

West End Citizens Association
Washington, D.C.

Boundaries: 15th Street on the East • Potomac Park on the South
Rock Creek and the Potomac on the West • N Street on the North

November 10, 2009

RECEIVED
D.C. OFFICE OF ZONING

2009 NOV 10 PM 12:17

Mr. Jamison L. Weinbaum
Director, DC Office of Zoning
441-4th Street, N.W. - Suite 210
Washington, DC 20001

Re: Appeal of 11/4/09 Certificate of Occupancy for 2140 F Street, NW (Square 81, Lot 811) for Expanded Use without Variance Relief per BZA Order No. 16259

Dear Mr. Weinbaum:

This letter transmits an Appeal (on Form 125 – see **Attachment A**) by the West End Citizens Association (WECA) of the 11/4/09 issuance by the Department of Consumer and Regulatory Affairs (DCRA) of a Certificate of Occupancy (CofO) for 2140 F Street, N.W. (Square 81, Lot 811). This CofO improperly expands the use of a grandfathered 1-story grocery store in a R-5-E District to a 3-story grocery store with “accessory prepared food shop” (see **Attachment B**) without the needed variance relief by the Board of Zoning Adjustment (BZA).

In fact, on 4/16/98, in Order No. 16259, the BZA unanimously denied (see **Attachment C**) expanded use by a special exception request for this grandfathered non-conforming use from a retail grocery to a “grocery and delicatessen” in a residential zone outside of the George Washington University (GWU) campus plan area. In addition, the BZA opined that variance relief (including having the property owner, GWU – not the lessee, the Foggy Bottom Grocery, LLC – meet the 3-part variance test at 11 DCMR §3103.2) would be required. In addition, on 10/14/09, Zoning Administrator Matt Le Grant revoked (see **Attachment D**) an improperly issued CofO for an expanded use without BZA variance relief. **Attachment E** is a copy of an 11/5/09 *GW Hatchet* newspaper article entitled, “FoBoGro receives new deli license,” which demonstrates the intention of the Foggy Bottom Grocery to interpret the 11/4/09 CofO for an “accessory prepared food shop” to mean delicatessen.

The WECA, founded in the 1890's and one of the oldest citizen associations in DC, is the principal community organization in the Foggy Bottom-West End area East of 23rd Street. It is primarily interested in maintaining the quality of life for the residential community in Foggy Bottom-West End.

Attachment F is a copy of the WECA's 8/31/09 “Protest of Substantial Change Application” with the DC Alcohol Beverage Control (ABC) Board. In this filing, the WECA asked the ABC Board to defer its consideration of the requested Substantial Changes (including for a deli) until there is an application to the BZA for variance relief and a new BZA Order is issued. Please note the chart on page 3 which compares the prior use and the proposed expanded use, including an 84% increase in square feet, 3 versus 1 floors of use, greatly expanded hours of operation (from

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18031

EXHIBIT NO. 1

Post Office Box 58098 • Washington, D.C. 20037-8098

Board of Zoning Adjustment
District of Columbia
CASE NO. 18031
EXHIBIT NO. 11

10 am-10 pm to 7 am-late night hours), on-site food preparation (e.g., fresh salads, fresh sandwiches, pizza), a deli, etc. The WECA intends to present additional information in the BZA's hearing of this Appeal, e.g., 2009 e-mails from the Zoning Administrator explaining that such expansion requires BZA relief and WECA's successful testimony and proposed findings of fact (including extensive case law) in the 1997-98 case.

If any additional information is needed, WECA Secretary Barbara Kahlow can be reached during the day on (202) 965-1083.

Sincerely,



John C. Batham
President

Attachments

cc Linda K. Argo, DCRA Director
Matt Le Grant, DCRA Zoning Administrator
Peter B. Feather, ABC Board Chair
Louis Katz, GWU (owner of the property)
Constance J. Miller, attorney for Foggy Bottom Grocery (lessee)
Armando Irizarry, ANC-2A Chair

Form 125 - Exhibit 1

(Revised 05/01/09)

Case No. _____



BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA



APPEAL

Before completing this form, please review the instructions on the reverse side.
Print or type all information unless otherwise indicated.

