

**DISTRICT OF COLUMBIA
Board of Zoning Adjustment**

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2010 JAN -8 PM 2: 34

In Re:

Mehmet Kocak and Philly Pizza,

Appellant.

Appeal No. 18027

DISTRICT OF COLUMBIA'S PRE-HEARING STATEMENT

Appellee, the District of Columbia, Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully submits this Pre-Hearing Statement in opposition to the granting of Appeal No. 18027 (the "Appeal"). The appeal seeks to challenge Notices of Revocation for Certificates of Occupancy #0800124 and #0903354, which were issued to Philly Pizza & Grill ("Appellant") at 1211 Potomac Street, N.W. Washington, D.C. ("the property"). The appeal should be denied for the following reasons: (1) pursuant to the zoning compliance inspections conducted in August of 2009, the Appellant's accessory carry-out and delivery uses were not clearly subordinate to its approved restaurant use, (2) the business use was not limited to the floors approved under Certificate of Occupancy #0800124 or #0903354, and the primary carry-out and delivery uses made of the property are inconsistent with its classification as a restaurant establishment.

Background

On September 11, 2003, Appellant was issued Certificate of Occupancy #0800124 for a "restaurant 7 seat prepared food shop" at the property. However, DCRA received complaints regarding the property and responded by conducting a zoning compliance inspection. Between August 15, 2009 and August 20, 2009, DCRA performed a regulatory investigation. The investigation revealed the following: that business at the property consisted of mostly delivery

BOARD OF ZONING ADJUSTMENT

District of Columbia

CASE NO.

18027

EXHIBIT NO.

3.5

Board of Zoning Adjustment
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EXHIBIT NO. 35

and pick-up transactions, the dine-in patrons ate from styrofoam containers with plastic utensils, the upper floor (not approved for any type of use under Certificate of Occupancy #0800124, which was in effect at the time of the compliance inspection) was made available to customers for seating, the basement of the property was used to store disposable plates and flatware for the business, and that a large commercial storage freezer servicing the business was located in the back yard of the property. Subsequently, a report of these conditions was made to the Zoning Administrator, who determined that the Appellant had exceeded the scope of its Certificate of Occupancy by operating primarily as a fast food service establishment and by extending its use of the property beyond the approved floor space. A second Certificate of Occupancy #0903354 was issued for the Property and expressly authorized “2 floor, 13 seat restaurant.”¹ This appeal followed.

Argument

Under 12 DCMR § 110.5.1, the Zoning Administrator may revoke a Certificate of Occupancy where “the actual occupancy does not conform with that permitted.” Under Certificate of Occupancy #0903354, the Appellant is permitted to operate as a “restaurant.” Under 11 DCMR §199.1, a “restaurant” is defined 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.

See 11 DCMR §199.1.

¹ Certificate of Occupancy #0800124 was in effect during the time of the DCRA zoning compliance inspections. However, while the investigation was in process, Certificate of Occupancy #0903354 was issued on September 21, 2009. This Certificate of Occupancy changed the space within which restaurant use was permitted, but the Zoning Administrator received no indication that the actual use of the property changed. Accordingly, a notice of Revocation was issued for both Certificates as the actual use of the property failed to comply with either Certificate of Occupancy #0800124 or #0903354.

The definition of a “restaurant” essentially contains two elements. First, the use must not have met the definition of a “fast food establishment” or “prepared food shop.” Second, any carryout use must be clearly subordinate to the principal use of providing prepared foods for consumption on the premises. *See* 11 DCMR §199. Because the language of the definition of restaurant distinguishes it from a fast food establishment and a prepared food shop, an analysis of those definitions is necessary.

A “fast food establishment” is defined in the Zoning Regulations 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; (b) Customers pay for the food before it is consumed; or (c) Food is served on/in anything other than non-disposable tableware. *See* 11 DCMR § 199.1.

A “prepared food shop” is “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.” *See* 11 DCMR § 199.1. “Prepared food” is defined as “food that is assembled, but not heated by means other than microwave or toaster, on the premises of a prepared food shop.” *See* 11 DCMR § 199.1.

As the zoning compliance inspections performed between August 15, 2009 and August 20, 2009 revealed, the majority of customers at the Property paid for food before it was consumed and the food offered to customers at the property was consistently served on disposable tableware. Therefore, it is clear that the Appellant’s operation meets two of the three “fast food establishment” definitional prongs. As a result, the use of the property: (1) cannot be classified as “restaurant,” and (2) such use is clearly in line with the definition of a “fast food establishment.”

