

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

**APPEAL NO. 18031-B OF WEST END CITIZENS ASSOCIATION
INTERVENOR'S REPLY AS ORDERED ON OCTOBER 8, 2013**

Foggy Bottom Grocery, LLC ("FoBoGro") submits the following reply

I. THE ELEMENTS OF LACHES ARE MET.

As the DCRA pointed out, laches, although concerned with timeliness,¹ is distinct from statutes of limitation or other regulatory bars, because it operates to "bar consideration of an appeal which for jurisdictional purposes would be timely"² Although laches, like estoppel, is not a favored defense in zoning law, it does apply under circumstances in which a party has unreasonably delayed in asserting a claim to the prejudice or harm to another³

WECA knew of plans to renovate and revive the business in 2009, months before the November 2009 C of O was issued on substantially the same terms as the 2008 C of O it replaced WECA learned from Kris Hart, the managing member of FoBoGo in early 2009 about plans for renovation.⁴ A June 12, 2009 email exchange about business operating hours clearly illustrates WECA knew about plans to lease and renovate the premises for some time when Barbara Kahlow asked, "Did GW agree to pay for much of the needed construction work?"⁵

WECA was time-barred to appeal the 2008 C of O and 2009 building permit Therefore, it had to contrive an unorthodox event to create a new Zoning Decision for a new opportunity to appeal WECA admits, "[p]rior to issuance of the 2009 C of O, WECA had nothing to appeal"⁶

¹ The District of Columbia Court of appeals acknowledged that FoBoGro raised timeliness as a bar vis-à-vis laches and estoppel

² *Goto v District of Columbia BZA*, 423 A.2d 917, 925 n. 16 (D C 1980)

³ *Id* at 925 See also *Beins v District of Columbia BZA*, 52 A.2d 122, 126 (D C 1990)

⁴ See attached Affidavit of Kris Hart, Exhibit 3.

⁵ *Id*

⁶ WECA's Response at 3-4

II. WECA SLEPT ON ITS RIGHTS AND MISSTATES FACTS.

Because WECA is so vigilant about The GWU properties, the issuance of the building permits and C of Os is relevant. WECA excuses its delay by misstating the facts. It casts a C of O for change of ownership as unimportant. That WECA failed to notice Zoning Office actions is not attributable to FoBoGro. Whether or not a C of O for a change of ownership is a “walk-through matter” that “never even touches the Zoning Administrator’s desk” neither helps nor excuses WECA.⁷ The issuance of C of Os and permits are public record. WECA ignored them.

Contrary to WECA’s unusual vigilance regarding the use of The George Washington University (“The GWU”) properties, not only did WECA fail to challenge the 2008 C of O but when it knew that the basement and second story were used in the business by prior owners, whether or not for retail sales, it did nothing to challenge any certificate of occupancy prior to 2009 for office/storage use of the basement and second floors.⁸ Note the following exchange:⁹

MR. SURABIAN: Okay. So I just want to make sure that it is clear, because saying that the - it was only one floor was used, I want to make it clear for the Board that your actual testimony is that there was grocery one floor, one floor of storage and one floor of offices?

MS. KAHLOW: Yes. Most of the time it was only one floor of grocery and one floor of storage. But we understand that occasionally they use the office upstairs. We aren't certain with that, that's what was testified. We know it was definitely not grocery use.

MR. SURABIAN: Okay. On what floor was the storage?

MS. KAHLOW: Basement.

MR. SURABIAN: And the office was upstairs, I presume?

MS. KAHLOW: If there was one at any time, it was upstairs.

