

BEFORE THE BOARD OF ZONING ADJUSTMENT

APPEAL No. 18027 of Mehmet Kocak and Philly Pizza & Grill, Inc

STATEMENT IN SUPPORT OF APPEAL No. 18027 (Mehmet Kocak & Philly Pizza & GRILL)

Brief Background

The issue before the Board with respect to the instant appeal, are two-fold. One is to determine whether the Zoning Administrator is authorized to revoke a C/O on the basis of an authority which reposes in the code official or the Director of the Department of Consumer and Regulatory Affairs (DCRA), as defined & as set forth in the relevant sections of the Building Codes. The other is to determine whether the determination of the Zoning Administrator that Philly Pizza is operating as a fast food restaurant to the effect that the "actual occupancy does not conform with that permitted", which forms the substantive basis for revocation, is in error; by extension, such determination hinges on the facts relied upon by the ZA to reach that conclusion.

1. Zoning Administrator not authorized to revoke Certificate of Occupancy

There is no dispute that the authority to revoke a certificate of occupancy (C/O), is set forth in the District of Columbia Construction Codes Supplement of 2003, 12 DCMR § 110.5 (Construction Codes), and that such authority reposes in the code official, who is The Director of DCRA, as defined and conditioned in §§ 103.1, and 103.1.2 of the same Title, respectively.

The central issue is likewise not whether the code official may delegate his/her authority to administer and enforce the Construction Codes, but whether the code official has taken a veritable act to effect the delegation to the Zoning Administrator (ZA), either in whole or in part.

The notion that the code official may delegate his/her powers to administer and enforce "zoning enforcement matters" within the Construction Codes to the Zoning Administrator demands the conclusion that the Zoning Regulations is devoid of any power to enforce zoning matters therein; a position clearly refuted by the plain meaning of 11 DCMR, §§ 3201.1 and 3201.2.

In fact there exist no zoning matters in the Construction Codes to be enforced by the ZA which may not be enforced within the Zoning Regulations. To argue the contrary is to suggest that the Board of Zoning Adjustment (BZA) possesses the authority to hear an appeal on a "zoning matter" which happens to be "embedded" in the Construction Codes, without a concomitant section in the Zoning Regulations.

A violation of the Zoning Regulations does not form the exclusive basis upon which the Director may exercise the authority to withhold or revoke a C/O. The Director may

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revoke a previously issued C/O because the actual occupancy does not conform to specific elements of the Construction Codes. The use of the term "occupancy" in 12 DCMR, § 110.5 is instructive in that it is not limited to those Uses enumerated in the Use Provisions set forth in respective zoning districts of the Zoning Regulations, but also encompasses the Use Group classifications of the Building and Construction Codes, and their unobstructed conformance.

The Director does not need to delegate his authority under the Construction Codes to the ZA in order to enforce a zoning matter, since all authority and powers delegated to the ZA for the administration and enforcement of the Zoning Regulations are delegated through the Director

12 DCMR, § 103.3 authorizes the code official to establish an organizational structure within which he/she "shall appoint such number of officers, technical assistants, inspectors and other employees as shall be necessary for the administration of the *Construction Codes*"

The exclusion of the Zoning Regulations is not an omission, because the specific functions for which the Zoning Division, headed by a Zoning Administrator, is responsible have been listed in a continuum of the authority of the Zoning Administrator outlined in a series of succeeding executive delegations, more pertinently beginning with Reorganizational Plan # 55 of 1953 and culminating in Reorganizational Plan No. 1 of 1983, which effectively transferred all the functions of the Department of Licenses, Investigations and Inspections to DCRA (see attachment).

Reorganization Plan # 55 lists twelve (12) specific functions to be performed by the Zoning Division, and by extension, the Zoning Administrator, in the course of administrative interpretation and enforcement of the Zoning Regulations. Item No. 3 states, in whole as follows:

"Reviews applications for building permits and for certificates of occupancy, and supervises inspections of premises, buildings and other structures in connection therewith, to determine if existing or proposed structures and uses comply with the provisions of the Zoning Regulations. Approves or rejects all such applications on the basis of the Zoning Regulations"

The list notably excludes any authority to revoke a C/O. No doubt the ZA plays an important and specific role in the process for review and approval of a C/O – approval or rejection on the basis of the Zoning Regulations – that role is nonetheless a partial role in that the issuance of a C/O is predicated not only on compliance with the Zoning Regulations, but also with the Construction Codes (see 11 DCMR, § 3203.1), over which the Zoning Administrator has no purview.

THE ZONING ADMINISTRATOR'S DETERMINATION IS IN ERROR

Philly Pizza was issued a certificate of occupancy to operate a restaurant at subject premises, after having undertaken the building permit process as required, to establish its use on all three floors of the existing building located on the subject property.

This statement focuses on C/O # 0903354 as the substantive C/O at issue here, since it in effect supersedes the previously issued C/O, # 0800124.

The original approved plans (Exhibit #) which authorized the establishment of the restaurant use provides substantiating evidence that DCRA approved the use on all three floors of the existing building. The certificate of occupancy application associated with the issuance of C/O # 0903354 (exhibit #) clearly reflects that application was made to occupy the basement, first, and second floors of the subject property for a restaurant purpose, consistent with the approved plans.

