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**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: January 12, 2010
ANC 2E

APPELLANT'S PRE-HEARING STATEMENT

The Appellant, Mehmet Kocak and Philly Pizza & Grill, Inc., by and through undersigned counsel, respectfully submits this Pre-Hearing Statement in further support of this Amended Appeal, pursuant to 11 DCMR §§ 3100 and 3101, from: 1) the October 14, 2009.¹ Notice to Revoke Certificate of Occupancy No. CO 0800124; and 2) the November 2, 2009 Notice to Revoke Certificate of Occupancy No. CO 0903354, for a restaurant, by the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), in the C-2-A District at premises 1211 Potomac Street, N.W. (Square 1207, Lot 124) (the "Property").

I. PROCEDURAL BACKGROUND

On October 23, 2009, the Appellant filed the original Appeal of the Zoning Administrator's October 14, 2009 decision to issue a Notice to Revoke Certificate of Occupancy No. CO 0800124 ("Original Notice to Revoke"). Exhibit A. In the original Appeal, the Appellant established that DCRA had investigated this matter and issued the Original Notice to Revoke based on Certificate of Occupancy No. CO 0800124 (September 11, 2008) ("Outdated Certificate of Occupancy"), Exhibit B, which was no longer operative having been replaced by a more recent and broader certificate of occupancy reviewed and approved by DCRA.

¹ The Original Notice to Revoke was dated October 9, 2009, but not signed by the Zoning Administrator until October 14, 2009. Exhibit A.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18027

EXHIBIT NO. 33

Board of Zoning Adjustment
District of Columbia
CASE NO. 18027
EXHIBIT NO. 33

On Monday November 2, 2009, the Appellant and counsel met with representatives of DCRA, including the Zoning Administrator, to discuss the unsubstantiated 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. CO 0903354 (“New Notice to Revoke”) Exhibit C. The New Notice to Revoke is almost identical in substance and form as the Original Notice to Revoke, but relies entirely on the earlier DCRA investigation and “undercover surveillance” to challenge Certificate of Occupancy No. CO 09030554, dated September 21, 2009 authorizing use of the Property for “2-FLOOR 13 SEAT RESTAURANT (7 SEATS ON 1ST FLOOR & 6 SEATS ON 2ND FLOOR)” (“Current Certificate of Occupancy”). Exhibit D. Significantly, this investigation was completed almost one month before the Current Certificate of Occupancy was issued. At this meeting, Appellant repeated its earlier requests to DCRA to voluntarily stay enforcement of both the Original and New Notices to Revoke. DCRA declined to stay enforcement and for the first time requested Appellant to provide documentation on its restaurant operations.

The Current Notice to Revoke alleges the Appellant exceeded the scope of the restaurant Certificate of Occupancy “by operating primarily as a fast food establishment and extending the business use beyond the first and second floors of the Property.” The Current Notice to Revoke states that a “CofO for a fast food establishment in a C-2-A zone requires a special exception from the Board of Zoning Adjustment” pursuant to 11 DCMR § 731.1.

On November 4, 2009, in response to the New Notice to Revoke and DCRA’s continued refusal to voluntarily stay enforcement of both the Notices to Revoke, the Appellant filed with the Board a “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.” At a Special Public Meeting on November 17, 2009, the Board heard extensive presentations from the Appellant, DCRA, and Advisory Neighborhood Commission 2E. As a result, the Board amended the original Appeal to include the Appellant’s Appeal of the New Notice to Revoke and granted a Stay of Enforcement of both Notices to Revoke until at least the conclusion of the Board’s hearing on the Amended Appeal rescheduled for January 12, 2010.² In granting the Stay of Enforcement, the Board concluded that the Appellant had established: 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 the stay is granted; and 4) the public interest favors granting the stay. Order Granting Stay in Appeal No. 18027 (November 25, 2009). Exhibit E.

II. BASIS FOR APPEAL

A. Notices to Revoke Are Unauthorized and Invalid

Both the Notices to Revoke were issued by the Zoning Administrator without proper authorization and are invalid as a matter of law. Under 12A DCMR §§ 103.1, 110.5 (D.C. Construction Codes Supplement of 2008 (December 26, 2008)),³ only the Director of DCRA is authorized to revoke a certificate of occupancy.

