Board of Zoning Adjustment
441 4th Street, NW, Room 220
Washington, DC 20001

Appeal of West End Citizens Association	)	**Case Number: 18031**

FOGGY BOTTOM GROCERY'S OPPOSITION TO WECA'S MOTION FOR RECONSIDERATION

I. FOGGY BOTTOM GROCERY, LLC JOINS THE DCRA'S OPPOSITION TO THE APPELLANTS MOTION FOR RECONSIDERTION.

The Owners and Managers of Foggy Bottom Grocery ("FoBoGro") deny the validity of the issues raised in the West End Citizens' Association ("WECA") Motion for Reconsideration and join the DCRA in asserting opposition to the WECA motion. FoBoGro asserts that the DCRA has correctly pointed out that the burden of proof in the Appeal Number 18031, according to 11 DCRM §3119.2, rested on the Appellant, and that WECA failed in putting forth persuasive evidence before the Board of Zoning Adjustment ("BZA"). WECA's arguments lack merit in its misapplication of the law and failure to cite supporting authority.

The undisputed facts showed that the Foggy Bottom Grocery was established in 1946, in an 1835 square foot, three-floor townhouse at what is now 2140 F Street, NW in the Foggy Bottom area across the street from The George Washington University ("The GWU") campus. With the enactment of new zoning laws in 1958, the property was grandfathered as a C-1 property in what was *then* an R-5-C zone.

According to the ZO records on file, relevant statistics for the premises are:

(a) Lot square footage:	3,824.34
(b) Building square footage:	1835
Basement:	476 with Occupancy of 16
1st Floor:	986 with Occupancy of 17
2nd Floor:	419 with Occupancy of 12
(c) FAR [(a)/(b) = FAR]:	.479

In C-1 properties the allowable Floor Area Ratio ("FAR") is 1.0. *See* 11 DCMR 771.

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neighborhood facility.

- Hire employees.
- Enter into contracts with distributors for grocery inventory.
- Apply for transfer of the Class B Retail License from the Alcoholic Beverage Regulation Administration ("ABRA"), which transfer was approved in January 2010.

In addition, and in reliance on the Certificate of Occupancy issued in August 2008:

- The GWU, the owner of the building, obtained approval from the Federal Commission on Fine Arts ("CFA") for the architectural plans for the building due to its historic nature.
- The GWU obtained demolition and building permits from the ZO to begin renovations to the building according to the plans approved by the CFA.
- The GWU invested in the construction and renovation to the property.

After the Zoning Administrator ("ZA") issued a Notice to Revoke the August 21, 2008 Certificate of Occupancy, which notice indicated *its issuance was due to an error on the part of the Zoning Office,* Hart acted promptly to respond to the ZA's concerns, with the result that on November 4, 2009 the ZO issued a second Certificate of Occupancy, which action WECA appealed in this Case Number 18031, and lost.

Although FoBoGro does not believe it was error to issue either the August 21, 2008 or November 4, 2009 Certificates of Occupancy if there was any error in the issuance of FoBoGro's Certificate of Occupancy, such error was made within the ZO. Hart and others acted in good faith, reasonable reliance on the actions of the ZO. Action against the Certificate of Occupancy at this late date will cause irreparable harm, significant expense and serious financial loss to many parties including FoBoGro, its investors and The GWU (lost investments), FoBoGro's employees (lost jobs), the local community (lost services), and the District of Columbia (lost revenues).

Over $1,000,000 and other resources were expended on the purchase of the business, retaining architects and engineers, obtaining permits, licenses, authorizations, and inspections from DCRA, the ABRA, the ZO, and the CFA, entering into vendor relationships, surveying the

community, and other actions related to construction, and opening and running the business. The approvals by DCRA, ABRA, and CFA support the merit of the renovations to the premises and their use as being consistent with the Zoning Regulations and other local and federal laws and as not having detrimental impact on the peace, quiet, traffic and real estate values of the area.

In addition, FoBoGro allows a greater number of services and products to be readily accessible to the largely pedestrian community of Foggy Bottom. For example, although the neighboring Plaza Hotel has a restaurant/café, it offers no products or commercial services for its guests like those offered at FoBoGro. Likewise, neither the recently constructed 474 room residence hall across the street, the adjacent Fraternity and Sorority town homes, nor the nearby high rise apartments have convenience stores within their premises, highlighting the need for the services and products that FoBoGro offers.

WECA failed to demonstrate any detriment to the public good or impairment to the intent, purpose, and integrity of the Zoning Plan for the District of Columbia, zoning laws or zoning regulations in its motion for reconsideration.