Given the foregoing, to the extent that C/O # 0903354 contains an omission with respect to the occupancy of the floors for which restaurant use is authorized, such omission constitutes a simple administrative error which may be corrected through simple administrative means, therefore not reaching the substantive threshold that should form the basis of revocation of the instant C/O.

Importantly since the administrative error or omission is that of DCRA, DCRA ought not be allowed to benefit by raising that very error as a basis for revoking a validly issued C/O.

PHILLY PIZZA OPERATES AS A RESTAURANT

By its very definition, an establishment which seeks to operate as a restaurant must establish the following facts:

- (a) That it does not meet the definition of a fast food establishment;
- (b) That it does not meet the definition of a prepared food shop;
- (c) That the food, drinks or refreshments are prepared and sold to on-site customers primarily for consumption on premise;
- (d) That the facilities for carry-out, are clearly subordinate to the principal use providing prepared food for consumption on the premises.

(A) Philly Pizza does not meet the definition of a fast food establishment for the following reasons:

- (1) The premises does not include a drive-through;
- (2) Except for food prepared and sold to on-site customers for carry-out, customers do not pay for food before it is consumed. Further, the building permit plans upon which approval of a building permit was granted do not depict a service counter without seating. The “facilities” referred to here, and in the definition of a restaurant which may be relied upon to form the basis of evidence of “clear subordination” is intrinsic in the physical layout of the establishment, and whether such “facilities” are designed to facilitate the carry-out of a greater proportion of the food prepared on premise and sold to on-site customers for off-premise consumption.
- (3) Food sold to on-site customers primarily for on-premise consumption, is served on non-disposable tableware. It certainly is not unreasonable that that portion of food prepared on premise for carry-out, as allowed as an integral component of a restaurant use, is served in disposable packaging. The definition of a fast food establishment goes further to clearly state that a restaurant providing carryout service clearly subordinate to its principal use of preparing food and selling same to on-site customers primarily for on premise consumption, ***“shall not be deemed a fast food restaurant”***

(B) Philly Pizza does not meet the definition for prepared food shop

The conclusion that Philly Pizza is not a prepared food shop should invite summary consensus in that the record is replete with ample evidence that it prepares food on premise with means other than microwave or toaster.

(C) Philly Pizza’s food, drinks or refreshments are prepared and sold to on-site customers primarily for consumption on premise.

The empirical evidence of the breakdown of transactions at Philly Pizza supports the conclusion

that the food, drinks or refreshments prepared and sold to on-site customers is for consumption

primarily on premise. The concept of analyzing the transactions of a restaurant in the context of

sale of the food prepared to customers who are on-site customers to determine whether an

establishment principally operates as a restaurant, as defined. This concept is espoused in the

definition of "Food Service Delivery" set forth in 11 DCMR, § 199.1. That definition, in pertinent

part distinguishes "a restaurant, prepared food shop, or fast food establishment in which the

principal use is the production of prepared food for delivery to customers located off the

business premises. Seating and tables for customers may or may not be provided for on-premises

consumption, but if present are clearly subordinate to the principal use of preparing food for

delivery to ***off-site customers***"

Clearly, Philly Pizza is not a restaurant that is a food delivery service because it derives

significantly less than 75% of its sales from delivery orders to off-site customers.

(D) The facilities for carryout, are clearly subordinate to the principal use providing food

for consumption on premises.

As aforementioned the only facility for carryout within the establishment is the service counter, which occupies a proportionately insignificant portion of the establishment. The establishment is otherwise largely occupied by facilities, such as the kitchen, the storage and other incidental and accessory space to the restaurant, dining tables and chairs on the first and second floors, all indicative of the principal activity providing food for consumption on premise.

A "carryout" is not a distinct and distinguishable use under the Zoning Regulations. Rather, it is a functional component of any of the eating establishments defined in the Regulations. Therefore, a carryout component of a restaurant does not in and of itself constitute an accessory use in the context of the defined term; as such a carryout function need not be subject to the test of an accessory, which may be some other use, not the principal use, which is customarily incidental and subordinate to the principal use.

The only relevant test therefore is whether by its physical layout, a restaurant provides facilities which culminate in empirical evidence that a majority of the food prepared on premise and sold to on-site customers is carryout or consumed on premise. This is clearly not the case with respect to Philly Pizza's operation.

Similarly, a food delivery service as defined, is not an independent use since it must be one of three kinds of eating establishment; a restaurant, a prepared food shop, or a fast food establishment.

Conclusion

The issuance of the C/O in the instant appeal is the culmination of a process which began with issuance of a building permit, in conjunction with an approved building permit plans which authorized the restaurant use on all floors of the existing building. By operation of 11 DCMR, § 3203.11 (b), the ZA issued a provisional certificate of occupancy designating the proposed use, and by extension, the floors upon which the use is authorized.

To the extent that the instant C/O does not indicate all floors upon which the restaurant use is authorized, that omission constitutes mere the administrative error of the appellee, DCRA; and such omission is easily remedied by administrative means.

The crux of the issue in the instant case cannot be fully understood without examining the import of the text amendment of the definition adopted under ZC Case No. 06-23.