Pursuant to Section (s) §3100 and §3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken

from the administrative decision of:

Name of administrative officer and title

Department of Consumer & Regulatory Affairs (DCRA) Director Linda Argo & Zoning Administrator (ZA) Matt Le Grant

made on

Date of decision

11/4/09

, to the effect that

DCRA issued a Certificate of Occupancy for 2140 F Street, N.W.

for a "Retail Grocery Store (sales of cigarettes & medicine) with accessory prepared food shop" even though the BZA denied a change in nonconforming use for a delicatessen, etc. in Order No. 16529 of 4/16/98 - see WECA's 8/31/09 Protest of Substantial Change in ABC license, etc.

Address(es) of Affected Premises	Square(s)	Lot(s)	Zoning Districts
2140 F Street	81	811	R-5-E

Present use of Property:

long vacant but was a 1-story Grocery Store from 10 am-10 pm Mon-Sun

Proposed use of Property:

3-story Grocery Store with delicatessen, etc. from 7 am - 12 midnight Mon-Sun

Owner of Property:

The George Washington University

Telephone No.:

GWU Exec. VP & Treasurer Louis Katz, 994-6605

Address of Owner:

2121 I Street, N.W., Washington, DC 20052

Name, address and telephone number of lessee:

Foggy Bottom Grocery, LLC, 2140 F Street, N.W., Washington, DC,

Attn Kris Hart, 215-740-2663

Name, address and telephone number of appellant, if other than owner:

West End Citizens Association, P.O. Box 58098,

Washington, DC 20037-8098, Attn WECA Secretary Barbara Kahlow, 965-1083

State specifically manner in which appellant is aggrieved by the administrative decision, the allegations of error in the administrative decision, and the relevant sections of the Zoning Regulations (see reverse for more detailed explanation).

Please use a separate piece of 8 1/2" x 11" to respond and attach it to the Form 125 Appeal.

I/We certify that the above information is true and correct to the best of my/our knowledge, information and belief. Any person(s) using a fictitious name or address and/or knowingly making any false statement on this application/petition is in violation of D.C. Law and subject to a fine of not more than \$1,000 or 180 days imprisonment or both.
(D.C. Official Code § 22-2405)

Date:

11/10/09

Signature:

John C. Batham Appellant*

* If appeal is filed by agent of the Appellant, Form 125 Appeal shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal.

To be notified of hearing and decision (Appellant or Authorized Agent*):

Name:

WECA President John C. Batham, c/o WECA Secretary Barbara F. Kahlow

Address:

800 25th Street, N.W. #704, Washington, DC 20037

Phone No.:

965-1083

Fax No.:

965-1080 (call 1st)

E-Mail:

barbara.kahlow@verizon.net

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

Department of Consumer and Regulatory Affairs

Attachment B

Permit Operations Division
941 North Capitol Street NE Room 2100
Washington DC 20002

Tel. (202) 442 - 4589 Fax (202) 442 - 4862
TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557

C_oF O

CERTIFICATE OF OCCUPANCY

THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE

PERMIT NO. CO1000323

Date: 11/04/2009

Address of Use: 2140 F ST NW		Zone: R-5-E	Ward: 2	Square: 0081	Suffix:	Lot: 0811
Description of Occupancy: Retail Grocery Store (sales of cigarettes and medicine) with accessory prepared food shop						
Permission Is Hereby Granted To: Foggy Bottom Grocery, Llc	Trading As: FO BO GRO	Floor(s) Occupied 3	PERMIT FEE: \$76.00			
Property Owner: George Washington University	Previous Use(s): Retail or Wholesale Store - M	Occupant Load: 0	BZA Number:			
Type of Occupancy: Use Change	Occupied Sq. Footage: 1835	Approved Use(1): Retail or Wholesale Store - M				
Conditions/ Restrictions: Retail Grocery Store (sales of cigarettes and medicine) with accessory prepared food shop As a condition precedent to the issuance of this Certificate, the owner agrees to conform with all conditions set forth herein, and to maintain the use authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all spaces whose use is authorized by this Certificate and to require any changes which may be necessary to ensure compliance with all the applicable regulations of the District of Columbia.						
Director: Linda K. Argo	Permit Clerk: Stacie Williams	Expiration Date:				
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557						

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 16259 of the George Washington University, pursuant to 11 DCMR 3108.1 for a special exception under Section 2003 to change a nonconforming use from retail grocery, basement and first floor to grocery and delicatessen, basement and first floor of a structure in an R-5-E District at premises 2140 F Street, N.W. (Square 81, Lot 811).

