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November 4, 2009

VIA HAND-DELIVERY

Jamison L. Weinbaum, Esq.
Director
D.C. Office of Zoning
441 4th Street, N.W.
Room 200 South
Washington, D.C. 20001

RECEIVED
D.C. OFFICE OF ZONING
2009 NOV -4 PM 4:27

Re: BZA Appeal No. 18027
Request for Stay of Enforcement
And Appellant's Notice of Related Appeal And
Motion to Amend Pending Appeal to Incorporate
Directly Related Notice to Revoke By DCRA

Dear Mr. Weinbaum:

This firm is counsel for Mr. Mehmet Kocak and Philly Pizza & Grill, Inc. ("Appellant") in bringing this matter and Request for Stay of Enforcement of the Pending Notices to Revoke.

Request for Stay of Enforcement:

The Board's immediate action is requested at the November 17, 2009 Special Public Meeting at 1:00 p.m. to issue a Stay of Enforcement of the Notices to Revoke to prevent enforcement by DCRA while this Appeal is pending. As more fully established in the attached, DCRA has been unwilling to voluntarily agree to a Stay in this matter and has indicated that it will seek to enforce the Notices to Revoke on November 17, 2009. Any attempt by DCRA to prematurely enforce these Notices to Revoke would improperly shut down the Appellant's operations and constitute a death sentence for this small minority-owned and operated business. As a practical matter, the harsh reality is that if the Appellant's doors are forced to close, they will never be able to reopen.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18027
EXHIBIT NO. 15

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Board of Zoning Adjustment
District of Columbia
CASE NO. 18027
EXHIBIT NO. 15



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Jamison L. Weinbaum, Esq.

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Under the circumstances, the requested Stay of Enforcement is clearly warranted, appropriate and a matter of fundamental fairness to the Appellant. Based on the Board's current schedule, this Appeal hearing will occur on February 9, 2010 with a final written decision likely coming a year or more later. The Appellant can not survive an improper and unwarranted shut down of his business for four (4) months, let alone the sixteen (16) months or longer it is likely to take for a final written adjudication of this Appeal to occur.

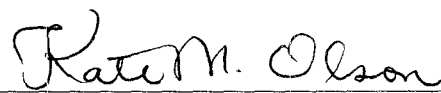
Thank you for your assistance and cooperation in scheduling this urgent matter for November 17, 2009.

Sincerely,

GREENSTEIN DELORME & LUCHS, P.C.



By: _____
John Patrick Brown, Jr.

By:  _____
Kate M. Olson

JPB/prm
Enclosure

cc: Mr. Mehmet Kocak
Ms. Juanita Gray
Mr. Matthew LeGrant, Zoning Administrator, DCRA
Bennett Rushkoff, Esq., Acting General Counsel, DCRA
Melinda M. Bolling, Esq., DCRA
Mr. Ron Lewis, Chair, ANC 2E
Mr. Bill Starrels, ANC 2E 05

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

Appeal of Mehmet Kocak and
Philly Pizza & Grill, Inc.

BZA Appeal No. 18027
Hearing Date: February 9, 2010
ANC 2E

**REQUEST FOR STAY OF ENFORCEMENT AND APPELLANT'S NOTICE OF
RELATED APPEAL AND MOTION TO AMEND PENDING APPEAL
TO INCORPORATE DIRECTLY RELATED NOTICE TO REVOKE BY DCRA**

The Appellant, Mehmet Kocak and Philly Pizza & Grill, Inc., by and through undersigned counsel, respectfully submits this Request for Stay of Enforcement and Notice of Related Appeal and Motion to Amend Pending Appeal to Incorporate Directly Related Notice to Revoke Certificate of Occupancy No. 0903354 ("Current Certificate of Occupancy") by DCRA. In support of this Motion, the Appellant states as follows:

I. BACKGROUND

On October 23, 2009, the Appellant filed this pending Appeal of the Zoning Administrator's October 14, 2009 decision to issue a Notice to Revoke Certificate of Occupancy No. 00800124 ("Original Notice to Revoke"). In its Appeal, the Appellant established that DCRA had investigated this matter and issued the Original Notice to Revoke based on the wrong, outdated certificate of occupancy.