Further, the use of the property by the Appellant does not meet the definition of a “prepared food shop.” As indicated in the Appellant’s Pre-Hearing submission and as observed by the DCRA compliance investigator, the food offered by the Appellant is not “prepared food”, but rather is food that has been cooked at the premises by means other than microwave or toaster. Therefore, the operations at the property are not consistent with a “prepared food shop” use.

The use of the property by the Appellant also does not conform with the second component of the definition of “restaurant” in that the carryout element of the use is not clearly subordinate to the principal use of providing food for consumption on the premises. By Appellant’s own admission, it does not prepare and sell food primarily for consumption on the premises. In Appellant’s Pre-Hearing Statement, the Appellant provides data in the form of spreadsheets that confirm that the majority of its transactions at the property come from carry out and delivery service to its customers, not from dine-in service or consumption of food on the premises. *See* Appellant’s Pre-hearing Statement, Exhibit J___.

The term “clearly subordinate” is not defined in the Zoning Regulations, therefore the Board must look to the definition given in Webster’s Unabridged Dictionary. *See* 11 DCMR § 199.2(g). Webster’s defines “subordinate” as that which “occup[ies] a lower class, rank or position.” Webster’s defines “clearly” as that which exhibits characteristics “capable of sharp discernment” and is “without ambiguity.” The inclusion of the word “clearly” before “subordinate” was undoubtedly meant to mean something more than just a scant majority. In order for a use to be “clearly subordinate” to another use the percentage differential between the two uses must be significant enough so that there is no ambiguity as to what the principal use of the property is. The legislative history of this regulation also sheds some light on the definition of “clearly subordinate.” In the Zoning Commission’s public hearing of April 19, 2007, Zoning

Commissioner Fengler proposes that “clearly subordinate” should be defined as consisting of no more than 25%. *See Exhibit 1 attached.*

DCRA’s compliance inspections and Appellant’s admissions both show that the business operations at the property are inconsistent with a “restaurant” use. Because the use of the property meets the definition of a fast food establishment and that carry out transactions predominate dine-in transactions, the Appellant’s use of the property does not meet the definition of restaurant found in the Zoning Regulations.

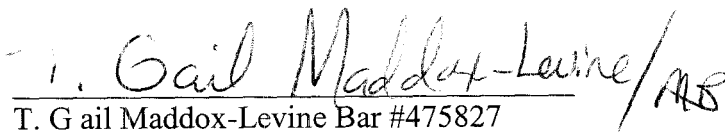
Additionally, the revocations of the Certificates of Occupancy were proper because the business use was not limited to the approved floors under Certificate of Occupancy #0800124 or #0903354.

Therefore, the Zoning Administrator’s determination to revoke the Certificates of Occupancy pursuant 12 DCMR § 110.5.1 was justified.

Respectfully Submitted,

PETER J. NICKLES
Attorney General for the District of Columbia

MELINDA BOLLING
Acting General Counsel


T. Gail Maddox-Levine Bar #475827

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January 2010, a copy of the foregoing District of Columbia's Pre-Hearing Statement was mailed to:

John Patrick Brown, Jr., Esq. (also electronically served)
Kate Olson, Esq.
1620 L Street, NW – Suite 900
Washington, D.C. 20036

Mr. Ron Lewis
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



April Wyke-Ransome

DISTRICT OF COLUMBIA

Board of Zoning Adjustment

In Re:

Mehmet Kocak and Philly Pizza,

Appellant.

Appeal No. 18027

**DISTRICT OF COLUMBIA'S NOTICE OF
PROPOSED WITNESSES AND EXHIBITS**

Appellee, the District of Columbia, Department of Consumer and Regulatory Affairs, by and through undersigned counsel, respectfully submits its Notice of proposed witness and supplemental exhibits as follows:

Proposed Witnesses:

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

Terrell Hill, Investigator
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Suite 9400
Washington, D.C. 20002

Lieutenant Hedgecock
Metropolitan Police Department
300 Indiana Avenue, NW
Washington, DC 20001

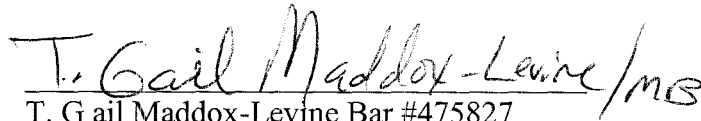
Exhibits:

April 19, 2007 Zoning Commission minutes.

