

2/23/10 Testimony of Barbara Kahlow
on BZA Case #18031 – Appeal of WECA for 2140 F Street CofO

I, Barbara Kahlow, am testifying on behalf of the West End Citizens Association (WECA), the oldest citizens organization in the Foggy Bottom-West End area. The WECA, founded in the 1890's and one of the oldest citizen associations in DC, is primarily interested in maintaining the quality of life for the existing residential community in Foggy Bottom-West End.

On 11/10/09, the WECA submitted an Appeal of the 11/4 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 expanded the use of a grandfathered 1-story grocery store (the old "Foggy Bottom Grocery") in an R-5-E District to a 3-story grocery store ("FoBoGro") with an "accessory prepared food shop" without the needed review by the Board of Zoning Adjustment (BZA) for Variance or Special Exception relief¹. This site, which is outside of the George Washington University (GWU) campus plan area is in the middle of a huge residential (R-5-E and R-5-D) district (see **Attachment A**) and very near six high-rise apartment buildings.²

Here is a chart of the proposed changes, each of which I will discuss in my testimony as well as the relevant DC law, case law, DC regulations, and three prior relevant BZA cases – two of which were Denied and one of which was Dismissed.

Aspect	old Foggy Bottom Grocery	planned FoBoGro	Comment
square feet	1,000 s.f.	1, 835 or 1,845 s.f.	84% increase
number of floors	1 st floor only	basement, 1 st & 2 nd	2 more floors
Sandwich Shop	pre-packaged only (prepared off site)	freshly prepared (prepared on site)	8/16/07 & 10/14/09 Zoning Administrator (ZA) said requires BZA Variance
Deli	11/96 ZA Disapproved , saying requires BZA Variance or Special Exception; 4/98 BZA Order Denied	7/09 ZA said requires BZA OK	FoBoGro applied to Alcoholic Beverage Control Board for a "deli" & press articles state "deli"
Accessory Prepared Food Shop	no on-site prepared foods	website includes pizza and other on-site prepared foods	zoning regulations very restrictive for heating foods
hours of operation	10 am – 10 pm	7 am – 12 midnight	alcohol hours would remain 10 am – 10 pm

¹ As discussed in this testimony, BZA Variance relief or Special Exception relief would be required for a Sandwich Shop, a Deli, a pizza operation, or an Accessory Prepared Food Shop.

² The six include: The Monroe House at 522-21st, Rotondas at 2100 F, The Statesman at 2020 F, The Empire at 2000 F, and The York at 532-30th.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18031
EXHIBIT NO. 18

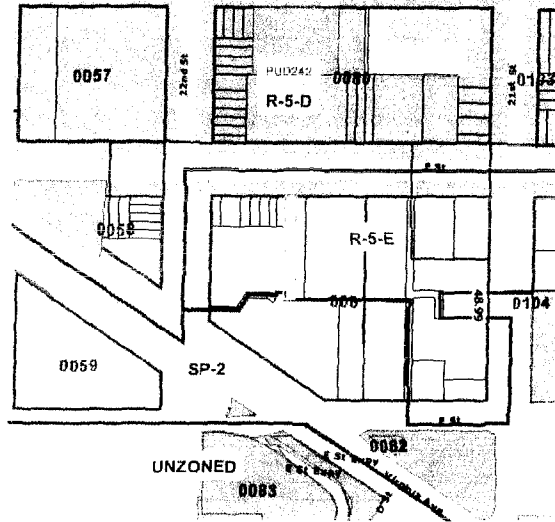
Board of Zoning Adjustment
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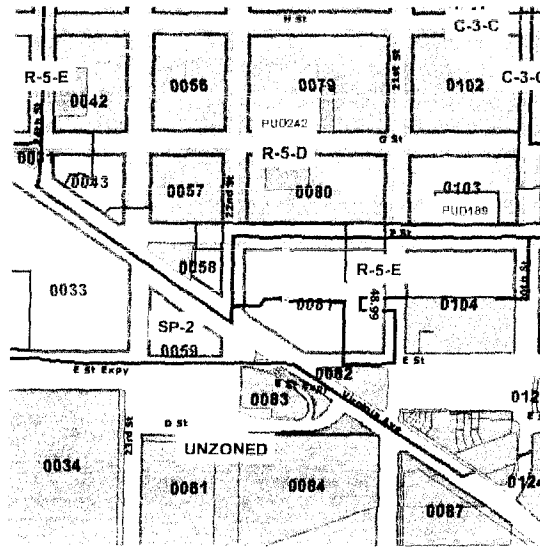
District of Columbia Zoning Map

Report of Square 2140 F ST NW

Selected Feature



Area Mapped



- ☒ Editing Quizzes
- ☒ Comments/Suggestions
- ☒ Parameters List Development [PDF]
- ☒ Overview
 - Planning Map Amendment
 - Preparing Parameter List Development PDFs
 - Generating Developmental Data Reporting Sheets
 - Map Notes
 - Basal Index
- ☒ Comments
 - DC Boundary
 - Lenthmarks
- ☒ Maps
 - Water
 - Roads
 - Boundaries
 - Transition/Patchline
- ☒ Map Labels
 - Major Roads
- ☒ Property Boundaries
 - Metro Road Line
 - Metro Center Line
 - Metro Orange Line
 - Metro Red Line
 - Metro Purple Line
 - Single Member Districts (SMD)
- ☒ Advisory Neighborhood Commission (ANC)
 - Current & Past Residential Facilities
 - Air Rights
- ☒ Metro Entrances
 - Metro Stops
 - CommuterHubway
- ☒ Squares
 - Hatched Lots
- ☒ Tax Lots
 - Parcels



Zone Information

Zone	Description	Min Lot Width	Min Lot Area	Max % Lot Occupancy	FAR Residential	FAR Other Uses	Max FAR	Max Stories	Max Height	Remarks
R-5-E	Permits matter-of-right high density development of general residential uses, including single-family dwellings, flats, and apartment buildings.	0.00	0.00	75.00	6.00	5.00	6.00	No Limit	90.00	6.0 max FAR for apartment houses and hotels
SP-2	Permits matter-of-right medium/high density development including all kinds of residential uses, with limited offices for non-profit organizations, trade associations and professionals permitted as a special exception requiring approval of the BZA.	0.00	0.00	80.00	6.00	3.50	6.00	No Limit	90.00	6.0 max FAR for residential

Search Results

Square:	Overlay:	PUD:	Advisory Neighborhood Commissions (ANC):	ANC Single Member District:	ANC Chairperson:	SMD Member:
0081			2A	2A06	Arnando Irizarry	Florence Harmon

Note 1: Development restrictions depend on a combination of zoning and overlays. Where overlays are present, refer to the zoning regulations for more detailed information.