B. Fatally Flawed Investigation By DCRA

DCRA’s investigation and “undercover surveillance” and resulting allegations are undocumented, untimely, limited and inherently unreliable and inconsistent with the

² The Order mistakenly refers only to a stay from a notice to revoke Certificate of Occupancy No. 0800124 (Original Notice to Revoke). Exhibit E. The Current Notice to Revoke is also at issue in this Amended Appeal.

³ In both Notices to Revoke, the Zoning Administrator incorrectly cites and quotes the outdated Construction Code Supplement of 2003.

Appellant's established restaurant operations authorized under the Current Certificate of Occupancy.

C. DCRA Has Repeatedly Reviewed, Inspected, Permitted and Authorized the Restaurant

Beginning in May 2008 and continuing through September 2009, the Appellant has received numerous regulatory approvals for the Restaurant, including building permits, inspections and certificates of occupancy.

D. DCRA's Action is Barred By Estoppel and Laches

Under the circumstances of this case, the Zoning Administrator and/or DCRA are estopped from revoking the Current Certificate of Occupancy and such action is also legally barred by the Doctrine of Laches.

III. BACKGROUND

A. Restaurant Operations

In September 2008, after extensive and costly renovations (at **least \$220,000.00**) to the two-story with basement structure that was built in 1825, the Appellant opened the Philly Pizza & Grill Restaurant ("Restaurant") at the Property. Despite the emphasis on pizza in the name, it is a full-service restaurant offering a full menu, including a wide selection of appetizers, salads, main courses (pitas, burritos and wraps, calzone and Stromboli, pizza, pastas, and hot and cold subs), desserts and beverages. Exhibit F (Menu). The Restaurant's menu is cooked fresh daily on the premises, not assembled using already prepared items that are reheated. The Appellant does not serve alcohol and does not permit alcohol in the Restaurant.

The Restaurant is primarily dine-in, but the full menu is available for carryout and delivery and catering is also available. Exhibit G (Photographs of Dine-In Customers, including families with children, couples and non-student adults). Dine-in customers are

served on non-disposable plates and utensils. Exhibit H (Photograph of non-disposable plates and utensils). Dine-in customers place their order and the food is delivered to their table. Dine-in customers pay after finishing their meals. Trash receptacles are no longer provided in the public areas of the Restaurant and the tables are cleared by Restaurant employees. Delivery is provided using two mopeds and two automobiles, although only two of the four vehicles are used at any one time. The delivery vehicles use off-street parking and are not allowed to park or stand on-street or in the adjacent public alley. Carryout customers are not allowed to consume their food outside the restaurant. Additionally, to encourage take home consumption and discourage immediate consumption of carryout items, the Appellant has recently began packaging carryout pizza in small (10" x 10") pizza boxes, Exhibit I, rather than on paper plates.

The Restaurant is open from 11:00 am to 2:30 am Sunday through Thursday and from 11:00 am to 3:30am Friday and Saturday. At least six restaurants in the immediate area, including Quick Pita immediately across the street at 1210 Potomac, stay open later on Friday and Saturday nights. Exhibit L. The Zoning Regulations do not limit the hours of operation of a restaurant or any other eating establishment. During the Restaurant's 110 hours of weekly operation, the mix of customers varies, depending on many factors, including day of the week, time of day, weather, season and the class schedule of nearby Georgetown University. Although the restaurant is very popular with students, customers are drawn from all demographics, including local residents and families with children, Georgetown shoppers and visitors, and office and retail workers in the area. Exhibit G.

Prior to the November 2 meeting with the Zoning Administrator and the New Notice to Revoke, the Appellant did not track or keep records of the breakdown of the number of

customers and type of service provided. However, beginning on November 11, 2009, the Appellant began tracking its customers on a daily basis and recording the number of transactions broken down between dine-in, carryout and delivery. In addition to the daily reports, the information has been compiled into weekly and cumulative (seven weeks) reports. As shown in the attached cumulative reports, the Restaurant's customer transactions are primarily dine-in (**45.41%**) and its carryout (25.76%) and delivery (28.83%) operations are each subordinate to the dine-in customers.⁴ Exhibit J. This customer type information is gathered at the point of sale or payment. Dine-in customer transactions are registered under Code "500", delivery under Code "600" and carryout under Code "800". To date, the Appellant's software has not allowed a further breakdown of type of service based on the time of day.