Respectfully Submitted,

PETER J. NICKLES
Attorney General for the District of Columbia

MELINDA BOLLING
Acting General Counsel

Handwritten signature of T. Gail Maddox-Levine in cursive script, followed by a forward slash and the letters 'ms'.

T. Gail Maddox-Levine Bar #475827
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E-mail: Tgail.maddox-Levine@dc.gov

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John Patrick Brown, Jr., Esq. (also electronically served)
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1620 L Street, NW – Suite 900
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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



April Wyke-Ransome

+ + + + +

ZONING COMMISSION

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PUBLIC HEARING

IN THE MATTER OF: :
Text Amendment - Eating : Case No. 06-23
Establishment Definition :

Thursday,
April 19, 2007

Hearing Room 220 South
441 4th Street, N.W.
Washington, D.C.

The Public Hearing of Case No. 06-23 by the District of Columbia Zoning Commission convened at 6:30 p.m. in the Office of Zoning Hearing Room at 441 4th Street, N.W., Washington, D.C., 20001, Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

ANTHONY J. HOOD	Chairperson
GREGORY JEFFRIES	Vice Chairperson
JOHN PARSONS	Commissioner (NPS)
MICHAEL G. TURNBULL	Commissioner (AOC)

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN Secretary
ESTHER BUSHMAN General Counsel

OFFICE OF PLANNING STAFF PRESENT:

JENNIFER STEINGASSER
TRAVIS PARKER

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

JACOB RITTING, ESQ.

The transcript constitutes the
minutes from the Public Hearing held on
April 19, 2007.

A G E N D A

Z.C. Case No. 06-23

Text Amendment - Eating Establishment
Definition

ANC 6A: 8
Commissioner Fengler

OFFICE OF PLANNING 57
Travis Parker

PROPOSERS

Andrew Klein 82
Linsley Williams 89
Commissioner Jarboe 95

PERSONS IN OPPOSITION

Nancy Macwood, Commissioner, ANC 3-C . 107
George Idelson 114

1 seats. So, we're talking to the specific
2 nature of the Office of Planning Text
3 Amendment.

4 COMMISSIONER PARSONS: Okay.

5 COMMISSIONER FENGLER: And, you
6 know, that's --

7 COMMISSIONER PARSONS: All right.

8 COMMISSIONER FENGLER: I
9 apologize.

10 COMMISSIONER PARSONS: That's all
11 right. Let's go to the specifics.

12 COMMISSIONER FENGLER: Yes, sir.

13 COMMISSIONER PARSONS: Under
14 Exclusion C-2 you talk about a coffee shop,
15 delicatessen, ice cream parlor.

16 COMMISSIONER FENGLER: Right.

17 COMMISSIONER PARSONS: But only if
18 any other use is clearly subordinate.

19 How would you define subordinate?
20 50 percent?

21 COMMISSIONER FENGLER: Well, we
22 would propose that subordinate would be

1 anything that's greater than 25 percent of
2 your sales going towards fast foods -- 75
3 percent of your business.

4 COMMISSIONER PARSONS: 75 percent.

5 COMMISSIONER FENGLER: Yes, sir.

6 COMMISSIONER PARSONS: Okay.

7 Thank you.

8 Because I think, wouldn't you
9 agree we need to define that term rather than
10 leave --

11 COMMISSIONER FENGLER: Yes. And
12 that's part of our --

13 COMMISSIONER PARSONS: -- it up to
14 somebody else?

15 COMMISSIONER FENGLER: Right.
16 That's all part of our testimony is the lack
17 of a definition of clearly subordinate to the
18 principal use.

19 We would offer and your proposed
20 Text Amendment would have to be set at 75
21 percent. At 75 percent of your business mile
22 must be based on a restaurant and 25 percent

1 based on carry out or fast food
2 characteristics.

3 So, we would agree with you, sir.

4 COMMISSIONER PARSONS: Okay.

5 Thank you.

6 So, that would be the same
7 percentage you have in delicatessen which is
8 the next --

9 COMMISSIONER FENGLER: We would --
10 we would define it consistently across all
11 definitions. Anything greater than 25 percent
12 carry out use would fall under the category of
13 a fast food establishment or a fast food
14 restaurant.

15 COMMISSIONER PARSONS: Okay.

16 Thank you.

17 COMMISSIONER FENGLER: I apologize
18 for the late notice and submitting an
19 alternative Text Amendment.

20 COMMISSIONER PARSONS: You know,
21 it's constructive.

22 COMMISSIONER FENGLER: Thank you.