On Monday November 2, 2009, the Appellant and counsel met with representatives of DCRA, including the Zoning Administrator, to discuss the allegations contained in the Original Notice to Revoke. At that meeting, the Appellant was personally served with a new Notice to Revoke Certificate of Occupancy No. 0903354 ("New Notice to Revoke") Exhibit A. The New Notice to Revoke is almost identical in substance and form as the Original Notice to Revoke, but correctly references the Current Certificate of Occupancy. In all other respects, the allegations

contained in the New Notice to Revoke are unsubstantiated and unsupported by the Zoning Regulations, including:

1. The Current Certificate of Occupancy clearly authorizes the nature and scope of the Appellant's operations, including use of the second floor for restaurant seating.
2. DCRA's "undercover" operations and allegations are undocumented, inherently unreliable and inconsistent with the permitted use authorized by the Current Certificate of Occupancy. A full documentation and review of the Appellant's operations will establish a restaurant in compliance with the C-2-A zoning of the Property.
3. DCRA's New Notice to Revoke is prohibited by Laches and Estoppel.

II. REQUEST FOR STAY OF ENFORCEMENT

The New Notice to Revoke will become effective in ten (10) business days on Tuesday, November 17, 2009.¹ The Appellant's counsel has on several occasions asked DCRA to voluntarily agree to stay enforcement of the Notices to Revoke while this Appeal is pending before the Board. Unfortunately, DCRA has been unwilling to agree to the requested stay.

As a result of DCRA's rush to judgment, the Appellant respectfully, but urgently requests the Board to grant a stay of enforcement of both the Notices to Revoke while this Appeal is pending. **Given the impending enforcement of the Notices to Revoke by DCRA, the Appellant asks the Board to take up this request for a stay at the Special Public Meeting on Tuesday, November 17, 2009 at 1:00 p.m.**

¹ Wednesday, November 11, 2009 is Veteran's Day, a Federal Holiday, and therefore not counted as a "business" day.

Any enforcement action by DCRA while the Appeal is pending would be premature, unjustified, improper and amount to a death sentence for this small minority-owned and operated business. Under the circumstances, the requested stay of enforcement is clearly warranted, appropriate and a matter of fundamental fairness to the Appellant. Based on the Board's current February 9, 2010 hearing date, the Appellant would be shutdown for almost four (4) months waiting for the hearing. At the conclusion of the hearing, substantial additional time will be required for post-hearing submissions, a Public Meeting for decision and lastly issuance of a final written decision. Based on recent experience, it will take the Board at least another year after its oral decision for the issuance of a written decision.²

The extreme prejudice to the Appellant is not warranted by the unique circumstances and facts of this situation, including:

1. Interpretation of the new restaurant definitions is a matter of first impression by the Board.
 2. The potential impact of the Zoning Administrator's decision goes well beyond the Appellant to include retroactive application to at least a half dozen existing "restaurants" in the immediate C-2-A zone district. The new definition of "fast food restaurant" clearly states that it will be applied to "**proposed and existing establishment[s]**." 11 DCMR § 199.1 (*Emphasis added*).
 3. The Appellant should be entitled to a presumption of innocence/compliance.
- DCRA has on at least three (3) separate occasions, reviewed, inspected and approved the

² BZA Appeal No. 17747 was filed on October 19, 2007, orally decided on September 16, 2008, but no order has been issued (pending almost twenty-five (25) months without a final order). BZA Appeal No. 17657 was filed on April 20, 2007, orally decided on December 4, 2007, and a written decision issued on March 31, 2009 (case pending twenty-three (23) months).

Appellant's restaurant use, including the building permit, the first certificate of occupancy and most recently, the Current Certificate of Occupancy issued on September 21, 2009 (one month **after** DCRA conducted undercover surveillance of the Appellant's existing restaurant operations).

4. The Appellant directly and substantially relied on the building permit and certificates of occupancy in making a substantial investment in the approved restaurant operations. It is overwhelmingly in the public interest that the recipient of numerous DCRA approvals can rely on those approvals to establish a business without fear of DCRA unilaterally changing its mind and on short notice destroying the business.

