

December 29, 2009

By Hand Delivery

Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

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Re: Motion to Intervene – Appeal No. 18027

Dear Members of the Board,

Enclosed please find a Motion for Leave to Intervene in the above-referenced Appeal.

Sincerely,


Martin P. Sullivan

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18027

EXHIBIT NO. 31

Board of Zoning Adjustment
District of Columbia
CASE NO. 18027
EXHIBIT NO. 31

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA
APPEAL NO. 18027 OF MEHMET KOCAK AND PHILLY PIZZA & GRILL, INC.

MOTION FOR LEAVE TO INTERVENE

I. Introduction.

This is a Motion for Leave to Intervene in Appeal No. 18027 (the “Appeal”), being filed on behalf of Lynn Schubert of 1220 Potomac Street, N.W., Anne Alonzo, of 1216 Potomac Street, N.W., and Alex Meeraus, of 1217 Potomac Street, N.W. (the “Potomac Street Intervenors”). The Potomac Street Intervenors are all residents and owners of their respective properties, and as such have a specific right and interest in the action that the Board of Zoning Adjustment (the “Board”) will take regarding this Appeal. The actions of the Appellant, Philly Pizza and Grill, Inc. (“Philly Pizza”), in operating in a way which does not conform with the use permitted in its certificate of occupancy, have had a significant negative impact on the Potomac Street Intervenors and their respective properties, as described in more detail herein. Furthermore, the Potomac Street Intervenors have hired land use counsel and intend to fully participate in the appeal hearing process by providing relevant testimony and evidence, cross-examining the Appellant, and articulating a legal argument, in order to provide the Board information necessary for its decision.

II. Location.

The Potomac Street Intervenors all reside on Potomac Street, in very close proximity or adjacent to Philly Pizza, and in properties that are directly impacted and trespassed upon by Philly Pizza’s late-night/early-morning patrons. As such, the Potomac Street Intervenors are entitled to intervenor status, pursuant to 11 DCMR 3112.15 and the corresponding BZA jurisprudence.¹

¹ See Appeal No. 16679, in which neighbors were granted intervenor status. See also Appeal No. 17519, in which certain neighbors were denied intervenor status, but only for reasons not applicable here: the Board denied status to certain neighbors because “they did not attend the hearing and did not indicate how they would participate as a party...”; the Board denied status to other neighbors because they were “not prepared to address the legal questions on appeal.” The Potomac Street Intervenors have attended and will attend every hearing, have indicated how they will participate, and are prepared (with counsel) to address the legal questions on this appeal.

Lynn Schubert lives across the street from, and slightly north of, Philly Pizza, at 1220 Potomac Street, approximately 97 feet from Philly Pizza. She has had her privacy and peace invaded by late-night/early-morning fast-food patrons from Philly Pizza, including experiencing intimidation and threats from male patrons as she attempted to reclaim her right to enjoy her property, peace, and privacy in the early morning hours. This is a consistent, nightly occurrence.

Anne Alonzo resides with her husband Wolf Wittke directly across Potomac Street from Philly Pizza, at 1216 Potomac Street. She and Wolf have experienced similar and even more severe negative impacts (due to their closer proximity) as a result of Philly Pizza's take-out operations. Anne and Wolf have also been confronted by patrons, as they try to defend themselves from the nuisance which is a direct result of Philly Pizza's illegal use of its property.

Alex Meeraus resides at 1217 Potomac Street, adjacent to Philly Pizza to the north, just across a 10 foot-wide alley. As the immediate neighbor, he is probably more negatively affected than any other neighbor.

The Potomac Street Intervenors, as a direct result of Philly Pizza's fast food establishment use, have experienced numerous trespassers on their front steps – trespassers that leave behind napkins, paper plates, cartons, and other indicia of fast food use. Their street has become an extension of Philly Pizza's facility, since there is little room inside the facility and there are a great many customers ordering take-out and proceeding out into the street to consume their food and engage in other activities, such as yelling, listening to loud music, intimidating homeowners, and urinating on front doors. Philly Pizza also puts trash cans in front of the Potomac Street Intervenors' properties, perhaps as a failed attempt at mitigation, but in any event as clear indicia of its fast food establishment use. The noise resulting from Philly Pizza's take-out customers is loud and disruptive, and disturbs the Potomac Street Intervenors virtually every night until as late as 4 a.m., impacting the Intervenors' ability to sleep and to perform their daily work. The Potomac Street Intervenors and others are forced to make calls to the Police nightly. Attached as Exhibit A are photos of Philly Pizza patrons on Potomac Street and in front of the homes of the Potomac Street Intervenors. While the issue of whether Philly Pizza is a good neighbor may not be directly before the Board, these impacts described above result from activities that clearly characterize a fast food establishment, and these impacts are what provide the Intervenors with the specific right and interest in the Board's decision in this case.

