

EXHIBIT E

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18027 of Mehmet Kocak and Philly Pizza & Grill, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made October 14, 2009, to issue a Notice to Revoke Certificate of Occupancy No. 0800124 ("Restaurant 7 Seat – Prepared Food Shop," dated September 11, 2008), concerning property located in the C-2-A district at premises 1211 Potomac Street, N.W. (Square 1207, Lot 124).

STAY DECISION DATE: November 17, 2009

ORDER GRANTING STAY

On October 23, 2009, an appeal was filed by Mehmet Kocak and Philly Pizza & Grill, Inc. (together, the "Appellant"), who challenged an administrative decision made by the Zoning Administrator on October 14, 2009 to issue a Notice to Revoke Certificate of Occupancy No. 0800124 concerning property located in the C-2-A district at 1211 Potomac Street, N.W. (Square 1207, Lot 124). Simultaneously with the appeal, the Appellant requested "immediate action" by the Board "to issue a Stay of the Notice to Revoke to prevent its enforcement" by the Department of Consumer and Regulatory Affairs ("DCRA") while the appeal was pending.

The Board considered the request on November 17, 2009, hearing argument and testimony from the Appellant and DCRA. At the conclusion of the meeting, the Board voted to stay the effectiveness of the Notice to Revoke until the conclusion of the Board's hearing on the appeal, which it rescheduled from February 9, 2010 to the afternoon of January 12, 2010, pursuant to § 3112.9.

CONCLUSIONS OF LAW

The Board's Jurisdiction

DCRA argued that the Board has no authority to stay an enforcement action. The Board need not address that precise issue, because it believes that the requested relief can be more narrowly formulated as a request to stay the effectiveness of the notice to revoke. DCRA does not deny that it has the authority to stay the effect of a revocation notice. Indeed § 110.6.2 of the

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Construction Codes, Title 12A DCMR, contemplates a stay process when stating that “the filing of an appeal of the revocation shall not operate to stay the revocation.”

Yet, DCRA claims that the Board does not also possess this power. Based upon the record it is clear that the Appellant requested DCRA to stay the appeal and the agency effectively refused.¹ Section 8 of the Zoning Act authorizes this Board to “to hear and decide appeals where it is alleged by the Appellant there is error in any ... refusal made by the Inspector of Buildings [now DCRA] in the ... enforcement of any regulation adopted pursuant to this Act.” D.C. Official Code § 6-641.07 (g). And in exercising that power the Board may “reverse ... the refusal appealed from; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken.” *Id.*

As part of this larger appeal, the Appellant is contending that DCRA erred in refusing to stay the revocation. The Board has now decided that DCRA erred in refusing to grant that request, and having reached that determination, possesses all of the powers of the Code Official.² Moreover, the District of Columbia Court of Appeals has recognized the Board’s “primary jurisdiction in administering the zoning laws”. *Murray v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 1055, 1057 (D.C.1990).

The Merits

Subsection 110.5.1 of the Construction Codes authorizes the Code Official to revoke a certificate of occupancy when “the actual occupancy does not conform with that permitted”. Pursuant to subsection 110.6 notice of a proposed revocation must be “personally served or sent by first-class mail, postage prepaid, at least ten (10) days prior to the date of the proposed action”. Such a notice was issued by DCRA to the Appellant based upon a violation of § 110.5.1. In essence, DCRA claimed that the use as operated did not meet the definition of a restaurant because its facilities for carryout were not “clearly subordinate to the principal use of providing prepared foods for consumption on the premises”. 11 DCMR § 199.1 (definition of “Restaurant”). Instead, DCRA viewed the operation as a fast food establishment. Based upon the date that the notice was served, the Notice to Revoke would become effective on November 17, 2009.

To prevail on a motion for stay, the party seeking the stay must demonstrate that (i) it is likely to prevail on the merits, (ii) irreparable injury will result if the stay is denied, (iii) the opposing party will not be harmed by a stay, and (iv) the public interest favors the granting of a stay. *See Kufлом v. District of Columbia Bureau of Motor Vehicle Services*, 543 A.2d 340, 344 (D.C. 1988) (administrative agency required to consider the four specified factors in considering a motion for stay). Where the last three factors strongly favor temporary relief, only a

¹ As a consequence of this *de facto* denial, the Appellant may be said to have exhausted its administrative remedies at the DCRA level.

² For the purposes of this appeal, the Code Official is the DCRA Director or her designee. 12A DCMR § 103.1.

“substantial” showing of likelihood of success, not a “mathematical probability,” is necessary for the grant of a stay. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

Likelihood of Success on the Merits.

The Board concludes, based on the evidence and testimony in the record, that the Appellant has proffered evidence suggesting that its carryout facilities were subordinate to the principal restaurant use during the time period of DCRA’s investigation. In addition, there is evidence to suggest that the use did not meet any of the three criteria of a fast food establishment as set forth in the definition of that use at 11 DCMR § 1991. There clearly is no drive-through facility on the premises. In addition, the Appellant has proffered evidence supportive of its claim that its non-carry-out customers were served food on non-disposable plates and paid for their food after its consumption during the relevant period.