HEARING DATES: July 2 and July 23, 1997
DECISION DATES: September 3 and October 1, 1997

ORDER

SUMMARY OF EVIDENCE:

1. The property that is the subject of this application is located on the south side of F Street, N.W. between 21st and 22nd Streets and consists of one lot of record (Lot 811) inn Square 81. It is improved with a two-story plus basement row house built in the 1920's. The basement and first floor are presently used as a grocery store. This use was first established in 1958. The second floor is presently vacant.
2. A 10-foot wide alley, running east-west, abuts the property in the rear.
3. The area surrounding the site consists of some high-rise and low-rise apartment buildings, office buildings, a hotel and various university uses. The property immediately east is vacant and boarded up. The properties to the west (row house type) are used as residences.
4. The site is zoned R-5-E. The R-5-E District permits matter-of-right general residential uses of high density development, including single-family dwellings, flats, and apartments to a maximum height of 90 feet, a maximum floor area ratio (FAR) of 6.0 for apartments; 5.0 for other structures and a maximum lot occupancy of 75 percent.
5. The applicant owns the property which is operated by Mesco, Inc., the tenant. The facility had previously operated a pizza establishment along with the grocery store, but was cited for not having a license for the pizza (delicatessen) portion or the operation.
6. The applicant is requesting a special exception under Section 2003 to change a non-conforming use from retail grocery, basement and first floor, to grocery and delicatessen, basement and first floor. The applicant maintained that the proposed use is a neighborhood facility. The applicant is proposing to use the basement as a delicatessen where only pizza

would be sold. The delicatessen would be used as a carryout, with approximately 50 percent of the pizzas being delivered by foot. The pizzas would be sold from 11:00 a.m. to 11:00 p.m. Monday through Sunday. The operator of the facility testified that a total of four persons would be working at the site. The operator further testified that there would not be an increase in trash as a result of the pizza business.

7. The facility would be required to have two parking spaces. The operator testified that she is allotted three of the parking spaces controlled by the owner, George Washington University.

8. The applicant contends that the granting of this application would not adversely affect the present character of the surrounding area, nor would the intended use affect the future development of the surrounding area. Claiming that most of the customers of the store are walk-in and delivery order customers of the surrounding neighborhood, the applicant believes that the limited additional service created by the pizza business would not increase the amount of noise or traffic in the neighborhood, nor will it detrimentally affect any of the institutional facilities in the area.

9. The D.C. Office of Planning (OP) offered evidence and testimony to support its recommendation that the special exception be granted. OP found that the change of nonconforming use from a grocery store to a delicatessen would not have a significant adverse impact on the area or the character of the neighborhood.

10. The Advisory Neighborhood Commission (ANC) 2A did not submit a written report or present testimony related to the application.

11. Several letters of support, a petition from the customers of the grocery store, and testimony from neighbors and an ANC commission member stated that the application should be granted. The supporters believe that the proposed use would be an asset to the community and that it is in compliance with the Zoning Regulations.

12. Those in opposition to the application sent letters and testified to the effect that the applicant does not meet any of the criteria for the relief granted, that the proposed relief would affect the present character of the surrounding residential area by increasing trash, noise and double parking. In addition, those in opposition offered testified that when they pass by the store, they see people sitting on the steps in front of the store and/or on the benches located outside the store. These areas were being used by customers for eating and drinking products purchased from the pizza place or the grocery store. The opponents believe that because of the ability to sit and eat, the facility would be used for more than merely a carryout with occasional delivery. They believe that to grant this application would create a dangerous precedent, possibly paving the way for the property to be sold to a business such as Papa John's or Dominoes.

13. Responding to the concerns raised by the opponents, the applicant stated that the neighbors who live closest to the facility know how well it is operated, and those who live farther away do not provide credible evidence on the operation of the facility. The applicant offered to remove the wooden benches located in front of the store to prevent patrons from using them to eat their food.

FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. This is a food delivery service, not just a delicatessen/grocery.
2. Store benches and planters located on the property are configured in such a way that they invite foot traffic which would encourage expansion of the use from delivery to an outdoor restaurant.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that the applicant is seeking a special exception to change a nonconforming use from a retail grocery, basement and first floor to grocery and delicatessen, basement and first floor of a structure in an R-5-E District. The granting of such special exception relief requires a showing through substantial evidence that the application can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map and that granting the application will not adversely affect the use of neighboring property in accordance with the Zoning Regulations and Map.

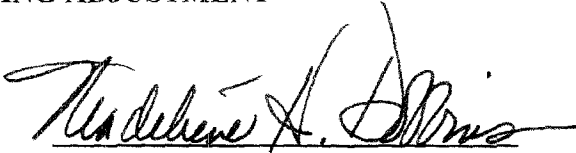
The Board concludes that the applicant has not met the burden of proof. The Board concludes that the grocery store is first allowed as a matter-of-right in a C-1 District. Under Section 2003, if the proposed use is deemed to be a neighborhood facility, the applicant may change that nonconforming grocery store use to another use allowed as a matter of right in the C-1 District. While the applicant's request is for a delicatessen, the use described at the hearing is one of a pizza delivery service, with about 50 percent of the pizzas prepared being delivered to nearby locations. A food delivery service is first allowed as a matter of right in the C-2-B District under Subsection 721.3(s). It is not allowed as a matter-of-right in a C-1 District. Based on the Board's understanding of the Zoning Regulations, a grocery store cannot be changed to a food delivery service in an R-5-E District without variance relief. The Board believes that the use, as proposed, would impermissibly expand the existing nonconforming use. Finally, the Board concludes that to grant a special exception for a deli/grocery store, where the actual deli use is that of a pizza delivery service would not be in harmony with the general purpose and intent of the zone plan for the R-5-E District.

Accordingly, the Board hereby **ORDERS** that this application be **DENIED**.

VOTE: 5-0 (Susan Morgan Hinton, Laura M. Richards, Maybelle Taylor Bennett, Sheila Cross Reid and Betty King to deny the application).

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

ATTESTED BY:



MADELIENE H. DOBBINS

Director

Final Date of Order: APR 16 1998

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

ord16259/AZ/TWR/LJP

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**

October 14, 2009



**VIA PERSONAL SERVICE and
U.S. FIRST CLASS MAIL**

To: George Washington University, Owner
Foggy Bottom Grocery, LLC
2140F Street, NW
Washington, DC 20037-2712

Foggy Bottom Grocery, LLC
c/o Kristopher D. Hart
2112 F Street, NW
Washington, DC 20037-2712

Foggy Bottom Grocery, LLC
c/o Kristopher D. Hart, Registered Agent
2140 F Street, NW
Washington, DC 20037-2712

NOTICE TO REVOKE CERTIFICATE OF OCCUPANCY No. 0800102

This is official notice ("Notice") from the Department of Consumer and Regulatory Affairs ("DCRA"), that Certificate of Occupancy ("CofO") No. 0800102 is revoked. The specific grounds for the revocation are found in 12A DCMR §110.1.2.1, which states that "the Department may review change of ownership applications ... to determine if there has been a change in use ... and certificates of occupancy that have been determined to have been erroneously issued on the basis of a change in ownership shall be revoked."

On August 21, 2008, you submitted a change of ownership application for the property located at 2140 F Street, NW ("the Property"). Your application indicated that the prior use of the premises was a "Grocery Store (same as proposed)". DCRA approved your application and issued you a new certificate, No. 0800102, that day.

Pursuant to 12A DCMR §110.1.2.1, DCRA reviewed your change of ownership application to determine if there was a change in use of the Property. Subsequently, DCRA determined that the formerly approved use for a "cigarettes and medicine/grocery store" was changed in your change of ownership application by the addition of the terms "sandwich shop". Use of a structure as a "sandwich shop" in an R-5-A zone is not a matter-of-right use, and requires a variance from the Board of Zoning Adjustment before a CofO authorizing such use may be issued. Therefore, CofO No. 0800102 was issued in error pursuant to 12A DCMR § 110.1.2, which states that "[f]or changes in ownership of

structures . . . with an existing valid Certificate of Occupancy, a new Certificate of Occupancy shall be issued in the name of the new owner (without re-inspection), provided there is no proposed change in use.” Because you changed the prior use of the Property in your application by the adding a proposed “sandwich shop use”, CofO No. 0800102 was issued in error.