Note 2: The Data displayed in the report applies to the use described, for other uses please consult the zoning regulations.

Enlargement

With respect to the 84% increase in square feet, DC law for nonconforming uses provides that they can be continued provided that “no enlargement is made” (currently at DC Code § 6-641.06a, Nonconforming use). In its Conclusions of Law and Opinion, the 10/17/97 BZA Denial Order for the Papa John’s site in a residential district of Georgetown stated, “provided no structural alteration ... or no enlargement is made” and “Finally, the statute makes clear that a prior existing nonconforming use is to remain limited to its original dimensions: it may not be extended throughout the building” (emphasis added, pp. 8-9, BZA Appeal No. 16154).

The BZA Order continues by citing DC’s then interpreting regulations, “It shall be the intent of this title that nonconformities shall not be enlarged upon, expanded, or extended” (§ 2000.2 at *Ibid*, p. 9) and “A nonconforming use shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment” (§ 2002.3 at *Ibid*, p. 10). The current regulatory text for the former is “It is the intent of this title that nonconformities may not be enlarged upon, expanded, or extended;” the current regulatory text for the latter is identical.

The 4/10/89 CofO application by the old Foggy Bottom Grocery was for 1,000 s.f. The 8/21/08 CofO application by FoBoGro was for 1,835 s.f., which is a 84% enlargement.

Number of Floors

The transcript for the BZA’s 7/23/97 hearing on this site (resulting in the 4/16/98 BZA Denial Order No. 16259) confirms that the old Foggy Bottom Grocery was only on the 1st floor:

- “According to the information presented at an administrative law hearing held previously this year concerning this location, the use of the retail grocery was provided for on the first floor of the structure and did not include the basement. The documentation presented during the hearing goes back to the earliest records maintained by the District of Columbia concerning this location” (p. 97).
- “Q. ... are they required to go outside to go down to the [requested expansion into the basement] pizza. A [by the former Foggy Bottom Grocery owner]. No, outside. Q. So they have to exit the grocery store to walk down in the front of the building inside the pizza operation in order to purchase pizza? A. Correct, yes. Q. So you will not have a structure in which persons can shop in the grocery store level, go down a back stairway – A. No, no, they don’t. (p. 30).

In addition, a 6/26/97 letter, in the case file for BZA No. 16259, from former Foggy Bottom Grocery lessee Mesco, Inc. states, “The grocery store operates out of the first full floor of the building.”

More recently, the 1/6/10 Alcoholic Beverage Control (ABC) Board Order stated in Finding #3: “The establishment has been operating since 1946 on one floor of a three floor building” (p. 2).

Sandwich Shop

The 7/23/97 transcript for the BZA hearing on Case No. 16259 confirms that the old Foggy Bottom Grocery did not prepare sandwiches on site:

- BZA Member “Ms. King: Now the sign that is by the front door in this photograph that you have just given us that says we sell sandwiches and subs made fresh daily, sandwich

place – is it required that you have a deli license in order to sell sandwiches and subs made on the premises? Ms. Bekele [owner of lessee Mesco, Inc.] Yes. That sandwich is pre-packaged” (p. 65).

- BZA “Chairperson Hinton: Now we haven’t seen a C of O for a deli. We have C of O’s for grocery. Mr. Boykin [Mesco, Inc.’s lawyer]. If I may clarify, Ms. King. The sandwiches that Ms. Bekele referenced are pre-packaged sandwiches that she purchases from her supplier. Ms. King: Made fresh daily? Ms. Bekele: Yes. Ms. King: I see. Mr. Boykin: They are made fresh daily from the supplier and sold by Ms. Bekele” (p. 66).
- ZC Member “Ms. Bennett: May I just mention, this is a license issued by the Business Regulation Administration [DCRA predecessor], which is different from C of O. ... even when one has a license to operate a deli, in order to locate that deli in a place specific, it would then need to have a C of O that permits that” (p. 48).

In addition, a 6/14/94 C of O for a “Grocery Store” only is in the case file for BZA No. 16259.

- On 8/16/07, former Zoning Administrator Bill Crews sent FoBoGro owner Kris Hart a **Denial** letter saying that a use Variance would be needed from the BZA for a “Sandwich Shop.”
- On 10/14/09, current Zoning Administrator Matt LeGrant issued a **Revocation** letter about the proposed change in use to include a Sandwich Shop, saying “Use of a structure as a ‘sandwich shop’ in an R-5-A [sic] 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 § 110.12 [sic], 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 ... CofO ... was issued in error” (emphasis added).

Deli

- On 11/16/96, former Zoning Review Branch Chief [now Zoning Administrator] Edgar T. Nunley issued a **Disapproval** letter for Mesco Inc.’s request to change to a “Grocery and Delicatessen” (in the case file for BZA No. 16259). He stated, “The property, for purposes of zoning, is classified as R-5-E which does not allow your proposed use.” He advised that a Special Exception or Variance would be needed from the BZA to change a nonconforming use.

On 6/11/09, FoBoGro applied (see question #15) to the ABC Board for a “deli” (**Attachment B**). The 1/6/10 ABC Order for the several requested Substantial Changes included approval for a “take-out deli” (Finding #1) even though land use changes are the purview of the BZA (p. 2).