The Appellant continues to take steps to encourage dine-in customers, including specials and interior renovations to provide a better dine-in atmosphere. Also, the recent relocation of the Georgetown Cupcake store located immediately next door at 1209 Potomac Street, N.W. has increased dine-in customers. Previously, the famously long lines for Georgetown Cupcake have extended up the block on the sidewalk in front of the Restaurant. These long lines for Georgetown Cupcake discouraged dine-in customers who mistakenly believed the lines were for the Restaurant and made it difficult, if not impossible, for customers to get through the crowds and into the Restaurant. The Restaurant provides clean, well maintained restroom facilities for its customers. Across the street, Quick Pita no longer

⁴ Catering transactions are reported as "carryout" although the food may be delivered. Typically, the Restaurant provides catering for two to three events a week, each involving twenty to thirty guests.

provides restroom facilities. The Restaurant allows Quick Pita customers to use its restroom facilities in order to prevent negative impacts on the neighborhood.

A. C-2-A Zoning

1. The Restaurant is Allowed as a Matter of Right

A “restaurant” located in the C-2-A Zone is allowed as a matter of right, whereas this zone requires a special exception in order to operate a “fast food establishment”. The Property is within the C-2-A Zone, as is the entire Square in which the Property is located. Exhibit K. Since the Appellant is operating his business as a Restaurant within this zone, this use is allowed as a matter of right and no special exception is needed.

2. Property Located in Busy Georgetown Commercial Corridor

The Property is located in the heart of the busy and long established Georgetown Commercial corridor defined by M Street and Wisconsin Avenue, including the adjacent Potomac and Prospect Streets. Restaurants, bars, retail and service establishments, and offices are the predominant uses in this C-2-A zone, not residential. Exhibit K. In fact, restaurants are one of the predominant permitted uses in the immediate area. More than fourteen (14) restaurants are located in the immediate area, including more than six moderately priced restaurants in the 1200 block of Potomac Street and 3200 block of Prospect Street. Exhibit L (Information on Area Restaurants). Additionally, several well-known and expensive restaurants are also located in the 3200 block of Prospect Street, including Morton’s Steakhouse and Café Milano both at 3251 Prospect Street.

3. Similar Restaurants in the Area

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*). The attached chart, containing information on area restaurants, illustrates the inconsistency of DCRA’s classification of businesses. Exhibit L.

4. Conduct is not Relevant

The conduct of Restaurant patrons is not a relevant factor to determining the nature of an eating establishment for zoning purposes and will not be considered by the Board in this Amended Appeal. In addition, the Board made it clear during the November 17, 2009 hearing that the issue of whether the Appellant is a good neighbor is also not a question that the Board will seek an answer to, as discussed.⁵ However, it should be noted that the Appellant has taken great measures to ensure that his establishment maintains a professional restaurant atmosphere. In response to ANC 2E and neighbors, the Appellant has gone above and beyond what is required of him as a business owner by hiring, at his own expense, two security guards in two shifts and Friday and Saturday nights (Fridays and Saturdays 12-4am and 1am-4am). These security guards are stationed outside of the Property to prevent loitering, limit noise and unruly activity, and control litter not only for the Restaurant’s customers, but also heavy non-Restaurant pedestrian activity. In addition, the Appellant provides outdoor trash cans and routinely looks for and disposes of any debris, including non-Restaurant debris found on the adjacent street and alley both during and after business hours. Lastly, the Appellant continues making a good faith effort to further increase dine-in transactions by further renovating the

⁵ Commissioner Shane L. Dettman stated that, “. . . when we do reach the decision hearing in January, the question that the Board will be asked to answer is not whether or not this particular applicant, Philly Pizza, is a good neighbor or it’s an appropriate use. The question that we are going to be faced to answer is whether or not the Zoning Administrator erred in making his determination that this particular establishment is operating as a carry out rather than a restaurant. And so I just wanted to put that in the record, because sometimes that causes confusion at appeal hearings.” November 17, 2009 BZA Transcript, Pages 168-169.

interior and offering dine in food specials. The Appellant cares not only about his business and his customers, but also strives to be a good neighbor.