The Advisory Neighborhood Commission (ANC) Single-Member District Representative, Bill Starrels, has testified that, in his nine years as a Commissioner, before August of 2009, he had never received complaints from Potomac Street residents about the commercial uses in that neighborhood. After Philly Pizza began operating on Potomac Street, Mr. Starrels began receiving regular e-mails and phone calls about the disturbances resulting from Philly Pizza's illegal use. This testimony is an indication of the extraordinary nature of the impact caused by Philly Pizza's illegal use.

III. Specific Interest.

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") issued a Notice to Revoke a Certificate of Occupancy for Philly Pizza, because DCRA contends that Philly Pizza and Grill was not operating in accordance with its stated use in its certificate of occupancy. DCRA contends that Philly Pizza is operating as a "fast-food establishment," and not as a "restaurant," as such terms are defined in the Zoning Regulations. Philly Pizza's operation as a fast-food establishment, or more accurately, Philly Pizza's specific actions which cause DCRA to characterize it as a fast-food establishment, have a direct and negative impact on the health, safety, and welfare of the Potomac Street Intervenors.

The Potomac Street Intervenors have taken note, and understand, the Board's admonition in the previous proceeding on November 17, 2009, that the appeal hearing process is not about determining whether or not Philly Pizza is a good neighbor, but whether or not the Zoning Administrator erred in issuing his Notice to Revoke. The Potomac Street Intervenors will testify, cross-examine, and otherwise provide indispensable information which is relevant to the central issue in this Appeal: whether Philly Pizza was/is operating as a fast-food establishment or as a restaurant. In that respect, the Potomac Street Intervenors, because they live with Philly Pizza on a day-to-day basis, have credible and relevant evidence that the Board must hear if it is to make an informed decision. Through counsel, the Potomac Street Intervenors will also address the legal questions involved in applying the facts to the applicable law in this Appeal.

Additionally, primarily for purposes of this Motion, evidence and testimony of the negative impacts that result from Philly Pizza's illegal operation is relevant for a limited purpose. It is these impacts, which result directly from the illegal operations of Philly Pizza, that impose

upon the Potomac Street Intervenors' specific right and interest. But for Philly Pizza's illegal use, there would be no significant negative impacts for the Potomac Street Intervenors.

It is because of the impacts necessarily associated with fast food operations, including the disturbance from patrons dining in the street up to 4 a.m., the litter and rat problems caused by the dispensing of disposable plates and food containers (and pizza crusts), and the high volume and turnover inherent in "take-out" operations, that fast food establishments are not permitted as a matter-of-right in the C-2-A zone district.²

IV. Not the Typical Appeal.

In the more common type of appeal, an appellant appeals the denial of a building permit application or a certificate of occupancy application. In such a case, the appeal process, and the Board's consideration, is limited to evidence and argument on the building permit or certificate of occupancy application, and the specific law and facts surrounding that application and the Zoning Administrator's denial thereof. In that type of appeal, neighbors are rarely competent to testify and participate (although they often do) because they have no specific knowledge or expertise to competently address the relevant legal issues.

This case is different. In this case, the certificate of occupancy was not denied, but was issued in accordance with representations made by Philly Pizza. Philly Pizza then proceeded instead to operate as a fast food establishment, at which point DCRA revoked the certificate of occupancy for restaurant use. In deciding this Appeal, the Board must make a factual determination, and, to that end, the Potomac Street Intervenors are uniquely positioned to provide the most competent and relevant testimony and evidence. The Potomac Street Intervenors intend to provide such evidence and testimony, as well as legal argument, and the same will be indispensable to the Board in making the correct decision in this Appeal.³

² The special exception requirements for fast food establishments are designed to specifically address the exact type of nuisance that Philly Pizza is causing on Potomac Street, including the requirement for an enclosed trash receptacle and the requirement that the use be operated so as not to become objectionable to neighboring properties because of noise, sounds, odors, lights, hours of operations, or other conditions.