Accessory Prepared Food Shop

Attachment C is a copy of FoBoGro’s 1/11/10, 11/30/09, and 1/17/10 websites offering pizza as well as other prepared food, such as soups. A 9/2/09 article in the Georgetown Current (“GWU

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ABRA APPLICATIONDISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE
REGULATORY ADMINISTRATION

OFFICIAL USE ONLY

2009 JUN 10 10:55

License Number: <u>ABRA-082431</u>		Date Accepted: <u>7/13/09</u>		Accepted by: <u>[Signature]</u>		Hearing Date: <u>7/13/09</u>	
Fees Paid: \$	From	To	Issue Date:	From	To	Fees Paid:	
Date Approved by Board / /	Initial: →						
Date Denied by Board / /	Initial: →						
Ward/ANC:	☐ New	☐ Transfer (new location)	☒ Transfer With Sale <u>With Substantial Change</u>	☐ Transfer without Sale	☐ Stock Transfer	☐ Storage	☐ Premise
TO BE COMPLETED BY APPLICANT							
1. CATEGORY	2. CLASS	3. TYPE		4. ENTERTAINMENT ENDORSEMENT	5. ENDORSEMENT	6. OTHER TYPES	
☐ Manufacturer ☐ Wholesaler ☒ Retailer	☐ A ☒ B ☐ C ☐ D	☐ Restaurant ☐ Tavern ☐ Nightclub ☐ Hotel	☐ Club ☐ Multi-Purpose Facility ☐ Common Carrier	☐ Entertainment ☐ Dancing ☐ Cover Charge	☐ Sidewalk Cafe ☐ Summer Garden ☐ Tasting ☐ Brew Pub	☐ Safekeeping ☒ 404.2 ☐ 405.1 ☐ No Substantial Change	
7. Number of Seating: <u>0</u>				8. Number of Hotel Rooms: <u>0</u>			
9. Applicant (Last Name, First Name, Middle [Initial], or Entity) <u>FOGGY BOTTOM GROCERY, LLC</u>				10. Trade Name <u>FOGGY BOTTOM GROCERY</u>			
11. Business Address <u>2140 F ST. NW</u> <u>WASHINGTON, D.C. 20037</u>				12. Mailing Address if different from business <u>SAME</u>			
13. Business Telephone: (202) <u></u>				14. Fax Number: () <u>N/A</u>		15. Email Address: <u>LHART@FOGBOYED.COM</u>	
16. Type of Applicant ☐ Sole Proprietor ☐ Corporation ☐ Partnership ☒ LLC ☐ Other (LLP or LP)							
17. List the name of Sole Proprietors and All Partners below. <u>KRISTOPHER HART</u> <u>CHRISTOPHER KIRPLE</u> <u>SETH ROSENZWEIG</u>							
18. List all Corporate Officers, LLC Managing Members, General Partners by name and title who have an ownership interest.						Number of Shares	Percent of Interest
<u>KRISTOPHER HART</u>							
<u>CHRISTOPHER KIRPLE</u>							
<u>SETH ROSENZWEIG</u>							
19. List the total number of stocks and shares distributed by the Corporation: Authorized <u>100</u> Issued <u>100</u>							
20. Has there been any administrative action taken against the applicant or any person listed above regarding ABC violations in the District of Columbia or any state? ☐ Yes ☒ No If yes, please explain what administrative actions were taken, location of action, and the disposition.							
21. If applicant is a Sole Proprietor, the individual must sign, if Partnership, each partner must sign, if Corporation, President or Vice President must sign, if LLC, managing member must sign the below certification. Certification: I hereby certify under penalty of perjury that the information in this application is true and correct. I also certify that the above applicant is the true and actual owner of the business.							
Printed name: <u>KRIS D. HART</u>						Cheng Ho Choi Notary Public District of Columbia My Commission Expires 8/14/09	
Signature: <u>[Signature]</u>						Subscribed and sworn to before me on this <u>10th</u> day of <u>June</u> , 20 <u>09</u> Notary Public My commission expires on _____	
Printed name: _____						My commission expires on _____	
Signature: _____						Subscribed and sworn to before me on this _____ day of _____, 20____ Notary Public My commission expires on _____	
Printed name: _____						My commission expires on _____	
Signature: _____						Subscribed and sworn to before me on this _____ day of _____, 20____ Notary Public My commission expires on _____	
22. In what language do you need vital documents translated?							

SPECIAL NOTICE

The District of Columbia will provide the appropriate services and auxiliary aids, including sign language interpreters, whenever necessary to ensure effective communication with members of the public who are deaf, hearing impaired or who have other disabilities affecting communications. Requests for services and auxiliary aids should be made at least ten (10) days prior to any scheduled hearing. Please notify the ADA Coordinator at (202) 442-4423.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION**