B. Chronology of Events

For the Board's reference and convenience, the following comprehensive chronology of events is provided:

Date	Event	Comment
Sept. 28, 2007	ZC Order No. 06-23 Zoning Text Amendments to Eating Establishment Definitions	As stated in the Order, "The amendments revised the definition of 'restaurant,' change the name of the 'fast food restaurant' use to 'fast food establishment,' include criteria within the definition of 'fast food establishment' <i>that can be readily determined as being satisfied or not as part of the Zoning Administrator's review of building permit plans</i> , and recognize a new use, to be called a 'prepared food shop.'" (emphasis added)
Dec. 7, 2007	ZC Order No. 06-23A Zoning Text Amendments to Eating Establishment Definitions	Corrected Order – Order No. 06-23 incorrectly indicated that the maximum number of seats allowed as a matter-of-right in a "prepared food shop" in a C-2-A Zone District is twelve, when it should have stated that the number is eighteen (and a prepared food shop having more than eighteen seats shall be permitted if approved as a special exception)
May 29, 2008	Building Permit No. 119148 for "Conversion of an Existing Office Space in to a <i>Restaurant</i> "	(emphasis added)
June 26, 2008	Building Permit No. 119148 for "Conversion of an Existing Office Space in to a <i>Restaurant</i> "	(emphasis added)
July 11, 2008	DCRA Fire Protection Inspection Final Approval	
July 24, 2008	3 rd Party Electrical Inspection Report	Denied
July 29, 2008	3 rd Party Plumbing Inspection Report	Approved

Date	Event	Comment
July 29, 2008	DCRA Plumbing Inspection Approval	
July 31, 2008	DCRA Electrical Inspection Approval	1 st , 2 nd Floor & Basement
Aug. 12, 2008	DCRA Permit Work Occupancy Approval Form	Intended Use of Structure: "Pizza Store" "Approved for Occupancy"
Aug. 29, 2008	3 rd Party Fire Inspection Report	Approved Intended Use of Structure: "Pizza Shop (Philly Pizza)"
Aug. 29, 2008	DCRA Fire Protection Inspection Suppression Systems Final Approval	
Sept. 2, 2008	3 rd Party Construction Inspection Report	Approved Intended Use of Structure: " Restaurant " (emphasis added)
Sept. 2, 2008	3 rd Party Electrical Inspection Report	Approved Intended Use of Structure: " Restaurant " (emphasis added)
Sept. 2, 2008	3 rd Party Plumbing Inspection Report	Approved
Sept. 2, 2008	DCRA Plumbing Inspection Approval	
Sept. 2, 2008	3 rd Party Electrical Inspection Final Approval for Occupancy	Approved
Sept. 2, 2008	DCRA Electrical Inspection Final Approval	1 st , 2 nd Floor & Basement
Sept. 5, 2008	Application for CofO and "Eating Establishment Questionnaire"	
Sept. 11, 2008	CofO for "Restaurant 7 Seat-Prepared Food Shop" CofO No. 0800124 ("Outdated Certificate of Occupancy")	Based on DCRA Approved "Eating Establishment Questionnaire" submitted with certificate of occupancy application.
Sept. 12, 2008	DCRA Building Inspection Final Approval	2 nd Floor
Aug. 14, 2009 (Friday)	DCRA conducted a zoning compliance investigation at the property	Time of investigation unknown