Therefore, DCRA is revoking CofO No. 0800102 effective ten (10) business days from the mailing of this Notice.

Pursuant to D.C. Official Code § 6-641.09(a), it is unlawful to use a building without a valid Certificate of Occupancy, other than as a single-family dwelling. Violations are punishable by a civil fine of \$2,000.

RIGHT TO APPEAL AND SHOW CAUSE

You have the right to appeal the revocation of your CofO. To appeal, you must file the appeal with the Board of Zoning Adjustment within sixty (60) days of this notice. Complete filing instructions may be found at 11 DCMR §3112. Filing an appeal of this revocation does not automatically stay the execution of the revocation. Any questions about this Notice may be directed to the Office of the Zoning Administrator at (202) 442-4576.

Oct 14, 2009
Date

Matthew LeGrant
Matthew LeGrant
Zoning Administrator

[< Back](#) | [Home](#)

FoBoGro owners Daniel Blake, left, Devlin Keating and Kris Hart go over floorplans for the store, which is now slated to open next semester. The team received a new certificate of occupancy, but still faces legal battles regarding their hours of operation.

FoBoGro receives new deli license

By: Gabrielle Bluestone

Posted: 11/5/09

A D.C. agency told the new owners of FoBoGro they could legally operate a deli Wednesday - ending what had been a major point of contention between the new management and a community group protesting the store. But there is still another battle to fight - the two parties remain deadlocked over the store's proposed hours of operation, something that must be resolved before the store may receive an alcohol license.

Kris Hart, a GW alumnus and owner of Relaxed Tans, said Wednesday that he had procured a new certificate of occupancy from the D.C. Department of Consumer and Regulatory Affairs that authorizes the store to operate a delicatessen - something Barbara Kahlow, secretary of the West End Citizens Association, had previously declared to be illegal. Kahlow, who has been an integral part of the protest against the store, declined to comment Wednesday evening.

Hart said he and his partners are happy to get the certificate, and said it shows the support of the D.C. Department of Regulatory and Consumer Affairs. Still, he said the store has always had a certificate allowing a deli.

"We've already had the approval, my original certificate of occupancy was dated on August

21, 2008, so we already had the approvals," Hart said. "But a couple of community members tried to get really loud and really protest us, so we submitted basically a briefing to DCRA. Basically they issued us a certificate in the last certificate's place."

That certificate should help them on Dec. 9 when Hart and his team will sit down for a third time with WECA to negotiate the store's operating hours, an integral part of getting a liquor license. Due to construction, zoning and mediation issues, the store, previously set to open in November, will instead be open for the second semester, Hart said.

"The only reason we were behind was that it took us a long time to get to the point where [we were ready to renovate], and then we were reticent to finish up our work until we clarified with the D.C. government that all the permits that we had and what the business was doing we could continue to

do," Hart said. "We're meeting with the contractors tomorrow morning and going from there we'll have a real good sense of the timeline."

Hart said one of the issues holding the store back from opening was whether the store could legally operate. Hart said Kahlow had testified at the last status hearing Oct. 28 that the store did not have a certificate of occupancy.

"Her standing and her basis for arguing against our liquor license transfer was the fact that we didn't legally occupy the space. Now that issue is cleared up, the zoning administration has chimed in and that's done," Hart said.

Hart and his team, which consists of 2006 GW alumnus Devlin Keating and junior Daniel Blake, hope to keep the store open from 7 to 2 a.m. on weeknights and until 3 a.m. on weekends, hours that Kahlow has said will be disruptive to the neighborhood.

Hart said the legal battle has taken a toll on the team's preparations.

"I want to work with Ms. Kahlow, but when she decides she's against something, she's really strong about her perspectives," Hart said. "The most frustrating part is here we are wanting to focus on the business. We want to focus on hiring employees, we want to focus on having products, we want to focus on marketing and instead we find ourselves down at the D.C. government."