BUSINESS INFORMATION

1. Business Address: 2140 F St. NW Washington, D.C. 20037			
2. Trade Name FOGGY BOTTOM GROCERY	3. Floor(s) for area of storage 2 ND AND 3 RD	4. Floor(s) of licensed business 1 ST 2 ND AND 3 RD	
5. Will you be the true and actual owner of the business? ☒ Yes ☐ No If no, please explain in an affidavit.			
6. Will any other business be conducted on the premises? ☐ Yes ☒ No If yes, please explain fully.			
7. Do you have or have you previously held a license for the sale of alcoholic beverages? ☐ Yes ☒ No If yes, please explain.			
8. Will any portion of the premises be used for a dwelling or a lodging house? ☐ Yes ☒ No If yes, is there interior access to the living quarters from the licensed area? ☐ Yes ☐ No			
9. Does any manufacturer, brewery, distiller, wholesaler or solicitor of alcoholic beverages, or any employee thereof, or any other individual or corporations have any financial interest directly or indirectly in this business or any other business holding an ABC License? ☐ Yes ☒ No If yes, please explain fully.			
10. List the hours below:			
Days	a. Hours of Operation <i>K.D.H.F. 9-18-09</i>	b. Hours of Alcoholic Beverage Sales/Service/Consumption	c. Hours of Live Entertainment occurring or continuing after 6:00 PM
Sunday	From 7 AM To 12 AM	From 10 AM To 10 PM	From <i>N/A</i> To <i>N/A</i>
Monday	From 7 To 12 AM	From 10 To 10	From <i>N/A</i> To <i>N/A</i>
Tuesday	From 7 To 12 AM	From 10 To 10	From <i>N/A</i> To <i>N/A</i>
Wednesday	From 7 To 12 AM	From 10 To 10	From <i>N/A</i> To <i>N/A</i>
Thursday	From 7 To 12 AM	From 10 To 10	From <i>N/A</i> To <i>N/A</i>
Friday	From 7 To 12 AM	From 10 To 10	From <i>N/A</i> To <i>N/A</i>
Saturday	From 7 To 12 AM	From 10 To 10	From <i>N/A</i> To <i>N/A</i>
List the hours for Summer Garden/Sidewalk Café below:			
Days	d. Hours of Operation	e. Hours of Alcoholic Beverage Sales/Service/Consumption	f. Hours of Live Entertainment occurring or continuing after 6:00 PM
Sunday	From To	From To	From To
Monday	From To	From To	From To
Tuesday	From <i>N/A</i> To <i>N/A</i>	From <i>N/A</i> To <i>N/A</i>	From <i>N/A</i> To <i>N/A</i>
Wednesday	From <i>N/A</i> To <i>N/A</i>	From <i>N/A</i> To <i>N/A</i>	From <i>N/A</i> To <i>N/A</i>
Thursday	From <i>N/A</i> To <i>N/A</i>	From <i>N/A</i> To <i>N/A</i>	From <i>N/A</i> To <i>N/A</i>
Friday	From To	From To	From To
Saturday	From To	From To	From To

K.D.H.F.
9-18-09

11. If you checked the box for in question 5 in the ABRA Application, initial that you understand that your tasting hours may not exceed your approved alcoholic beverage hours. N/A

12. Provide below the name, address and distance (in feet) of the following:

	Name	Address	Distance
School	School Heights HS	2130 G St. NW	1742 Ft.
Public Library	West End Neighborhood Library	1101 24th St. NW	4382 Ft.
Day Care Center	OW School	1920 G St. NW	2587 Ft.
Recreation Center	YMCA	1101 17th St. NW	4910 Ft.

13. How were the above distances measured? MARQUEST

Answer the following if you are an off-premise consumption establishment

14. Is there another ABC licensed establishment of the same class within 400 feet of your establishment? ☐ Yes

☒ No If yes, state name, address and distance.

15. Answer the following if you are applying for a Hotel, Tavern, Restaurant, Night Club, Club, Multi-purpose Facility, Boat or train license.

Describe the nature of operation, including the type of food served, type of entertainment, including nude performance(s), and any goods & services to be provided. If dancing is provided please indicate the dimension of the dance floor(s) and the location(s).

NO SIT DOWN DINING OR CONSUMPTION OF ALCOHOL.
THE FIRST FLOOR HAS A SMALL DELI WITH NO
ALCOHOL. THE SECOND AND THIRD FLOOR HAVE GAMES
BEER AND WINE BUT WILL BE SECTIONED OFF AT 10PM.

16. Answer the following if you are applying for a Restaurant, Hotel, or Tavern License.

If you checked "Cover Charge" in Section 4 of the ABRA application instructions AND have a Certificate of Occupancy over four hundred (400) persons, please provide the following:

- 1) Copy of Public Hall Certificate of Occupancy from the Zoning Administrator; AND
- 2) Copy of Entertainment Endorsement for a Public Hall from the Department of Consumer and Regulatory Affairs.

17. Answer the following if you are a Hotel or Restaurant License.

a. What are your projected gross annual receipts from food sales for the next twelve months (\$) How did you arrive at this amount?

N/A

b. What are your projected gross annual receipts from alcoholic beverage sales for the next twelve months? (\$) How did you arrive at this amount?

N/A

18. Answer the following if you are applying for a new application or transferring ownership with a substantial change or transferring to a new location.

a. Give a detailed explanation as to what effect your establishment will have on real property values on the relevant locality, section, or portion of the District of Columbia.

There will be no effect on real property values.

b. Give a detailed explanation as to what effect your establishment will have on peace, order, and quiet including noise and litter, on the relevant locality, section or portion of the District of Columbia.

There will be no effect on peace, order, or
quietness.

c. Give a detailed explanation of what effect your establishment will have upon residential parking needs and vehicular traffic and pedestrian safety.

If applicant is a Sole Proprietor, the individual must sign, if Partnership, each partner must sign, if Corporation, President or Vice President must sign, if LLC, managing member must sign the below certification.

19. Certification: I hereby certify under the penalty of perjury that the information in this application is true and correct. I also certify that the above licensee is the true and actual owner of the business.

Printed name: KRIS D. HART

Signature: *Kris D. Hart*

Subscribed and sworn to before me on this 16th day of 09

Notary Public

Chang Ho-Ghal
Notary Public District of Columbia
My Commission Expires 6/14/09

My commission expires on

Printed name: _____

Signature _____

Subscribed and sworn to before me on this _____ day of _____, 20____

Notary Public

My commission expires on _____

Printed name: _____

Signature _____

Subscribed and sworn to before me on this _____ day of _____, 20____

Notary Public

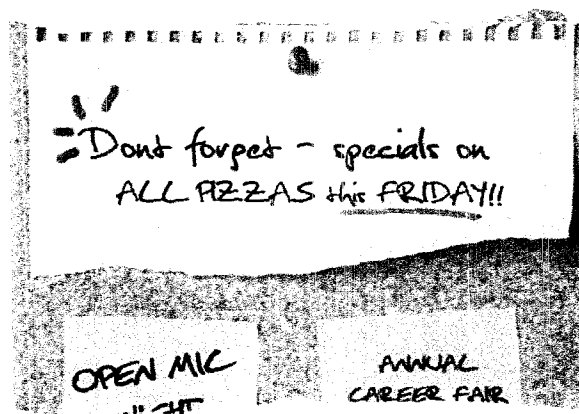
My commission expires on _____

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Attachment C

WE'RE ALWAYS UP TO SOMETHING!
CHECK BACK OFTEN FOR
NEWS AND EVENTS.