Date	Event	Comment
Aug. 15, 2009 (Saturday)	DCRA undercover surveillance at the property	Time, duration and documentation of surveillance unknown
Aug. 18, 2009 (Tuesday)	DCRA undercover surveillance at the property	Time, duration and documentation of surveillance unknown
Aug. 19, 2009 (Wednesday)	DCRA undercover surveillance at the property	Time, duration and documentation of surveillance unknown
Aug. 20, 2009 (Thursday)	DCRA undercover surveillance at the property	Time, duration and documentation of surveillance unknown
Aug. 29, 2009 (Saturday)	Georgetown University: Arrival of New Undergraduate Students	Pursuant to the Georgetown University Registrar's Website 2009-2010 Academic Year Calendar http://registrar.georgetown.edu/calendars/2009-2010.htm
Aug. 30, 2009 (Sunday)	Georgetown University: Arrival of Returning Students	
Sept. 1, 2009	Application for Current Certificate of Occupancy	
Sept. 2, 2009	Georgetown University: Classes Begin	
Sept. 21, 2009	CofO for "2-Floor 13-Seat Restaurant (7 Seats on 1 st Floor & 6 Seats on 2 nd Floor)" CofO No. 0903354	(emphasis added)
Oct. 9, 2009	DCRA Notice to Revoke CofO No. 0800124 "exceeded the scope of your restaurant CofO by operating primarily as a fast food establishment and extending the business use beyond the first floor of the Property"	Notice to revoke effective 10 business days from the mailing of the notice. The Notice to Revoke was dated Friday, Oct 9, 2009 but was not signed by Mr. LeGrant until Wednesday, Oct. 14, 2009 and then served on the Applicant
Oct. 23, 2009	Appellant filed an Appeal and Request for Stay of Enforcement to the BZA	

Nov. 2, 2009	Appellant met with Mr. LeGrant	
Nov. 2, 2009	DCRA Notice to Revoke CofO No. 0903354 “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”	Notice to revoke effective 10 business days from the mailing of the notice. The Notice to Revoke was dated and signed on Nov. 2, 2009
Nov. 4, 2009	Appellant filed an Appeal and Request for Stay of Enforcement and Notice of Related Appeal and Motion to Amend Pending Appeal to Incorporate Directly Related Notice to Revoke to the BZA	
Nov. 17, 2009	BZA Hearing	Board voted to stay the effectiveness of the Notices to Revoke until the conclusion of the Board’s hearing on the appeal which it rescheduled from Feb. 9, 2010 to the afternoon of Jan. 12, 2010 Stay became effective on Nov. 17, 2009
Nov. 25, 2009	BZA Order No. 18027	Motion for stay granted (as of Nov 17, 2009) up to and through the completion of the hearing scheduled for Jan. 12, 2010
Nov. 25-30, 2009	Georgetown University: Thanksgiving Recess	
Nov. 30, 2009	ANC 2E held its regularly scheduled public meeting	ANC voted to support the DCRA determination that Philly Pizza is operating as a fast food establishment, not a restaurant.
Dec. 9, 2009	Georgetown University: Classes End	
Dec. 14, 2009	Georgetown University: Examinations Begin	
Dec. 22, 2009	Georgetown University: Examinations End	
Jan. 12, 2010	BZA Appeal Hearing	
Jan. 13, 2010	Georgetown University: Classes Resume	

IV. ARGUMENT

A. Invalid Notice to Revoke

The D.C. Building Code Supplement of 2008 states that only the “code official” is authorized to revoke a Certificate of Occupancy pursuant to Sections 110.5.1 through 110.5.5. The Building Code further defines “Code Official,” in section 103.1, as referring to the DCRA Director and describes the code official as having authority to delegate his or her duties and powers under the Construction Codes. There is no evidence that the Director’s duties and powers under the Building Code have been delegated to the Zoning Administrator, who’s duties are limited to enforcement of the Zoning Regulations. Both the Notices to Revoke were signed by the Zoning Administrator. As a result, both the Notices to Revoke are unauthorized and invalid as going beyond the duties allowed by the Construction Code.

B. Flawed Investigation By DCRA

DCRA’s “undercover” operations and allegations are undocumented, inherently unreliable and inconsistent with the permitted use authorized by the Current Certificate of Occupancy. No time or duration is provided as to when these surveillance inspections occurred and the conclusions are not based on any documented evidence, but merely limited observations of a Restaurant that operates 110 hours a week. Surprisingly, DCRA conducted this investigation and reached its unsubstantiated conclusions without contacting Appellant or requesting accurate documentation on the Restaurant’s actual operations.