III. WECA'S APPEAL FAILS TO SHOW A VARIANCE IS AT ISSUE.

A. A Use Variance is Not Applicable or Necessary in this Case

Use Variances permit uses that are ordinarily prohibited for a property. *Palmer v Board of Zoning Adjustment,* 287 A.2d 535, 542 (D.C. App. 1972)(applicant sought a use that was not within the matter of right uses in an R-4 zoning district). Because FoBoGro is not changing the use of the property, a Use Variance was not necessary in this case, and the three-part test set forth in 11 DCMR §3103.2 was not applicable.

B. An Area Variance is Not Applicable in this Case

An Area Variance is not at issue because there is no change to the square footage of the building and the FAR for this property is not exceeded. An Area Variance does not alter the character of the Zoning District, but involves changes or additions to the structures that are outside of the parameters of the Zoning Regulations.

In this case, although WECA argues that the use of the three floors of the premises violates the law, the use of all 1835 square feet of interior space of the building for the business does not exceed the FAR of this property. The FAR ratio of the 1835 square foot store is 0.479 or less than one-half of the allowable 1.0 FAR for a C-1 property. The renovations to the

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2010 a copy of this submission was mailed by US Mail to the following:

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Except for a short period of closure to permit renovations under the new management, the nonconforming use of the premises as a grocery store has been continuous for 64 years. From 1958 through 2008, the Foggy Bottom Grocery operated under seven prior owners, as demonstrated by the Certificates of Occupancy on file in the Zoning Office ("ZO").

II. ESTOPPEL APPLIES TO PRECLUDE ANY CHANGE TO THE BZA ORDER.

The facts of this case and the law of estoppel are clear. The Zoning Board has previously noted that, "To make a case of Estoppel, [a party] must show that it: (1) acted in good faith, (2) on the affirmative acts of a municipal corporation; (3) made expensive improvements in reliance of the Certificate of Occupancy." *See* BZA Appeal 17109 of Kalorama Citizen's Association dated November 8, 2008. *See e.g., District of Columbia v. Cahill*, 60 D.C. App. 342, 54 Fed 2d 453 (1931)(City estopped to revoke certificate of occupancy due to the good faith of the parties, the mistakes of the municipal agency, the significant cost and change of position, and the balance of equities in favor of the property owner.) *See also Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964, 972 (D.C. 2002).

In this matter, while negotiating the purchase of the Foggy Bottom Grocery from Mesco, Inc., the managing member of FoBoGro, Kristopher D. Hart, acted in good faith to apply for a Certificate of Occupancy from the ZO in August of 2008. After obtaining the Certificate of Occupancy, Hart proceeded to:

- Purchase the business from Mesco, Inc.
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- Contract for architectural and engineering plans.
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In addition, FoBoGro allows a greater number of services and products to be readily accessible to the largely pedestrian community of Foggy Bottom. For example, although the neighboring Plaza Hotel has a restaurant/café, it offers no products or commercial services for its guests like those offered at FoBoGro. Likewise, neither the recently constructed 474 room residence hall across the street, the adjacent Fraternity and Sorority town homes, nor the nearby high rise apartments have convenience stores within their premises, highlighting the need for the services and products that FoBoGro offers.

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In this case, although WECA argues that the use of the three floors of the premises violates the law, the use of all 1835 square feet of interior space of the building for the business does not exceed the FAR of this property. The FAR ratio of the 1835 square foot store is 0.479 or less than one-half of the allowable 1.0 FAR for a C-1 property. The renovations to the

building did not result in moving any weight-bearing structure or constructing new structures on the property. Rather the building's shell remained intact; there is no encroachment upon neighboring properties' air, light or view.

Because there is no increase in the building square footage or any changes to the configuration of the building upon the lot, neighboring properties are unlikely to experience any negative impact simply because the Certificate of Occupancy allows the entire building to be used most effectively and efficiently for the business. WECA failed to show a violation of the variance provisions of the zoning laws or a negative impact on the community as a whole by FoBoGro's use of the full 1835 square feet of the premises.

IV. CONCLUSION.

The BZA considered substantial information respecting the plans for FoBoGro as a business and the fact that the ZO, ZA, and DCRA were significantly involved in the construction permits, review of plans for renovations, and required inspections the property when it decided Case Number 18031. Therefore, and for the reasons articulated above and supported by the record, FoBoGro urges that the Motion for Reconsideration be denied.

Respectfully submitted on behalf of Foggy Bottom Grocery, LLC

Constance J. Miller

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Manning Sossamon, PLLC
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