News & Community

PRESS

BUSINESS JOURNAL

Dates
9.28.09



Dates
6.11.09
8.28.09

EVENTS

Friends of FoBoGro

gwhatchet.com
www.fobogro.com

We're not just a store. We're your neighborhood store. Which means a FoBoGro community. And we want you to join.

We'll write occasionally about cool events and send along plenty of free perks. And, we'll hold lots of contests so you can win cool stuff.

So, if you want in, (and why wouldn't you), join our entourage by putting your email in the box below.

(We promise to never send you stuff you didn't ask for or give your info to anyone. To make sure you receive all the membership perks, add (community@fobogro.com) to your Address Book to help us get by your spam filter.)

2140 F STREET, NW

WASHINGTON, DC 20037

202.296.0125

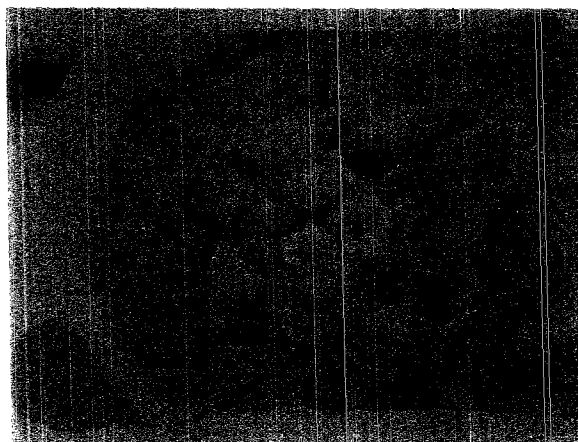
 Work for Us

FOBO★GRO

FOGET BOTTOM GROCERY EST. 1946

**YOUR NEIGHBORHOOD GROCERY STORE FOR ALL YOUR ON-THE-GO-NEEDS
SERVING PIZZA, SALADS, SANDWICHES, AND MORE...COMING SOON!**

WE HAVE FILLING BREAKFAST ITEMS
TO START YOUR DAY, AND
MOUTHWATERING LUNCHES AND
DINNERS TO KEEP YOU GOING.



Menu

CAN'T DECIDE? ★ DOWNLOAD OUR ENTIRE MENU

Our inventive menu offers specialty spins on the classics, such as the P.B.J.B (chunky peanut butter, raspberry jam, granola, and sliced bananas) and Italian subs named after the owners' hometowns like the Cazenovia (Italian ham, Pepperoni, Sopressata and Provolone).

Lunch and Dinner Menu

COLD SANDWICHES

Cazenovia Sub

Hand-Sliced Italian Hot Ham, Pepperoni, Sopressata, Sharp Provolone, Lettuce, Tomato, Tangy Hot Peppers, Oregano, and Oil & Vinegar

Chicken Salad on Ciabatta

Walnuts, Craisins, Tarragon, and Fresh Greens

The Luther Rice Wrap

Sliced Turkey Wrapped with Sliced Avocado, Crispy Bacon, Caramelized Onions, Field Greens, and Ranch Dressing

The Brewster

Hand-Sliced Roast Beef on an Italian Sub with Caramelized Onions, Horseradish Coleslaw, and Ground Black Pepper

Egg Salad on Pumpernickel

Crispy Bacon, Horseradish, and Pepper Jack Cheese

Lox'n Bagel

Smoked Salmon on an Everything Bagel with Sliced Green Apple, Capers, Red Onion, and Cream Cheese

Tuna Salad on White Toast

Shaved Fennel, Sliced Black Olives, Fresh Greens, and Lemon Juice

Springfield Sub

Hand-Sliced Prosciutto, Ham, Genoa Salami, Sharp Provolone, Devlin's Debris

SOUPS

Ask us about our current seasonal soups including:

Chicken and Andouille Gumbo

Gazpacho

Split Pea and Ham

Vegetarian Chili

Chicken Noodle

SALADS

Fiorenza Salad

Spring Mix tossed with Gorgonzola Cheese, Walnuts, Craisins, and Balsamic Vinaigrette
(Add Chopped Grilled Chicken for a Little Extra)

Classic Caesar Salad

Romaine Lettuce tossed with Parmesan Cheese, Croutons, Caesar Dressing, and Fresh Ground Black Pepper
(Add Chopped Grilled Chicken for a Little Extra)

Chef Salad

Romaine Lettuce tossed with Sopressata, Genoa Salami, Provolone, Tomato, Red Onion, Black Olives, a Hard Boiled Egg, and Oil & Vinegar

P.B.J.S.

Chunky Peanut Butter, Raspberry Jam, Sliced Banana, and Granola on Toasted White Bread

Garden Salad

Fresh Spring Mix tossed with Sliced Tomato, Red Onion, Black Olives, Croutons, and Balsamic Vinaigrette
(Add Chopped Grilled Chicken for a Little Extra)

HOT SANDWICHES

The Oakland

Hand-Sliced Hot Italian Ham, Pepperoni, Sopressata, Devin's Debris, Sweet and Hot peppers, and Pepperjack Cheese on Ciabatta Bread

The Famous McDougall

Grilled Chicken Breast on a Sub Roll with Hot Buffalo Sauce, Crumbly Bleu Cheese, Tangy Pepper Jack Cheese, and Red Onion

The Wellesley

Chopped Grilled Chicken on Ciabatta Bread with Creamy Brie, Sliced Green Apple, Red Onion, and Field Greens

Grilled Cheese Deluxe

Cheddar and Provolone Cheese Melted on White Toast with Sliced Tomato and Red Onion (Add Bacon for a Little Extra)

Breakfast Menu

Cinnamon Buns with Icing

Fresh Pastries

Fruit and Yogurt Parfait

Toaster Strudel with Icing

Fountain Beverages * Assorted Chips & Snacks * Fresh Fruit

VISIT OUR COFFEE BAR LOCATED ON FIRST FLOOR
Serving up fresh, hot coffee to jump start your morning or fuel your all-nighter!