5. DCRA, any other interested parties or the public will not be harmed by a stay of enforcement. Clearly, DCRA has been investigating this matter since at least August 2009. By its own admission, the last undercover surveillance occurred on August 20, 2009, but DCRA clearly saw no potential harm requiring it to act quickly. Having concluded its investigation in August, DCRA waited almost two (2) months to take any action.

As set forth by the D.C. Court of Appeals, the Appellant has clearly met the standard for a stay, including: (1) likelihood of success on the merits, (2) an irreparable injury will result if a stay is denied, (3) no harm to opposing parties will result if a stay is granted, and (4) the public interest favors the granting of a stay. Barry v. Washington Post Co., 529 A.2d 319, 320-321 (D.C. 1987).

III. ARGUMENT

A. Jurisdiction

The Board has jurisdiction to hear this Appeal of the New Notice to Revoke. Pursuant to 11 DCMR § 3100.2, the Board is authorized to “hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of the Zoning Regulations, Title 11 DCMR.” The Original and New Notice to Revoke specifically allege violations of the Zoning Regulations as the alleged basis for the proposed revocations.

B. Timeliness of Appeal

Under 11 DCMR § 3112.2, the appeal of the Notice to Revoke Permits must be filed within sixty (60) days of that decision. The Original Notice to Revoke was dated October 14, 2009, but the New Notice to Revoke was served on November 2, 2009. In both instances, The Original and the Amended Appeal are timely. DCRA and the affected Advisory Neighborhood Commission are fully and directly on notice of both the original Appeal and this Amended Appeal.

C. Judicial Economy and Fundamental Fairness

It cannot be disputed that it is in the interest of judicial economy and fundamental fairness to Appellant that the pending Appeal and the New Notice to Revoke be litigated at the same time. DCRA will not be prejudiced and should be held accountable for its actions in a single consolidated proceeding. The Appellant will continue to be substantially prejudiced by the delay and burden of pursuing separate Appeals of what is the same matter.

IV. REVISED HEARING NOTICE

As amended, the Notice of this Appeal should be revised to read as follows:

Appeal of Mehmet Kocak and Philly Pizza & Grill, Inc. pursuant to 11 DCMR §§ 3100 and 3101, from an October 14, 2009, Notice to Revoke Certificate of Occupancy No. 0800124, and November 2, 2009 Notice to Revoke Certificate of Occupancy No. 0903354 for a restaurant, by the Zoning Administrator, Department of Consumer and Regulatory Affairs, in the C-2-A District at premises 1211 Potomac Street, N.W. (Square 1207, Lot 124).

V. CONCLUSION

For the foregoing reasons, the Zoning Administrator's New Notice to Revoke is invalid and therefore, the Appeal must be GRANTED and DCRA is NOT authorized to enforce the original and/or New Notice to Revoke while this Appeal is pending.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.



John Patrick Brown, Jr
Kate M. Olson
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 452-1400

*Counsel for Appellant – Mehmet Kocak and Philly
Pizza & Grill, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Request for Stay of Enforcement and Appellant's Notice of Related Appeal and Motion to Amend Pending Appeal to Incorporate Directly Related Notice to Revoke by DCRA was served by first-class mail, this 4th day of November 2009, upon the following:

Mr. Matthew LeGrant, Zoning Administrator
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E.
Suite 2000
Washington, D.C. 20002

Bennett Rushkoff, Esq.
Melinda M. Bolling, Esq.
Office of the General Counsel
941 North Capitol Street, N.E.
Suite 9400
Washington, D.C. 20002

Mr. Ron Lewis
Chairperson
Advisory Neighborhood Commission 2E
3400 Reservoir Road, N.W.
Washington, D.C. 20007

Mr. William Starrels
Advisory Neighborhood Commission 2E 05
1045 31st Street, N.W.
Washington, D.C. 20007



John Patrick Brown, Jr.