³ Unless of course the Appellant fails to meet its initial burden of proving by clear and convincing evidence that it is in fact operating as a restaurant.

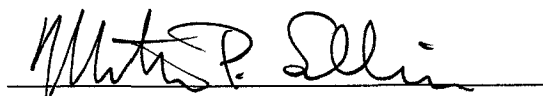
V. Advisory Neighborhood Commission.

In the interest of time and efficiency, the Potomac Street Intervenors will coordinate with ANC 2E and with the Attorney General (both of whom have indicated to the Potomac Street Intervenors their support for this request) to avoid duplicating testimony. The interests of the ANC in this case are more general than the specific interests of the Potomac Street Intervenors. The ANC represents not only Potomac Street, but the surrounding area as well. The Potomac Street Intervenors, combined with the ANC as a party, will limit its presentation to no more than one hour. While the ANC should reserve its right to cross-examine witnesses and otherwise enjoy the benefits of the party status to which it is entitled, the Potomac Street Intervenors, and their counsel, will coordinate with the ANC to avoid redundancy and repetition.⁴

VI. Conclusion.

The Potomac Street Intervenors have a specific right and interest that will be affected by the Board's action in this appeal. For this reason, they are prepared to present relevant testimony and evidence, to cross examine witnesses, when appropriate, and to address the legal questions involved in this Appeal. The Potomac Street Intervenors, for all the reasons stated above, respectfully request that the Board permit them to intervene in this Appeal.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Martin P. Sullivan", written over a horizontal line.

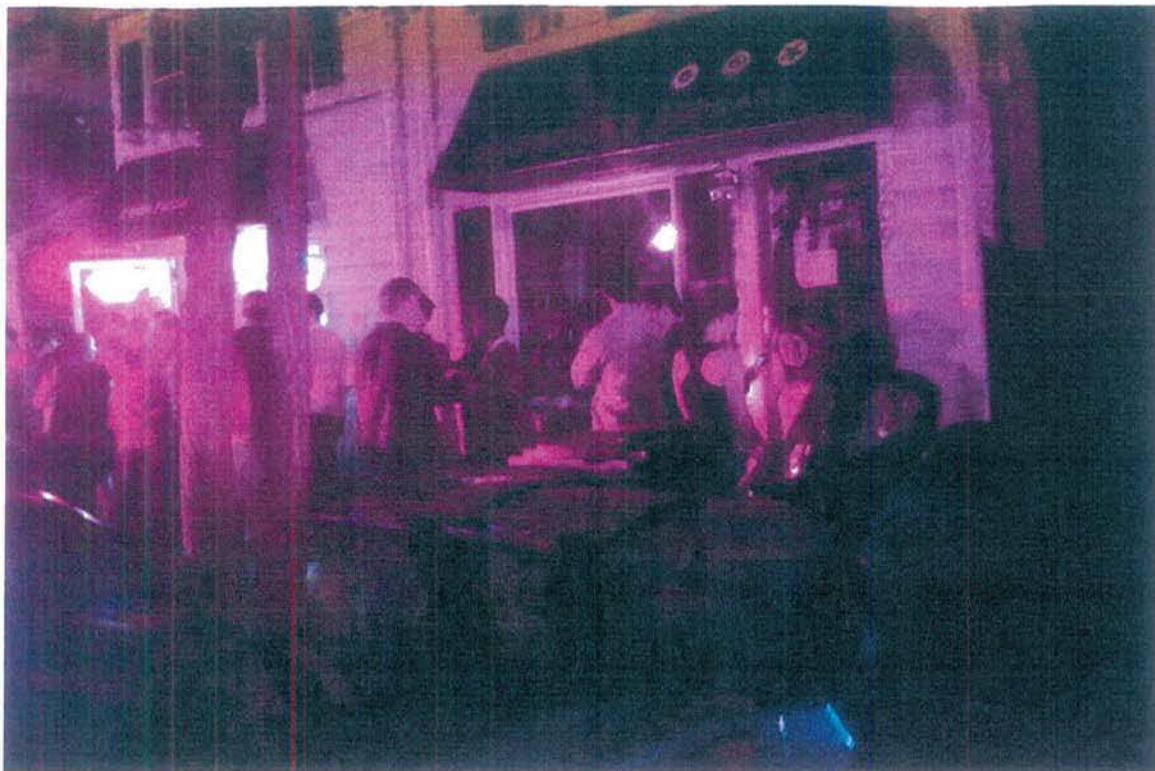
Martin P. Sullivan, Esq.