2140 F STREET, NW	WASHINGTON, DC 20037	202.296.0125	FOBOGRO
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Work for Us

alum takes over Foggy Bottom grocery”) states that FoBoGro “will feature fresh-made sandwiches, salads, pizza” and “‘We’re going to be a combination of a Subway and a CVS,’ Hart said” (**Attachment D**). In a 9/19 e-mail to Zoning Administrator LeGrant, the WECA reported on what Mr. Hart told the Foggy Bottom and West End Advisory Neighborhood Commission (ANC-2A) on 9/16. See indented below for the relevant text:

From: Barbara Kahlow [mailto: ...]
Sent: Saturday, September 19, 2009 5:04 PM
To: 'LeGrant, Matt (DCRA)'
Subject: PLEASE HELP -- FW: 8/31/09 WECA protest of the ABC Substantial Change application by the Foggy Bottom Grocery, 2140 F St. NW

Matt – This e-mail follows up on my Thurs. 9/17/09 voice mail at 11:10 am in which I reported on Kris Hart’s presentation to the Foggy Bottom and West End Advisory Neighborhood Commission (ANC-2A) the night before (i.e., Wed. 9/16). Kris told the ANC that he will be selling fresh produce, fresh salads, fresh sandwiches, pizza, etc. He also answered a Question saying that he will not be submitting a BZA variance request because he has a CofO. ... – Barbara

The proposed food offerings exceed those allowed for a Prepared Food Shop in Zoning Commission Order No. 06-23 of 9/28/07. This Order defined “Prepared food shop - ...principally devoted to the sale of food, non-alcoholic beverages, or cold refreshments. This term includes an establishment known as a sandwich shop, coffee shop, or an ice cream parlor.” Please note no mention of a Grocery Store. Please also note that FoBoGro will sell alcoholic beverages, expanding from doing so on 1 floor to 2 floors. In a 7/31/09 e-mail from Zoning Administrator LeGrant to the WECA, Mr. LeGrant said “I recall meeting with him [FoBoGro owner Kris Hart] and clearly explaining to him the need for BZA relief to add a ‘pizza ... or deli’ use at this location” (see indented below for the relevant text):

...
From: LeGrant, Matt (DCRA) [mailto: ...]
Sent: Friday, July 31, 2009 5:48 PM
To: Barbara Kahlow
Subject: RE: request for ZA letter dated 8/16/07 on 2140 F Street, NW

Barbara:

... I do not see “any later e-mails” I sent to Kris Hart making a determination on this matter. I recall meeting with him 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.

Also thank you for clarifying the outcome of BZA #16259 which, as you stated, of course did deny the proposed use; my voicemail was in error.

Best Regards,

Matthew Le Grant
Zoning Administrator

...

GWU alum takes over Foggy Bottom grocery

By JESSICA GOULD

Current Staff Writer

George Washington University alum Kris Hart expected to be well on his way to Congress by now, crossing the aisle and counting votes. Instead, he's still in Foggy Bottom, stocking the aisles and counting Cokes.

"I definitely didn't think I'd be doing this," Hart said.

But he wouldn't have it any other way. "Now that I'm a small-business owner ... I wouldn't want to be

one of 435."

Hart, who graduated from the university in 2005, is getting ready to open his second business, taking over ownership of Foggy Bottom Grocery at 2140 F St.

He also owns Relaxed Spa & Tans, at 2112 F St., which he opened shortly after graduating, in March 2006.

Like many of his Colonial classmates, Hart came to D.C. with his sights set on the city's political scene.

See **Grocery**/Page 39

GROCERY

From Page 5

In high school, he worked as a page for the U.S. House of Representatives. In college, he majored in political science, served as finance director of the College Republican National Committee and was elected president of the university's Student Association.

"My goal when I was younger was to be a member of Congress," he said.

He was on his way.

But Hart's extracurricular experiences spurred an entrepreneurial spirit. He switched his major to business and began cultivating ideas for companies that would suit the Foggy Bottom community. When one of his fraternity brothers suggested opening up a tanning salon, he decided to go for it.

Hart said the salon, which has expanded to include a day spa, serves students and residents. He employs approximately 20 staff members — many of whom are students at the university — and serves up to 300 customers a day.

"Sometimes, there are lines out the door," he said.

Hart said operating the business has been tough at times. "I have a lot of gray hairs," he said. "They come in quick." But he wouldn't change a thing. "I love seeing a business come to form and grow. It's exciting as heck."

And when Foggy Bottom Grocery owner Meseret Bekele approached him two years ago about selling her store, he jumped at the chance. "I thought it would be cool to get into a different kind of business," he said. "Being a local guy, I thought it would be better to open it myself instead of having a Starbucks come in."

The store, currently being renovated, will feature fresh-made sandwiches, salads, pizza, beer, wine and cigars in addition to the traditional toiletries. "We're going to be a combination of a Subway and a CVS," Hart said.

Hart said he wants the store to contribute to the community. "We're going to try to get involved in D.C. programs and D.C. issues," he said, adding that the store recently donated \$2,000 to Bread for the

City.

Meanwhile, he hopes Foggy Bottom Grocery will pump energy, as well as nutrition, back into the university, which owns the building and has given him so much.

Hart's friend (and former Student Association chief of staff) Devlin Keating will serve as the store's manager, and university junior Daniel Blake will be the assistant manager.

"Our key goal for the grocery store is to make it a community place," Blake said. "I love GW, but I think one of those things that is missing right now is the community feel."

He said the store — casually called FoBoGro — has signed on to sponsor Colonial Army, the university's spirit corps, and expects to host barbecues before sporting events.

Like Hart, Blake said he came to George Washington with dreams of a career in politics. Now he's also been bitten by the business bug.

"I definitely love what I'm doing with the business," he said, "so maybe I'll see where it takes me."