The Board wishes to make it clear that it has not found that the Appellant has met its burden of proof for this appeal nor does the above finding in any other way bind the Board when hearing or determining the merits of the appeal.

Irreparable Harm

The Appellant contends that the closing of its business until February 9, 2010, will result in irreparable harm. As noted, the Board announced prior to its deliberations that the hearing date would be moved forward from February 9, 2010 to January 12, 2010. Therefore, the time period within which to determine whether the closing of this business will result in irreparable harm ends on the January date. It is “well settled that economic loss does not, in and of itself, constitute irreparable harm. ... Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business.” *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674, 244 U.S.App.D.C. 349, 354 (D.C Cir.1985). *Accord, Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003). The Board concludes that the Appellant has presented credible evidence that its business would likely not survive if forced to close pending the Board’s decision on the appeal. Therefore the Board concludes that denial of the stay will result in irreparable harm. “An injunction should not be issued unless the threat of injury is imminent and well-founded, and unless the injury itself would be incapable of being redressed after a final hearing on the merits.” *Wieck v. Sterebuch*, 350 A. 2d 384 (D.C. App 1976); *See Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). The closing of the restaurant would have occurred immediately pursuant to the effective date of the Notice to Revoke had the status quo not been maintained.

Harm to the opposing party

For the purposes of this discussion, the opposing party is DCRA, since as of the date of the stay hearing, the affected ANC did not have the opportunity to designate a representative to express its view nor has any motion to intervene been granted. Nevertheless, DCRA stands in the shoes

of the public when it seeks to enforce violations of the Zoning Regulations, particularly when it attempts to close an unlawfully operated use.

Although the Board makes no definitive finding as to the nature of the Appellant's operations at the time the Notice to Revoke was issued, the Appellant's continued operation within the scope of its certificate of occupancy ("C of O") would not create any significant harm to DCRA or the public. From photographic and other evidence presented, the Appellant's carryout facilities are apparently subordinate to its restaurant use and no aspect of its operations meets any of the three criteria for a fast food establishment. There can be no harm to DCRA or the public in the continued operation of the use within the scope of its C of O. Should DCRA prove to the Board that these circumstances change, it may ask this panel to rescind this stay.

The public interest in the granting of a stay

The Board is highly sympathetic to the concerns expressed by the neighbors as to the alleged adverse impact of this use, but most of the concerns expressed dealt not so much with how the use is being operated as with the conduct of its customers. However, a restaurant certificate of occupancy may not be revoked due to the misconduct of its clientele. In general, the Board believes that the public interest favors the continuation of a lawful operating use. Because it believes that a stay is needed to allow this particular establishment to survive, the Board concludes that the public interest favors the grant of this stay.

Great Weight

This hearing was held prior to notice of the appeal being provided to the affected Advisory Neighborhood Commission. Such notice is required "for decisions regarding planning, streets, recreation, social services programs, education, health, safety, budget, and sanitation which affect that Commission area". D.C. Official Code § 1-309.10 (a). As to zoning matters, such notice must be given 30 business days "before the formulation of any final policy decision or guideline with respect to ... requested or proposed zoning changes, variances". D.C. Official Code § 1-309.10 (c)(1). Although appeals are not specifically mentioned, the Board's rules treat appeals as coming within the ambit of the notice requirement. Nevertheless, the decision as to whether to grant this stay is not a final decision as to this appeal, but concerns whether the *status quo* should be maintained while that final decision is formulated. The ANC will be given notice of this appeal and afforded the 30 business day period to submit a written report before that final decision is made.

CONCLUSION

The Board concludes that the Appellant has met the burden of proof with respect to the motion to stay the effectiveness of the Notice to Revoke Certificate of Occupancy No. 0800124, issued by the Zoning Administrator on October 14, 2009, concerning property located in the C-2-A district at 1211 Potomac Street, N.W. (Square 1207, Lot 124). In deciding the appeal, the Board will

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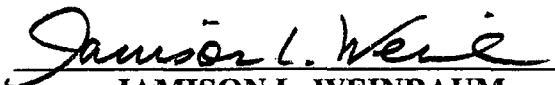
consider whether the Zoning Administrator erred in issuing the Notice to Revoke on October 14, 2009. The operation of the Appellant's business since the notice was issued is not germane to a determination of whether the business was previously operating within the scope of its certificate of occupancy.

For the reasons stated, it is hereby **ORDERED** that the motion for stay is **GRANTED** up to and through the completion of a hearing (including any bench decision) on the appeal of the administrative decision to issue the notice, now scheduled for January 12, 2010.

VOTE: **4-0-1** (Marc D. Loud, Shane L. Dettman, Meridith H. Moldenhauer, and Michael G. Turnbull voting to approve; one Board member not participating (vacant seat))

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of Board members approved the issuance of this order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: NOV 25 2009

THE STAY FORMALLY ORDERED HEREIN BECAME FINAL AND EFFECTIVE UPON THE RECORDATION OF THE BOARD'S VOTE TO GRANT THE STAY ON NOVEMBER 17, 2009.

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As Director of the Office of Zoning, I hereby certify and attest that on NOV 25 2009, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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