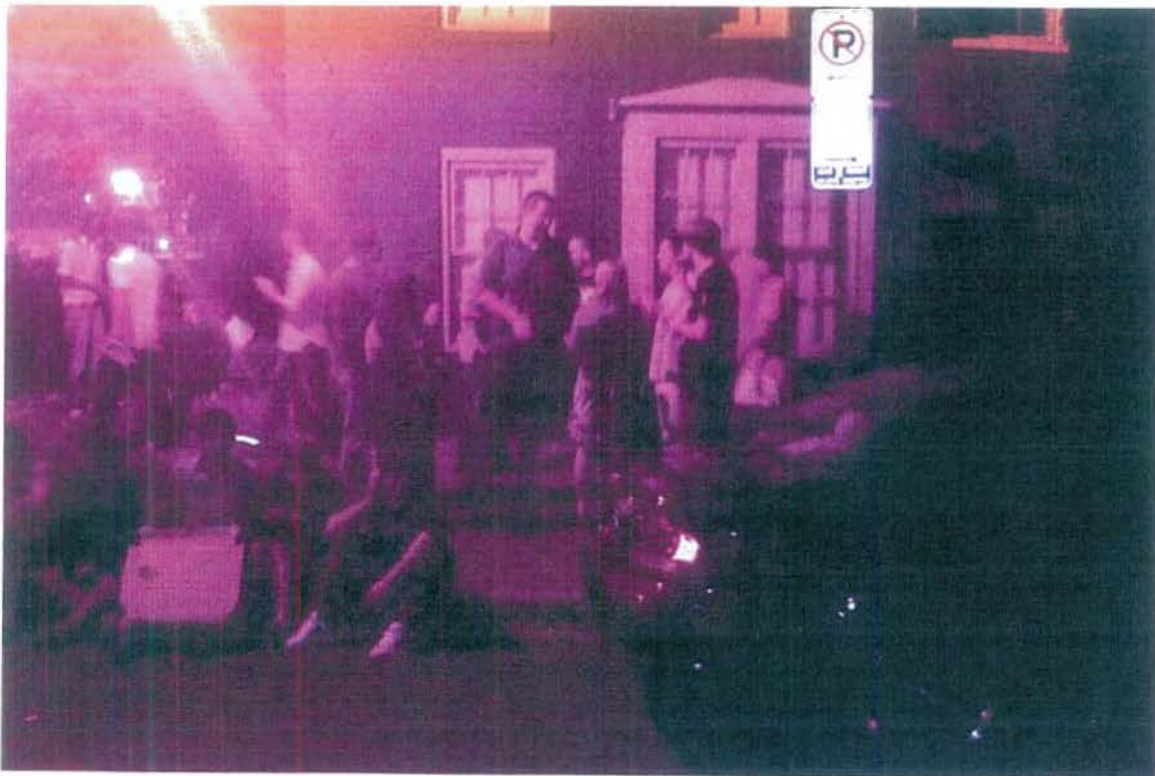
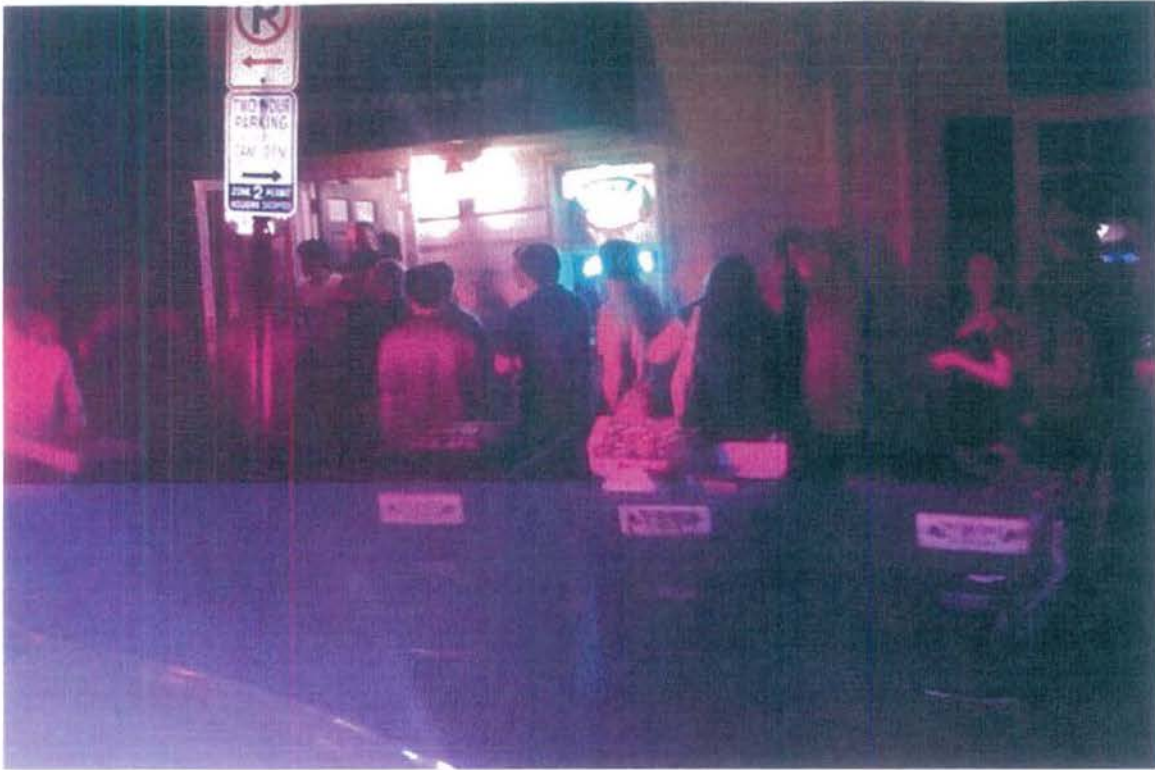
December 29, 2009