For reasons unknown to FoBoGro, after June 2009 WECA was aroused to challenge FoBoGro’s business plans. It began by protesting the Class B Alcoholic Beverage license transfer with a substantial change. Because WECA failed for years to challenge use of other

⁷ WECA’s Response at 6

⁸ WECA’s Response at 3. WECA never sought revocation of any C of O despite basement kitchen and storage therein and the second floor office and storage. Obviously aware of the 2008 C of O, WECA’s challenged to the beverage license transfer as to operating hours, potential increase in business and traffic, and deli-food sales

⁹ Transcript of Hearing, February 23, 2010 at 218, line 10 to 219, line 8.

floors on the premises, WECA lobbied the Zoning Administrator to revoke the 2008 C of O, alerting him first by email in September 2009 about the premises “prior use.”¹⁰ Absent a hearing, the Zoning Administrator revoked the 2008 C of O, met with Mr. Hart of FoBoGro, and then reissued the 2009 C of O on substantially the same terms as prior one. That 2009 C of O then became a new Zoning Decision and the unfortunate opportunity for WECA to appeal.

WECA tries to excuse its lack of attention to and concern for building permits for, “[r]enovations to existing townhouse”¹¹ as meaning that the work was no more than “outdoor renovation work only.”¹² Contrary to WECA’s claim, the term “renovations to existing townhouse” certainly denotes more than changing windows and doors.

WECA now protests that Mr. Hart was not an owner when he obtained the 2008 C of O “due to change of ownership.”¹³ There is no authority for the suggestion that a sale of a business must be fully consummated before a C of O can be issued to a new owner; negotiated sales and purchases of businesses are transactions that typically takes place over time. Indeed, Mr. Hart’s affidavit attests that he and the former owner of the grocery executed a Letter of Intent on June 18, 2008. They signed the written purchase agreement in November 2008 only after the 2008 C of O was issued and the 60-day time bar per 11 DCMR § 3112.2 for appeal had passed.¹⁴ Mr. Hart, on behalf of Foggy Bottom Grocery LLC, was for all intents, a new owner.

In error WECA states that “[b]y the summer of 2008, the Foggy Bottom Grocery was closed and there was no active service to residents of the neighborhood, construction crews or other passers-by”¹⁵ and that the “store was vacant from October 2008 to May 2010”¹⁶ during the

¹⁰ Transcript of Hearing, February 23, 2010 at 217, line 22 to 218, line 2

¹¹ WECA’s Response at 3 – 4.

¹² *Id.* at 5.

¹³ WECA’s Response at 5.

¹⁴ See Affidavit of Kris Hart.

¹⁵ Transcript of Hearing, February 23, 2010 at 236, line 22 to 237, line 4

¹⁶ WECA’s Response at 5

life of the 2008 C of O The store was open well into October 2008 according the attached article in The GWU Hatchet, marked Exhibit 1 to Mr Hart's Affidavit. FoBoGro originally planned to open in September 2009, but actually reopened on March 11, 2010, according to the The GWU Hatchet story, marked Exhibit 2 attached to Mr. Hart's Affidavit In addition to its investment in the property, the delay in opening caused the business to lose over \$775,000¹⁷ Beyond revenues and profits, revoking FoBoGro's C of O now will cut up to 60 or more jobs and income for its workers, as well as obliterate substantial tax revenues to the District of Columbia.

III. WECA'S RELIANCE ON *INTERDONATO* IS MISPLACED.

By the end of February 2010, FoBoGro was successful before both the Alcoholic Beverage Commission in transferring the Class B license and before the BZA on WECA's appeal Because estoppel applies in zoning matters when persons commit substantial resources to a business undertaking in justifiable reliance on a municipality, it strains all credibility to suggest that FoBoGro should *not* have relied on a series of official DCRA actions beginning in August 2008, 15 months before WECA's appeal Therefore, WECA's reliance on *Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000 (D C. 1981) is misplaced

Interdonato involved a special exception sought in 1976, which exception was granted The law firm in *Interdonato*, however, completed the purchase of and commenced work on the involved premises *only after the petition for review of the special exception was filed*¹⁸ Unlike *Interdonato*, where the parties took a risk in *commencing* their undertakings during appeal, FoBoGro relied on the unchallenged actions in 2008 (the C of O) and 2009 (building and demolition permits) of the Zoning Office and Administrator when it and The GWU committed resources in excess of \$500,000 for the purchase of the business and renovations long before

¹⁷ *Id.*

¹⁸ *Interdonato*, 429 A.2d at 1002

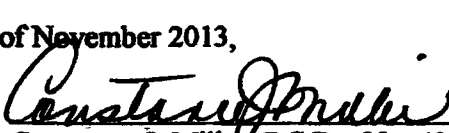
WECA manipulated revocation of the 2008 C of O and appealed the 2009 C of O. After the BZA denied WECA's appeal on February 23, 2010, FoBoGro completed final construction work and opened for business three weeks later. Contrary to the facts in this case, in *Interdonato* the purchase of the business and work on the premises occurred *after* the special exception decision in that case was appealed, in this case, commitments and work occurred *before* WECA's appeal.

