GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

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Appeal No. 17902-B of Joseph Park, pursuant to 11 DCMR §§ 3100 and 3101, from an August 29, 2008 decision of the Zoning Administrator to revoke the Certificate of Occupancy Permit No. 167331, for a liquor store (Oasis Liquors) in the R-4 District at premises 1179 3rd Street, N.E. (Square 773, Lot 277).

HEARING DATE:	April 14, 2009
DECISION DATE:	May 12, 2009
DATE OF ISSUANCE OF FINAL ORDER:	July 10, 2009
DATE OF DECISION ON RECONSIDERATION:	September 15, 2009, October 27, 2009

ORDER DENYING RECONSIDERATION[1]

On July 23, 2009, ANC 6C, a party to this appeal, filed a motion for reconsideration (Exhibit No. 34) of the Board of Zoning Adjustment's ("BZA" or "Board") decision of May 12, 2009 granting the appeal. The decision established that Mr. Joseph Park ("Appellant"), had not intended to discontinue his nonconforming liquor store use at 1179 3rd Street, N.E. ("subject property"), and that the Zoning Administrator ("ZA") had erred in revoking the Certificate of Occupancy for the business. During the hearing on the appeal, ANC 6C appeared as a party in opposition.

The ANC's request/motion for reconsideration ("motion") was timely filed, per 11 DCMR §§ 3126.2 and 3110.3, and complains of procedural irregularities and several of the findings of fact in Board Order No. 17902. The motion states that Findings of Fact Nos. 10 and 25 were based

[1]Although the Board denies the substance of ANC 6C's reconsideration request, it agrees with the ANC that Findings of Fact Nos. 16 and 25 need to be corrected and has issued a Corrected Order including revised versions of these Findings.

on the Applicant's testimony with no "evidence," or no "supporting documentation," to back it up. The Appellant's testimony, however, *is* evidence and there is no requirement that it be illustrated in a documentary manner. The Appellant was under oath when he testified and the Board found him to be a credible witness. The Board was free to credit his testimony, with or without "supporting documentation," over that of other witnesses. *See, e.g., Dorchester Associates v. D.C. Bd. of Zoning Adjustment,* 976 A.2d 200, 215 (D.C. 2009). ("[A]n agency as a finder of fact, may credit the evidence upon which it relies to the detriment of conflicting evidence, and [generally] need not explain why it favored the evidence of one side or the other.")

The ANC's motion also claims that certain evidence relied on by the Board was not seen by the ANC. The motion cites Finding of Fact No. 15 and states that an American Express "Merchant Financial Activity Statement" was not made available to the ANC. This Financial Activity Statement was in the record, as an attachment to Exhibit No. 14, which was filed on April 3, 2009, 11 days prior to the hearing on the appeal. The Financial Activity Statement was therefore in the record and available for the ANC's review.

The ANC further claims that the Appellant's Unincorporated Business Franchise Tax Returns were "not provided to the ANC." Because the Board had, at the close of the hearing, asked for these returns, they had been post-hearing filings. As such, the Board had no way of determining with certainty whether they had been properly served on the ANC. Therefore, the Board postponed action on the motion from September 15th to October 27th, 2009, in order to allow the ANC time to obtain and review the tax returns and discuss them at a regularly-scheduled public meeting.

The ANC received the tax returns and considered them. It then submitted to the Board a statement discussing the returns in further support of its motion for reconsideration. Exhibit No. 41. The ANC stated that the tax returns contradicted Findings of Fact Nos. 16 and 25 and that such contradictions call into question the veracity of the Appellant. The Board agrees that the tax returns are at odds with Findings of Fact Nos. 16 and 25, but finds this to be harmless error, particularly because the fact that the returns were filed at all belies an intent to discontinue the business. The Board disagrees with the ANC's statement as to the veracity of the Appellant, and reiterates that, taken as a whole, the Appellant's demeanor and testimony were credible.

The ANC finally claims that the Board relied too heavily on the tax returns to conclude that the Appellant did not intend to discontinue the liquor store business. But the Board relied on all the evidence, including the Appellant's testimony, his payment to put his liquor license in safekeeping, and his efforts to sell or lease the business, culminating in the 2008 lease agreement with Mr. Mikyung Yoon. See, e.g., Transcript of May 12, 2009 Decision Meeting, pp. 15-18 and 21 & 22; Transcript of October 27, 2009 Decision Meeting on Reconsideration, p. 87, lines 10-22, and 88, lines 1-7, and p. 89, lines 15-16.

Looking at the evidence in its totality, as proffered by both the Appellant and the parties in opposition, the Board concluded that Mr. Park met his burden of proof to establish that the certificate of occupancy was revoked in error. The Board will not entertain any re-hashing of the evidence presented at the hearing in the guise of a motion on reconsideration.

For all the above reasons, it is hereby **ORDERED** that ANC 6C's motion for reconsideration is **DENIED.**[2]

VOTE: **3-0-2** (Marc D. Loud, Shane L. Dettman, and Anthony J. Hood, to deny reconsideration. Two members not participating nor voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT.
A majority of the Board approved the issuance of this order.

ATTESTED BY: Jamison L. Weinbaum
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 09 2010

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

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[2]The Department of Consumer and Regulatory Affairs ("DCRA"), the appellee herein, did not file a motion for reconsideration, but instead filed a "Response to the ANC's Motion for Reconsideration," which essentially agreed with the points raised by the ANC. DCRA appears to contend that it had not been properly notified that certain evidence had been submitted "prior to or after the hearing" and alleges that "no notice was provided to DCRA that [the tax returns] would be submitted to the Board." Exhibit No. 35, at 3. Any evidence submitted "prior to" the hearing would be in the public record, available for DCRA's review. Since DCRA attended the hearing, any evidence submitted during the hearing should have been known to it, and since the Board specifically requested the tax returns, DCRA was on notice that they would be submitted to the Board. In any event, DCRA acknowledges that it was provided a copy of the tax returns after the hearing (which is when the Board received them). Insofar as DCRA's filing makes assertions different from those made in the ANC's motion, DCRA's filing is untimely as a request for reconsideration, as it was filed more than 13 days after the date of issuance of Order No. 17902. 11 DCMR §§ 3126.2 & 3110.3.