Attachment E is a copy of an 11/5/09 (i.e., 1 day after issuance of the 11/4 CofO including an Accessory Prepared Food Shop) GW Hatchet article (“FoBoGro receives new deli license”). It states, “Kris Hart ... 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. ... he said that the store has always had a certificate allowing a deli.” On 11/5, the WECA faxed the Zoning Administrator a copy of the 11/5 article. Clearly, FoBoGro is planning a deli, not an accessory prepared food shop. As discussed above, such a change in use requires BZA review.

On 12/11/09, the WECA reported to the Zoning Administrator what FoBoGro included in its 12/9 ABC protest testimony, including mention of “deli.” See indented below for the relevant text:

From: Barbara Kahlow [mailto: ...]
Sent: Friday, December 11, 2009 11:02 AM
To: 'LeGrant, Matt (DCRA)'
Subject: followup to our phone conversation a few minutes ago

Matt – Thanks for taking my call asking you to alert the DCRA Business Office folks not to issue a Delicatessen license & for explaining the differences in your view between an “accessory prepared food shop” and a deli. As mentioned, here’s a link to the Foggy Bottom Grocery’s website (<http://www.fobogro.com/>) which includes pizza. Based on Kris Hart’s testimony during the Wed. hearing in which he said “deli” and & the establishment’s website, I think that your distinction is not clear to him. – Barbara

Later on 12/11/09, the WECA responded to the Zoning Administrator’s referral to the 9/28/07 Zoning Order stating, “As for the immediately prior grandfathered establishment ..., it was a grocery on 1 floor, 1 floor of storage, & 1 floor of offices, as so testified in Wednesday’s ABC protest hearing. In the grocery store, the only prepared foods were pre-packaged sandwiches & coffee, i.e., no freshly made sandwiches, salads, etc.” See indented below for the relevant text:

From: Barbara Kahlow [mailto: ...]
Sent: Friday, December 11, 2009 12:00 PM
To: 'LeGrant, Matt (DCRA)'
Subject: FW: followup to our phone conversation a few minutes ago

Matt – Thank you for your informative e-mail with the attached 9/28/07 Zoning Order. I will review the Order later today. As for the immediately prior grandfathered establishment (which was the subject of the 4/16/98 Zoning Order), it was a grocery on 1 floor, 1 floor of storage, & 1 floor of offices, as so testified in Wednesday’s ABC protest hearing. In the grocery store, the only prepared foods were pre-packaged sandwiches & coffee, i.e., no freshly made sandwiches, salads, etc. – Barbara

In addition, **Attachment F** is a photograph of some of FoBoGro’s new kitchen equipment, including a Panini Press, which is not allowed under the 9/28/07 Zoning Order. The Order defines “Prepared food – 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).

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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.

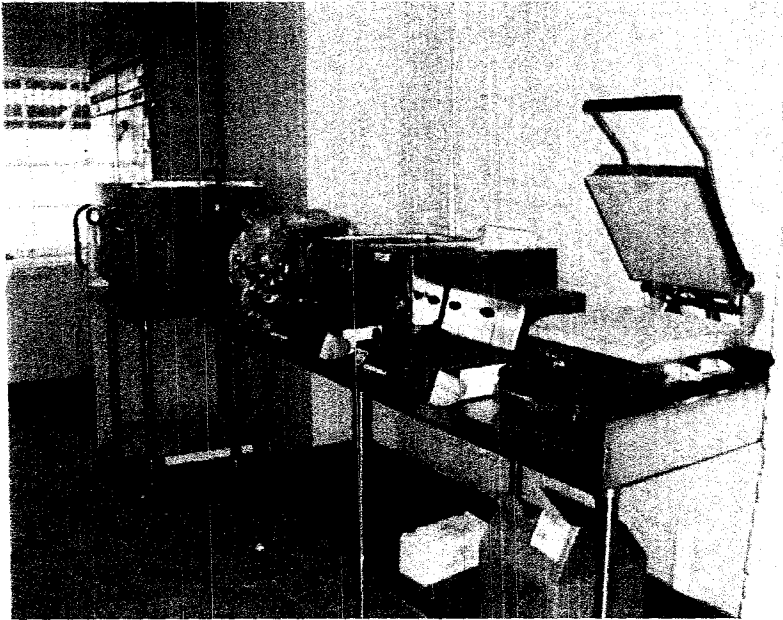
"I want to work with Ms. Kahlow, but when she decides she's against something, she's really strong about her perspectives," Hart said. "The most frustrating part is here we are wanting to focus on the business. We want to focus on hiring employees, we want to focus on having products, we want to focus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

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Attachment F

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FoBo's Photos - Setting up the New Kitchen Equipment/ShelvingPhoto 35 of 46 | [Back to Album](#) | [FoBo's Photos](#) | [FoBo's Profile](#)

From the album:

"Setting up the New Kitchen
Equipment/Shelving" by FoBo

Added February 9

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I will be discussing below in more detail the 4/09 BZA **Dismissal** Order for Application No. 17906 to add an accessory prepared food shop to a grocery store. The Order concluded, "Therefore, the Board concludes that the addition of those five items [prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs] -- **and nothing more** -- to the Applicant's grocery store does not require zoning relief" (emphasis added, p. 5).

Hours of Operation

DC's zoning rules for nonconforming uses states the grandfathered uses "shall be regulated strictly and permitted only under rigid controls" (11 DCMR § 2000.3). The rules for possible changes in use state that "The proposed use shall not adversely affect the present character or future development of the surrounding area" and "The proposed use shall not create any deleterious external effects, including but not limited to noise, traffic, parking and loading considerations, illumination, vibration, odor, and design and siting effects" (11 DCMR § 2003.2 & § 2003.3).

In the prior proposed change in use case for this site, the WECA presented possible adverse effects from the expanded use and the extended hours of operation for the limited grandfathered 1-story grocery, including about trash, noise, double parking, etc. (see Finding #12). The 1998 BZA Order concluded, "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. ... The Board concludes that the applicant has not met the burden of proof" (4/16/98 BZA Order on Application No. 16259, p. 3).

The 1/6/10 ABC Order for the several requested Substantial Changes included approval for extended hours of operation (from 10 am-10 pm to 7 am-12 midnight) except for serving alcohol (which remained from 10 am-10 pm) (Finding #1) even though such changes are the purview of the BZA.