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West End Citizens Association
Washington, D.C.

Boundaries: 15th Street on the East • Potomac Park on the South
Rock Creek and the Potomac on the West • N Street on the North

August 31, 2009

Chairperson Peter B. Feather
Alcohol Beverage Control Board
941 North Capitol Street, N.E. #7200
Washington, DC 20002

Re ABRA-082431, Foggy Bottom Grocery, LLC, 2140 F Street – Protest of
Substantial Change Application (Retail Class “B”)

Dear Chairperson Feather:

This letter is an official protest by the West End Citizens Association (WECA) of the Substantial Change application (ABRA-082431) filed by Foggy Bottom Grocery, LLC for 2140 F Street, N.W. The WECA, established in 1910, is the oldest citizens organization in the Foggy Bottom-West End area. It is primarily interested in maintaining and improving the quality of life for the residential community in Foggy Bottom-West End.

The WECA is an incorporated non-profit citizens association, with membership open to all residents. Consistent with the WECA’s bylaws, at a duly called meeting with over 10 days notice, on August 10, 2009, the WECA Board unanimously passed a resolution (without Mr. Hart’s participation due to the recusal requirement in the WECA’s bylaws) to protest the substantial change application.

Substantial Changes

The prior owner of the Foggy Bottom Grocery operated seven days a week from 10 AM to 10 PM. The current application seeks to substantially increase operating hours – from 7 AM seven days a week (i.e., 3 hours earlier) to 2 AM Sunday-Thursday and to 3 AM Friday-Saturday (i.e., 5 hours later). Basically, the Alcoholic Beverage Control (ABC) substantial change application essentially morphs a limited grandfather use in a Residential zone to a late night establishment.

In addition to substantially increased operating hours, the Alcoholic Beverage Regulation Administration’s re-advertized notice reveals that the Substantial Change application also entails: (a) use on three floors as opposed to the prior use on one floor only – in fact, the use would increase from 1,000 s.f. to 1,835 s.f., which is an 84% increase in space; and (b) a change in use from a “Grocery Store” to “A retail, grocery store and sandwich shop ... with ... a small deli” (emphases added).

ABC Protest

Under DC’s Appropriateness Standard (Title 25, §25-313(b) and 23 DCMR, §400.1), the WECA opposes the proposed substantially increased hours due to:

- (1) the effect of the establishment on real property values;

- (2) the effect of the establishment on peace, order, and quiet (statute) -- the regulations provide "The establishment will not interfere with the peace, order, and quiet of the relevant area, considering such elements as noise, rowdiness, loitering, litter, and criminal activity;" and
- (3) the effect of the establishment upon residential parking needs and vehicular and pedestrian safety.

The WECA's principal concern is appropriateness standard (2) but all three appropriateness areas pose potential adverse impacts. The WECA believes that the requested substantial change will adversely affect the quality of life in the surrounding neighborhood which houses several high-rise apartment buildings (including some in the same city Square) with many elderly residents.

Zoning Rulings

The Applicant is located outside of the George Washington University (GWU) campus plan area in a **R-5-E** zone, a Residential district. Its grocery store use is grandfathered but there is no grandfather protection for a substantial change to a nonconforming use. In fact, on 4/16/98, the Board of Zoning Adjustment (BZA) unanimously **denied** a requested change for a nonconforming use from "retail grocery" to "grocery and **delicatessen**" (emphasis added) (BZA No. 16259). The Order stated, "a grocery store cannot be changed to a food delivery service in an R-5-E District without variance relief. The Board believes that the use, as proposed, would impermissibly expand the existing nonconforming use" (p. 3). Therefore, **we request that the ABC Board defer its consideration for a "deli" until after the Foggy Bottom Grocery has applied to the BZA for such an expanded use for this grandfathered site and a new BZA Order is issued.**