It should also be noted, as evidenced by the above chronology of events, that all of the surveillance occurred (Sunday, August 15th; Tuesday, August 18th; Wednesday August 19th; and Thursday, August 20th) prior to the Georgetown students arriving for the fall semester,

which took place on Saturday, August 29th. While the Appellant does not only serve Georgetown University Students, its business activity is definitely impacted, as are most Georgetown businesses, based on the University schedule. The dates of the DCRA inspections fall within the period two weeks before the arrival of students at which time dine-in transactions experience a reduction in number.

DCRA has on at least four (4) separate occasions, reviewed, inspected and approved the Appellant's Restaurant use, including the building permits, the Outdated Certificate of Occupancy, and most recently, the Current Certificate of Occupancy issued on September 21, 2009 (one month after DCRA conducted its undercover surveillance of the Appellant's existing Restaurant operations). Significantly, in obtaining the original Outdated Certificate of Occupancy, the Appellant submitted the required "Eating Establishment Questionnaire."

Exhibit M. Based on the projections on future operations of 25% carryout and 15% delivery provided by the Appellant, DCRA determined that the proposed use was allowed in the C-2-A Zone and issued the Outdated Certificate of Occupancy. After fifteen months of operations, the Restaurant's actual and documented sales transactions are entirely consistent with the projections provided and the approvals granted.

On October 23, 2009, the Appellant filed this pending Appeal of the Zoning Administrator's October 14, 2009 decision to issue the Original Notice to Revoke. Exhibit A. In its original 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 the New Notice

to Revoke Exhibit C. The Current Notice to Revoke is almost identical in substance and form as the Original Notice to Revoke, but correctly references the Current Certificate of Occupancy.

The Appellant directly and substantially relied on the building permits and certificates of occupancy in making a substantial investment in the approved Restaurant operations of at least \$220,000.00. 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 without reasonable or documented justification and on short notice destroying the business.

C. Restaurant Operations – Zoning Definitions

The Appellant's business fits within the definition of "**Restaurant**", as defined by the Zoning Regulations as:

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.**

11 DCMR 199.1. (*Emphasis added*).

As an initial matter, a "Restaurant" can not operate as a "fast food establishment" or "prepared food shop" as defined by the Zoning Regulations, (except a prepared food shop with less than 13 seats and no drive-through is permitted in the C-2-A zone). The Appellant's Restaurant cooks all of the food from raw ingredients on the premises which it sells to customers for consumption. The Restaurant also does not fit within any of the three conditions (a) through (c) described within the Fast food establishment definition, as evidenced below:

“Fast food establishment” is defined as

“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;

The premises does not 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;

Dine-In customers at the Restaurant do not pay for food prior to consumption. Also, Appellant has certified by the “Eating Establishment Questionnaire”, Exhibit M, that the intended principal use is for a restaurant 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. A proposed or existing establishment meeting this definition shall not be deemed to constitute any other use permitted under the authority of these regulations, except that a restaurant, grocery store, movie theater, or other use providing carryout service that is clearly subordinate to its principal use shall not be deemed a fast-food establishment.”

11 DCMR 199.1

This is clearly not the case with the Appellant’s Restaurant. Dine-in customers are served on non-disposable plates and silverware. Exhibits G and H. The non-disposable plates and silverware are washed by hand and the building permit plans did not show an automatic dishwasher. There are no trash receptacles in the public areas of the Restaurant.

The Restaurant's carryout and delivery are each subordinate to its principal dine-in use, as discussed in more detail below.

"Prepared food shop" is defined as:

a place of business that offers seating or carry out service, or both, and which is principally devoted to the sale of prepared food, non-alcoholic beverages, or cold refreshments. This term includes an establishment known as a sandwich shop, coffee shop, or an ice cream parlor.

11 DCMR 199.1

"Prepared food" is further defined as:

food that is assembled, but not heated by means other than microwave or toaster, on the premises of a prepared food shop.

11 DCMR 199.1

The Appellant does not fit within the definition of "prepared food shop" since it does not serve "prepared food," but rather makes and cooks food using raw ingredients on the premises in ovens and on stoves for consumption. For example, all of the pizzas are made on site (versus merely heating them up).