EXHIBIT A

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



November 2, 2009

**VIA PERSONAL SERVICE and
U.S. FIRST CLASS MAIL**

To: Mehmet Kocak, Owner
Philly Pizza & Grill
1211 Potomac Street, NW
Washington, DC 20007

Philly Pizza & Grill
c/o Mehmet Kocak, Registered Agent
1204 34th Street, NW
Washington, DC 20007

NOTICE TO REVOKE CERTIFICATE OF OCCUPANCY No. 0903354

This is official notice ("Notice") from the Department of Consumer and Regulatory Affairs ("DCRA"), that pursuant to 12A DCMR §110.5, Certificate of Occupancy ("CofO") No. 0903354 is revoked. The specific grounds for the revocation are found in 12A DCMR §110.5.1, which states that "any certificate of occupancy previously issued or issued pursuant to Section 110 shall be revoked by the Director, after notice, if the actual occupancy does not conform with that permitted."

On September 21, 2009, DCRA issued Certificate of Occupancy No. 0903354, authorizing you to use the property, located in a C-2-A zone, at 1211 Potomac Street, NW (the "Property") as a "2 floor, 13 seat restaurant" establishment.

On August 14, 2009, DCRA conducted a zoning compliance investigation concerning the use of the Property. A search of the DCRA database revealed that Philly Pizza & Grill ("PPG") was issued a Certificate of Occupancy ("CofO") on September 21, 2009 that authorized its use of the Property as a restaurant.

On August 15, 2009, a DCRA investigator conducted an undercover surveillance at the Property and noted numerous individuals picked-up food orders and delivery people took food orders out, but no patrons consumed food orders onsite. The Property was also

observed on August 18, 19, and 20, 2009 by a DCRA investigator who noted that the Property was primarily used for carryout and delivery orders, with one or no patrons consuming food orders inside the restaurant at any given time. Based upon the investigations, DCRA concluded that the primary use of the Property is consistent with that of a fast food establishment, and although PPG possesses a CofO for a restaurant¹, it does not possess a CofO for a fast food establishment². Moreover, pursuant to the District's Zoning Regulations, a CofO for a fast food establishment in a C-2-A zone requires a special exception from the Board of Zoning Adjustment. See 11 DCMR § 731.1

Additionally, on August 20, 2009, the DCRA investigator conducting a business compliance inspection at the Property, noted that PPG used the basement, a backyard that contained food storage in a walk-in freezer. However, CofO No. 0903354 authorizes only the first and second floors to be used for this purpose. Accordingly, you have exceeded the scope of your restaurant CofO by operating primarily as a fast food establishment and extending the business use beyond the first and second floors of the Property.

Therefore, DCRA is revoking CofO No. 0903354 effective ten (10) business days from the mailing of this Notice.

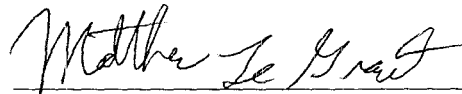
RIGHT TO APPEAL AND SHOW CAUSE

You have the right to appeal the revocation of your CofO. To appeal, you must file the appeal with the Board of Zoning Adjustment within sixty (60) days of this notice. Complete filing instructions may be found at 11 DCMR §3112. Filing an appeal of this revocation does not automatically stay the execution of the revocation.

Any questions about this Notice may be directed to the Office of the Zoning Administrator at (202) 442-4576.

11/2/09

Date



Matthew LeGrant
Zoning Administrator

¹ Pursuant to 11 DCMR §199 a restaurant is "a place of business that does not meet the definition of a "fast food establishment" or "prepared food shop," where food, drinks, or refreshments are prepared and sold to customers primarily for consumption on the premises. Any facilities for carryout shall be clearly subordinate to the principal use providing prepared foods for consumption on the premises." [underscore added]

² Pursuant to 11 DCMR § 199 a fast food establishment is "a place of business, other than a "prepared food shop," where food is prepared on the premises and sold to customers for consumption and at least one of the following conditions apply: (a) The premises include a drive-through; (b) Customers pay for the food before it is consumed. One characteristic that would satisfy this element would be building permit plans that depict a service counter without seating unless the applicant certifies that the intended principal use is for a restaurant or grocery and that the counter is part of a carry out service that is clearly subordinate to that principal use; or (c) Food is served on/in anything other than non-disposable tableware. Characteristics that would satisfy this element include, but are not limited to: the building permit plans do not depict a dishwasher or do depict trash receptacles in public areas.

CERTIFICATE OF SERVICE

hereby certify that on _____, 2009, this document was personally served by me upon
the following person: _____ at the following
address: _____ at _____ a.m./p.m.

Signature

Printed Name

Title