The enabling Act behind the zoning regulations indicated that nonconforming uses are to be construed narrowly, with the goal that they eventually be phased out. The District Court of Appeals stated, "one of the major purposes of the Zoning Regulations, namely, the 'gradual elimination of ... existing [nonconforming] structures and trades'" (Wood v. District of Columbia, 39 A.2nd 67, 69 (D.C.1944)). The District of Columbia Court of Appeals ruled that nonconforming uses are not favored and must be regulated strictly so that the goals of the districting scheme established by the Zoning Commission are not undercut (C&P Bldg. Ltd. Partnership v. District of Columbia Board of Zoning Adjustment, 442 A.2nd 129 (D.C. 1982)). The Zoning Administrator is obliged to interpret which alternative uses are permitted very strictly. As the courts have repeatedly recognized, any interpretation of the zoning regulations which seeks to expand the prerogatives of owners of structures containing nonconforming uses defeats one of the major purposes of the Zoning Regulations, namely, "the gradual elimination of ... existing [nonconforming] structures and trades" (Edward J. Lenkin v. District of Columbia Board of Zoning Adjustment, 428 A.2d 356, 358 (D.C. 1981) quoting the Court of Appeals decision in Wood already referenced). In fact, in C&P Building Limited Partnership v. District of Columbia Board of Zoning Adjustment, 442 A.2d 129, 131 (D.C. 1981), the Court noted the "[b]oth this court and the Zoning Commission have stressed that nonconforming uses are not favored and must be regulated strictly so that the goals of the districting scheme established by the Zoning Commission are not undercut ... Thus, we have stressed that any interpretation of the

zoning regulations which expands the prerogatives of nonconforming users is generally undesirable.”

Further, on 8/16/07, DC’s Zoning Administrator **denied** the request for a “**sandwich shop**,” determining that a zoning variance was needed for this change in nonconforming use. Therefore, **we request that the ABC Board defer its consideration** for a “**sandwich shop**” until after the Zoning Administrator has reviewed the matter, including the same-day (8/21/08) application and issuance of a Certificate of Occupancy (C of O) without any indication of the Zoning Administrator’s prior ruling. In addition, on his C of O application (#08D0102), under #9, the Applicant checked only “Ownership Change” and not also “Use Change.” Under #11, the Applicant erroneously indicated that the “Prior Use of Premises” is “same as proposed.” And, under #10, the Applicant stated that the “Proposed Use of Premises” was “Grocery/Retail Sales/**Sandwich Shop**, Cigarettes and Medicine/Grocery Store not sexually oriented” (emphasis added).

More recently, on 7/31/09, DC’s Zoning Administrator informed the WECA that, “I recall meeting with him [Foggy Bottom Grocery owner Kris Hart] and clearly explaining to him the need for BZA relief to add a ‘pizza delivery, carry out, restaurant, fast food or **deli**’ use at this location” (emphasis added). To our knowledge, no BZA variance application has yet been filed.

Comparison of Prior and Proposed

This chart briefly compares the former Foggy Bottom (FB) Grocery and the planned Foggy Bottom Grocery, including not only late hours but also desired expanded uses, such as delivery service, carryout, deli, pizza, and sandwich shop. These expanded uses fly in the face of the denials by the BZA and Zoning Administrator:

Aspect	Old FB Grocery	Planned FB Grocery	Comment
square feet	1,000	1,835	84% increase
# floors	1 st	basement, 1 st & 2nd	2 more floors; ABC “substantial change”
hours of operation	10 am – 10 pm	7 am – 2 am Sun-Thurs 7 am – 3 am Fri-Sat	ABC “substantial change”
alcohol hours	10 am – 10 pm	10 am – 10 pm (7 days/week)	1 st & 2 nd floors
delivery service	4/98 BZA said “no”	7/09 ZA said requires BZA OK	use variance requires 3-part test of owner (GWU) (<i>NOTE: applies to next 4 rows too</i>)
carryout		7/09 ZA said requires BZA OK	
deli	4/98 BZA said “no”	7/09 ZA said requires BZA OK	ABC “substantial change”
pizza	4/98 BZA said “no”	[would like to serve pizza]	
sandwich shop		8/07 ZA said requires BZA OK	ABC “substantial change;” 8/21/08 C of O in error due to mistakes on application form

WECA Secretary Barbara Kahlow will be presenting the WECA's protest case before the Board. If you have any questions about this request, please contact her on 965-1083 or at barbara.kahlow@verizon.net.

Sincerely,


John C. Batham
President

cc Matt LeGrant, Zoning Administrator