Certificate of Occupancy

DCRA's regulations

(http://www.dcr.dc.gov/dcra/frames.asp?doc=/dcra/lib/dcra/services/permits/c_of_o_regs.pdf) in

Section 118.0 Certificate of Occupancy provide:

- 118.1.2 Change in Ownership – "For changes in ownership ... with an existing valid Certificate of Occupancy, a new Certificate of Occupancy shall be issued in the name of the new owner ... provided there is no proposed change in use"
- 118.3.5 Construction Completion Required – "If the erection or alteration of a structure, or part thereof, is contemplated, a certificate of occupancy for that structure, or part thereof, shall not be issued until the erection or alteration is completed to the point that the structure, or part thereof, is deemed by the code official to be available for occupancy and in compliance with the requirements of the applicable law and regulations" (emphasis added).

Since the construction was still underway during preparation of this testimony, the 11/4/09 (i.e., issued over 3 months ago) CofO is invalid.

Permits

The former Foggy Bottom Grocery was shuttered in Fall 2008. The first construction activity started in summer 2009. The new lessee displayed three DC permits: (a) 8/10/09 for outdoor renovations, which were paid for by the property owner; (b) 10/15/09 for interior demolition for a “Restaurant” (which was incorrect since the site has never been a Restaurant); and (c) 1/13/10 for construction of a “Prepared Food Shop” (i.e., months after the extensive interior construction work began, i.e., before permit issuance). Copies of (a) and (b) are in the lessee’s 12/2/09 filing in this case.

BZA Review

- On 10/17/97, in BZA Appeal No. 16154, the BZA **Denied** an appeal of the Acting Zoning Administrator’s decision that a Special Exception under Section 2003 was needed to change a nonconforming use to another nonconforming use or a Variance from Section 320.3 for another use in an R-3 District at 1659-61 35th Street, N.W. See above for a discussion of the relevant DC law and regulations.
 - In addition, the BZA Order states, “Ms. Ellen McCarthy ...cited the Zoning Regulations and the enabling act which indicate that nonconforming uses are to be construed narrowly, with the goal that they eventually will be phased out” (p. 6) and “the grandfathering of the nonconforming use does not permit a change to a new primary use which is not permitted in the zone district” (p. 7).
 - The BZA Order further states, “The District of Columbia Court of Appeals has 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.2d 129 (D.C. 1982)” (p. 10)
 - The BZA Order further states, “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.’ Lenkin v. Board of Zoning Adjustment, 428 A. 2nd 356, 358 (D.C. 1981) quoting Woods v. District of Columbia, 39 A. 2d 67, 69 (D.C. 1944). See also Sheridan-Kalorama Neighborhood Council v. Board of Zoning Adjustment, 411 A.2d 959, 963 (D.C. 1979)” (p. 11).
 - The BZA Order further states, “Nor, of course, may a certificate of occupancy issue merely on the declaration of the appellant that its proposed use is a continuance of a prior nonconforming use and that therefore, it may operate without further governmental review” (p. 13).
 - Lastly, the BZA Order states, “Where there is doubt as to whether the change in use is substantial rather than insubstantial, the courts have consistently declared that it is to be resolved against the change in use. Id. At n. 25.” (p. 13).
- On 4/16/98, in BZA Order No. 16259, the BZA **Denied** a Special Exception under Section 2003 to change a nonconforming use from a grocery to a grocery and delicatessen in an R-5-E District at 2140 F Street, N.W. (for the old Foggy Bottom Grocery).

- In 4/09, the BZA **Dismissed** Application No. 17906 for a Special Exception to change a nonconforming use from a grocery store to a grocery store with delicatessen under Sections 2002 and 2003 in an R-4 District at 321 T Street, N.E. The Conclusions of Law state, “The Board concludes that the addition of the sale of prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs is not an ‘expansion’ of the grocery use, but an inherent part of that use. Therefore, the Board concludes that the addition of those five items -- **and nothing more** -- to the Applicant's grocery store does not require zoning relief” (emphasis added, p. 5). This case, unlike FoBoGro menu, involved no soups, grilled chicken breast, etc.

The BZA’s rules for granting Variances require the property owner to meet a stringent 3-part test, including an exceptional condition, practical difficulty or economic hardship, and without substantial detriment to the public good. The instant case fails to meet this 3-part test since there is no exceptional condition, practical difficulty or economic hardship, and there would be a substantial detriment. In 6/09, the Foggy Bottom Grocery lessee knowingly³ leased a 3-story townhouse that was zoned for 100% residential use and with a BZA Denial Order for an expansion from a grocery to a grocery with a delicatessen. If this property owner were to obtain a Variance, what would stop other commercial users from expanding the uses for small grandfathered groceries? The bottom line is that the precedent would be harmful not only to Foggy Bottom-West End but also to the entire City.

Summary

The bottom line is that FoBoGro’s 12/28/09 statement (in its rebuttal to the WECA’s 12/15 reply) that the “Foggy Bottom Grocery is not changing the more than 60-year use of the property as a grocery store” is patently untrue.

- DC law forbids any enlargement of a nonconforming grocery use, i.e., no additional square feet and no additional floors.
- BZA case law does not allow the addition of an Accessory Prepared Food Shop in a grandfathered nonconforming grocery store.
- DC regulations reveal that the 11/4/09 CofO was prematurely issued, i.e., before the extensive alteration was completed.
- Interior alteration construction began before the necessary DCRA permit was issued.

As a consequence, the BZA should order revocation of the 11/4/09 CofO. In addition, the BZA should require FoBoGro to not expand its operations beyond the 1-story grandfathered grocery use.

Sara Maddux, who is also on WECA’s Board, will be the WECA’s second witness today. Her testimony will compliment mine. Thank you for your consideration of the WECA’s Appeal.

³ On 5/22/09, I exchanged e-mails with Mr. Hart personally objecting to the proposed extended hours as inappropriate and undesirable in a residential zone.