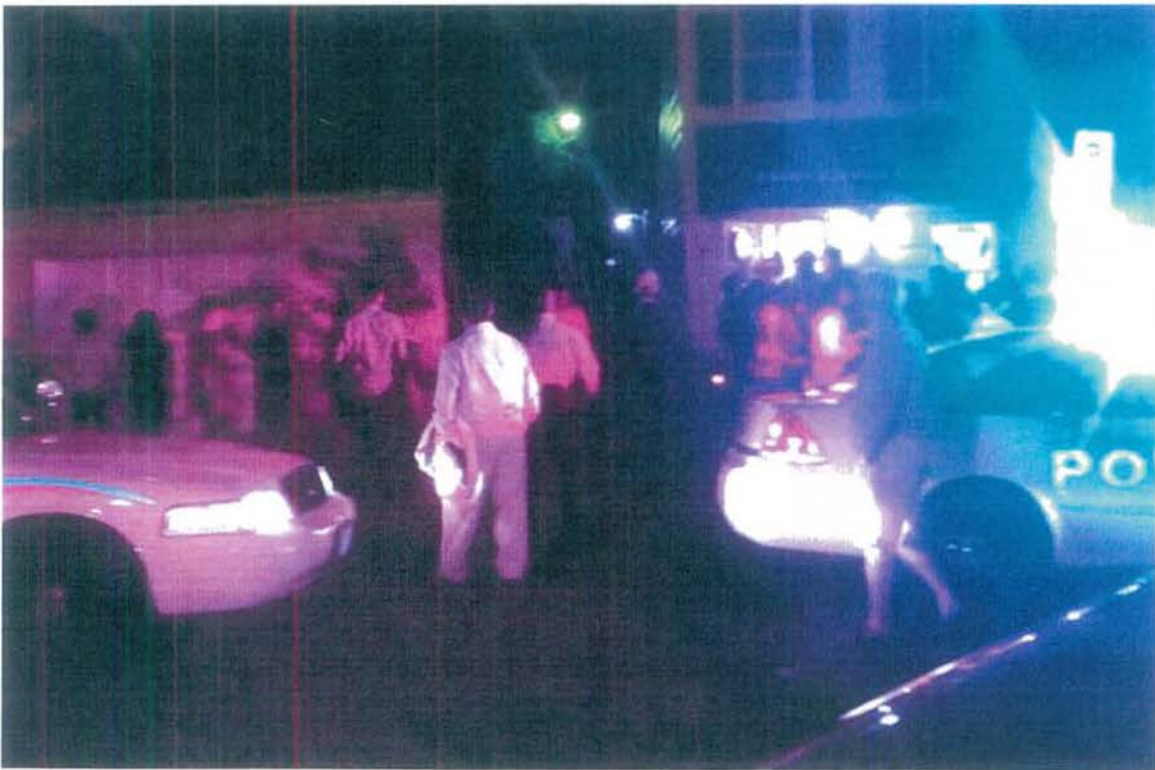
⁴ A lengthy hearing is of no benefit to the Potomac Street Intervenors, as a continuance would only serve to prolong the detrimental effects of Philly Pizza's operations.

