheduled monthly meeting on October 14, 2009, with a quorum of 9 Commissioners and the public present, ANC 6C voted unanimously to file the following response to the Board.

A. Facts revealed by the returns

The Board's Order, dated July 10, 2009, contained Finding of Fact 16, which stated:

> 16. Through the year 2008, the Appellant filed with the D.C. government Unincorporated Business Franchise Tax Returns for his store. [A BZA footnote here states: "Tax returns for 2002 and 2003 are not in the record and their absence was not explained."] The 2004

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and 2005 returns show income from the business, while the 2006 return shows no income, but shows that repairs were made to the subject property.

The Board made a factual error as to the finding that the 2005 return showed income – the returns show that there was no income of any kind in 2005; rather, the Appellant claimed a $4,090 loss for writing off much of his remaining inventory before ceasing operations. Also in error was the Board's finding that the 2006 return showed repairs made to the subject property; Line 12 of the return, titled "Repairs," shows zero dollars spent. **The tax returns show no gross receipts, no sales, no income, and no inventory purchases at any time in 2005, 2006, 2007, and 2008.**

The tax records also show that the Board's Finding of Fact 25 was incorrect. That Finding stated:

> 25. The Appellant spent approximately $30,000 repairing and renovating the subject property in preparation for the operation of the liquor store business by Mikyung Yoon. Hrg. Trans., at 133.

In its motion to reconsider, the ANC objected to this finding of fact, as there was no documented evidence to support it. The Board dismissed this objection in the Sept. 14 hearing, stating that:

> . . .it's in the Board's discretion and it's not abuse of that discretion for the Board **to credit testimony in the record based on the witness and the witness' veracity and credibility** and demeanor and all of those types of things.
>
> And with respect to whether $30,000 was actually spent in repairs, **it's immaterial.** Again, it's part of the larger argument that the Applicant was making for the BZA regarding lack of abandonment and it doesn't matter if he spent $30,000, if he spent $2,000 . . . So, the issue I think is immaterial and I disagree with the ANC that we ought to reconsider on that basis. *(Sept. 14 Motion to Reconsider Hearing transcript, pp. 74-75)*

The ANC respectfully but strongly disagrees with the Board's position that this assertion of $30,000 spent on repairs is immaterial, and the discrepancy between the Applicant's testimony and the tax returns bears this out. **Most significantly, this discrepancy calls into question the veracity and credibility of the Appellant, upon which the Board based its decision.** The Board considered Appellant's assertion material enough to issue a finding of fact on the matter. The Appellant asserted, under oath, that he had spent $30,000 in repairs and renovations. If he had spent such a significant sum on the property, he certainly would have claimed it as an expense on his tax returns.

B. <u>BZA's reliance on the tax returns</u>

Even though the tax returns show no business activity at 1179 3rd St. NE whatsoever, the Board repeatedly referenced its reliance on those tax records in deciding for the Appellant during its May 12 decision hearing. Comm. Hood expressly relied on the tax returns:

> COMMISSIONER HOOD:
> I'll just -- not be belabor or to keep repeating anything I've heard, I would just say that the appellee, I thought, made a very good case, as you mentioned, Mr. Chair, and also, with

> the neighbors and everything and their comings and goings and seeing what is actually taking place at the liquor store. But when the evidence came in for the tax filings and the BBL license and all those issues**, for me, it was the tax filings which let me know there was no intent to abandon**. *(May 12th decision transcript, p. 22)*

The Chairman also heavily relied on the tax records and specifically used them to balance the weight of the evidence in the Applicant's favor – expressly giving the Applicant the benefit of the doubt despite the absence of a business license, no water service to building, and testimony of neighborhood witnesses:

> CHAIRMAN LOUD:
> Park also testified that the liquor store was his sole means of retirement and that while he did start to suffer from failing health in 2006, he continued to open the store a couple times a week after encountering those health issues. There were six witnesses who testified to not seeing the liquor store open after 2004. And the witnesses were credible and all of them testified that they were there at different periods of time, including walking their dogs, some on weekends, some in the morning in route to Metro and so on and so forth. And that testimony was considered by me. **But on the other hand you have directly running up against that testimony the tax filings records,** the payment of the safekeeping license; you have the execution of the April 2008 lease, all of which again tend to suggest, to me anyway, that there was never an intent to abandon. And I don't think that one could infer from the neighbor testimony, although it was very strong testimony, that they were able to monitor the premises 24 hours a day, 7 days a week for a three year period, such that one could draw the conclusion that there was an intent to abandon the store . . . There was some testimony regarding the lapse of the basic business license in 2003 and that marking the beginning of a period of discontinuous use and/or abandonment. I think an inference can be made with respect to that, **particularly in light of the tax records that were later filed**, that that could have been simply a sloppy management . . . I have the same conclusion with respect to the cutoff of the water. I think that there -- I think an inference can be drawn that that was bad management, that it might be shrewd management in the sense that one might now want to continue to incur those **expenses as one was cutting down to one or two days a week being open. But again, that alone, particularly in the face of these business filings, business tax filing, showing some income on the property and showing some repairs to the property and the lease,** water cutoff alone, I don't think amounts to or rises to the level of substantiating a claim that there was an intent to abandon operation of the liquor store. *(May 12 decision hearing transcript, pp. 17-19)*

Vice Chair Dettman also discounted the neighborhood witnesses, stating that the neighbors could nott monitor the building 24 hours a day. *(May 12 decision hearing transcript, p. 20.)* However, these tax records, showing no income or repairs of any kind, clearly prove the neighbors correct.

C. CLOSING

Appellant's own evidence directly contradicts the key testimony relied upon by the Board in weighing the evidence of intent. Not only do the tax records refute Appellant's own testimony, the records also support the testimony of DCRA's witnesses and the ANC.

- Appellant's testimony that he actively operated at 1179 3rd St NE until Sept. 2006 is clearly refuted by the lack of gross receipts and income in 2005 and 2006; his testimony that he sporadically operated thereafter is also clearly refuted by the lack of gross receipts and income in 2007 and 2008.

- The unsworn witness statements and the American Express report are also refuted by the complete lack of gross receipts and income in 2005, 2006, 2007, and 2008. No business open even as infrequently as a couple of days a week over the course of four years would show zero gross receipts and zero change in inventory.

- It's important to note that the mere act of filing business tax returns does not itself indicate a functioning business; such returns would be filed to claim depreciation on the property itself.

Not only do the tax returns prove that the non-conforming liquor store use at 1179 3rd St NE was plainly discontinued after 2004 in excess of three years, satisfying the presumption of abandonment, but the returns cast serious doubt on the credibility of the Appellant, upon which the Board rested its decision. While Mr. Park benefited by claiming tens of thousands of dollars of tax losses after 2004, filing tax returns to claim losses and years later signing a lease does not overcome the presumption of abandonment.

The entire record, short of Appellant's own testimony, shows that Oasis Liquor was closed by at least January 1, 2005. Accordingly, ANC 6C requests the Board reverse its July 10, 2009, decision and find against the Appellant.

ANC 6C authorizes Commissioner Anne Phelps and/or Planning/Zoning Committee Chair Rob Amos to continue to represent the Commission in this matter.

On behalf of ANC 6C,

Karen J. Wirt

Karen Wirt
Chair, ANC 6C

Cc: Mr. Steven Gell, Appellant's attorney (via email)
Mr. Robert Renjel, DCRA (via email)

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Fax Cover Sheet

Date: 10·19·09 **Time:** 11:10 am

To:
Name Mr. Mark Loud
Office BZA
Phone
Fax (202) 727-6072

From:
Name Karen Wirt
Phone (202) 707-8479
Fax

Message:
Deadline for this case # 17902 is Weds. 10·21·09
Please call to confirm this has been received by BZA: (202) 707-8479 Karen Wirt

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Please reply to ANC 6C at P.O. Box 77876, Washington, D.C. 20013-7787 Tel. (202) 547-7168