Having determined that the Appellant does not fit within the definitions of either fast food establishment or prepared food shop, the final analysis is based on the definition of "Restaurant" which states "food, drinks, or refreshments prepared and sold to customers *primarily* for consumption on the premises and that any facilities for carryout shall be clearly *subordinate* to the principal use providing prepared foods for consumption on the premises."

11 DCMR § 199.1 (Emphasis added.)

As established, the food is made on the premises to be sold to the customers. The term "primarily" or "subordinate" are not defined by the Zoning Regulations and therefore, according to 11 DCMR 199.2(g), words not defined in the Zoning Regulations shall have the

meanings given in *Webster's Unabridged Dictionary*. *Websters* defines "primarily" as: 1. first of all 2. in the first place. The first definition under "primary" is 1. first in order of time or development. While "subordinate" is defined by *Webster's* as "1: placed in lower order, class, or rank: holding a lower or inferior position." Dine-in, carry out and delivery are three distinct components of the Restaurant's operations. Based on these definitions, the primary or highest percentage of transactions is clearly Dine-in customers with carry out and delivery each clearly and substantially subordinate to dine-in transactions. As fully documented by the attached daily, weekly and cumulative transaction counts, Exhibit J, dine-in is the primary use with a percentage of **45.41%** and carry out (25.76%) and delivery (28.83%) are each subordinate.

D. The District Is Estopped From Revoking The Certificate Of Occupancy

The District of Columbia is estopped from revoking the Current Certificate of Occupancy. The Appellant has already acted in good faith reliance, to its detriment, on the Original and Current Certificate of Occupancy, both of which granted the Restaurant use at the Property.

There is a substantial body of case law applying estoppel to municipal corporations, including, specifically the District of Columbia. See i.e., District of Columbia v. Cahill, 54 F.2d 453, 454 (D.C. 1931) (where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvement that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied); Bannum, Inc. v. District of Columbia Board of Zoning Adjustment, 894 A.2d 423 (D.C. 2006); Saah v. District of Columbia Board of Zoning Adjustment, 433 A.2d 1114 (D.C. 1981); Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917 (D.C. 1980); Wieck v.

District of Columbia Board of Zoning Adjustment, 383 A.2d 7 (D.C. 1978); Smith v. District of Columbia Board of Zoning Adjustment, 342 A.2d 356 (D.C. 1975).

The D.C. Court of Appeals has repeated the six part test required to successfully establish an estoppel claim against the D.C. government, including: 1) expensive and permanent improvements; 2) made in good faith; 3) in justifiable and reasonable reliance upon; 4) affirmative acts of the District Government; 5) without notice that the improvements might violate the Zoning Regulations; and 6) the equities strongly favor the petitioner. Bannum, Inc. at 431; District of Columbia Department of Consumer and Regulatory Affairs v. Vu, CR-C-06-100009, (OAH, October 16, 2006). Finally, the District, and specifically, the Zoning Administrator, and DCRA are estopped from revoking the Certificate of Occupancy.

It is undisputed that the Appellant undertook the present action, including but not limited to, incurring substantial expenses (\$220,000.00) and debt, contracting with several contractors, allowing substantial and costly work to be performed on the Property and making other expensive and permanent improvements to the Property, in reliance on the building permits and certificates of occupancy issued under the direction of DCRA, long before the issuance of the Zoning Administrator's Notices to Revoke.

The Appellant's reliance on the repeated affirmative acts of the District were at all times in good faith, justified and reasonable under the circumstances for the purpose of investing in a restaurant in Georgetown. When the Appellant received the Current Certificate of Occupancy he had no knowledge or reason to believe that the use as a Restaurant was in doubt.

In a matter decided by the Office of Administrative Hearings, captioned District of Columbia Department of Consumer and Regulatory Affairs v. Vu, supra, the District was

estopped from revoking a building permit as the homeowner had debt of in excess of One Million Dollars (\$1,000,000.00) and the expenditure of the funds was in good faith and in justifiable and reasonable reliance on affirmative acts of DCRA, including instructions from DCRA to bring the structure to a "safe height". October 2 BZA Transcript, Pages 165, 347. District of Columbia Department of Consumer and Regulatory Affairs v. Vu, CR-C-06-100009, (OAH, October 16, 2006).⁶

At no time prior to initiating the expensive construction at the Property did the Appellant have any notice that the Certificate of Occupancy was in violation of the Zoning Regulations and made no misrepresentations in any of the permit applications.