Exhibit A

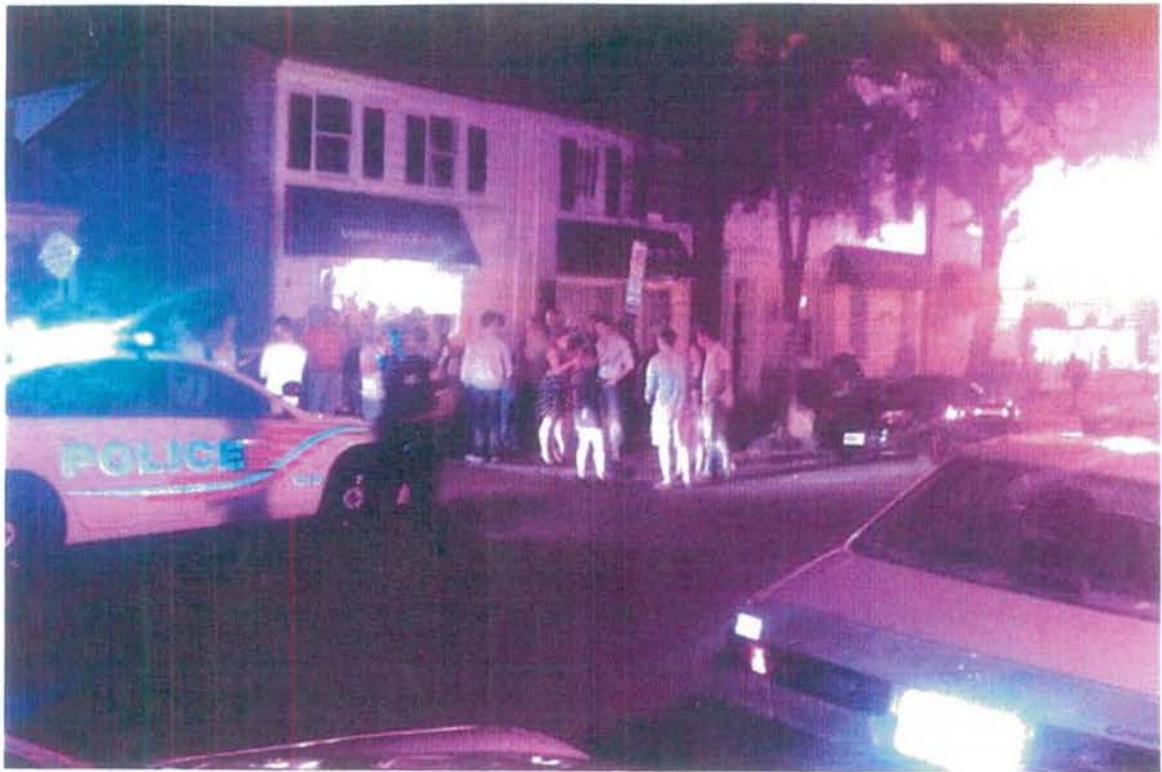
Photos of Philly Pizza Patrons in Potomac Street taken on September 26, 2009











Lynn Schubert
1220 Potomac Street, N.W.
Washington, DC 20007

December 17, 2009

Board of Zoning Adjustment
441 4th Street, NW
Suite 200 South
Washington, DC 20001

Re: Authorization Letter – Appeal No. 18027

Dear Members of the Board:

I hereby authorize Martin P. Sullivan, a D.C. attorney, to represent me, with the specific power to bind me, in all proceedings before the District of Columbia Board of Zoning Adjustment concerning the above-referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lynn Schubert', written in a cursive style.

Lynn Schubert