E. Revocation Of The Certificate Of Occupancy Is Barred By The Doctrine Of Laches

The Notice to Revoke the Certificate of Occupancy is barred by the doctrine of laches, as the District "slept on its rights" with respect to any claim as to the Certificates of Occupancy.

"To prevail on the affirmative defense of laches, the party asserting the defense bears the burden of proving that (1) the claimant knew of the existence of the grounds for the claim; (2) the delay was unreasonable and must have worked to the disadvantage, injury or prejudice of the party asserting the defense; (3) the delay of time has resulted in some change in the condition of the property or in the relations of the parties; however, the mere passage of time is insufficient to support a finding of laches." Town of Cameron v. Woodell, 150 N.C. App. 174, 563 S.E. 2d 198 (N.C. App. 2002).

⁶ The Court of Appeals in Saah v. District of Columbia Board of Zoning Adjustment, supra, found that equitable estoppel applied against the District when significantly less money had been expended to complete less construction than in Vu. In Saah, the homeowner spent over one-quarter of a million dollars (\$225,000.00) for sixty percent (60%) completion.

If the District had a viable claim against the issuance of the Certificate of Occupancy, it waited far too long in seeking recourse. See, Federal Marketing Company v. Virginia Impression Products Company, 823 A.2d 513 (D.C. 2003); see also, Richards v. Mackall, 124 U.S. 183 (1888); Halstead v. Grinnan, 152 U.S. 412 (1894). The Court of Appeals in American University Park Citizens Association v. Burka, 400 A.2d 737 (D.C. 1979), stated that "[l]aches is the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." Id. at 740 (internal quotations omitted).

The original Certificate of Occupancy was issued on September 11, 2008. Exhibit B. The District is barred by laches, as well as estoppel, discussed *infra*, from revoking the Certificate of Occupancy after the issuance of the Building Permits and the completion of construction.

Clearly the District's delay in acting on its alleged claims, without making a concession as to the merits of the same, has operated to the extreme prejudice of the Appellant. The Notices to Revoke may result in the Appellant going out of business, the loss of his substantial investment, and inability to repay his debt.

V. WITNESSES

1. Mr. Mehmet Kocak, Appellant
2. Mr. Olutoye Bello, Zoning Expert with Bello, Bello & Associates, LLC

VI. EXHIBITS

Exhibit A: Original Notice to Revoke.

Exhibit B: Outdated Certificate of Occupancy.

Exhibit C: New Notice to Revoke.

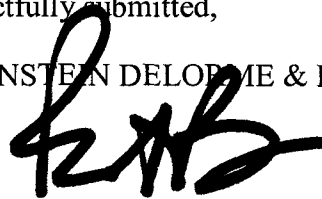
- Exhibit D: Current Certificate of Occupancy.
- Exhibit E: Order Granting Stay in BZA Appeal No. 18027.
- Exhibit F: Full Service Menu.
- Exhibit G: Photographs of Dine-In Customers.
- Exhibit H: Photograph on Non-disposable plate and utensils.
- Exhibit I: Photograph of New Carryout Pizza Box.
- Exhibit J: Daily, Weekly and Cumulative Transaction Reports.
- Exhibit K: Zoning Map of Georgetown Commercial Corridor.
- Exhibit L: Analysis of Surrounding Restaurants.
- Exhibit M: Eating Establishment Questionnaire.
- Exhibit N: Expert Resume of Mr. Olutoye Bello.

VII. CONCLUSION

For the foregoing reasons, the Zoning Administrator's Notices to Revoke are invalid and incorrect and therefore the Amended Appeal must be GRANTED and DCRA is permanently prohibited to enforce the Original and/or Current Notices to Revoke.

Respectfully submitted,

GREENSTEIN DELOE ME & LUCHS, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Pre-Hearing Statement was served by first-class mail, this 29th day of December 2009, upon the following:

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