IV. CONCLUSION

Notwithstanding that laches and estoppel are not favored in Zoning cases, FoBoGro has demonstrated that both laches and estoppel do apply. Although WECA challenged the 2009 C of O within the prescribed 60-day time as required by the Zoning Regulations, its appeal was far too late to be fair in any context. WECA had obvious notice of FoBoGro's undertakings in early 2009, which undertakings were done dependent on Zoning Decisions in 2008 and 2009, months before the 2009 C of O was reissued on substantially the same terms as the 2008 C of O. WECA's appeal was long after FoBoGro's detrimental reliance on the Zoning Office actions in 2008 and 2009. Because WECA's appeal was so late into FoBoGro's undertakings, the substantial prejudice to FoBoGro is undeniable, satisfying the key elements of laches.

Likewise, estoppel applies to bar revocation of the present C of O. FoBoGro has satisfied the elements of estoppel as to its justifiable reliance on the actions of the Zoning Office. Even so and as the DCRA suggests, if WECA is barred by laches, the application of estoppel becomes moot. In conclusion, the facts demonstrate that equity operates to deny WECA's appeal.

Respectfully submitted this 26 day of November 2013,


Constance J. Miller, DC Bar No. 499445
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McLean, VA 22102
(703) 883-9360
Counsel for Foggy Bottom Grocery, LLC

CERTIFICATE OF SERVICE

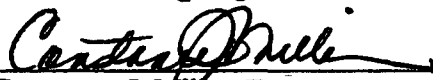
I hereby certify that a copy of the foregoing document was served by email this 26 day of November and also mailed by first class mail to the following persons

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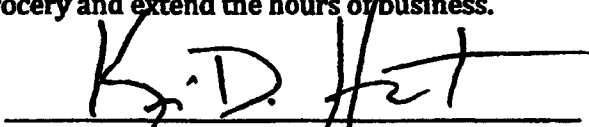
Constance J Miller, Esq

Affidavit of Kris Hart

My name is Kristopher D. Hart, and I am over the age of 18 and competent to make the following statement, which is based on my own personal knowledge and experience:

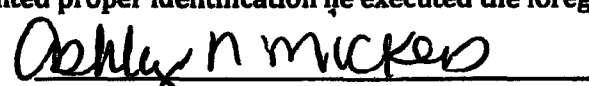
1. I am the managing member of Foggy Bottom Grocery LLC ("FoBoGro").
2. I worked on the premises with the former owner of FoBoGro since April 2007. On June 18, 2008, I signed a Letter of Intent to purchase Foggy Bottom Grocery from Mesco, Inc. I then submitted the Articles of Organization for FoBoGro on August 21, 2008 and applied for the 2008 C of O, signed the contract to purchase the grocery store from Mesco, Inc. on November 20, 2008, and signed the lease for the premises on July 1, 2009.
3. The store was operating until early 2009. Attached as Exhibit 1 is an article from The George Washington University Hatchet showing that I spoke with police about a robbery at Foggy Bottom Grocery on October 22, 2008. I am identified as an owner of the store, because the former owner and I had reached an agreement to buy the business.
4. Attached as Exhibit 2 is an article from The George Washington University Hatchet ("GWU Hatchet") showing that the business reopened on March 10, 2010, even though it had originally been scheduled to open in September 2009.
5. Due to WECA's protests, between October 15, 2009 and our opening on March 10, 2010 FoBoGro suffered an additional \$775,333 in Pecuniary and Non-Pecuniary damages. These are separate from the investments in the business prior to October 15, 2009.
6. Attached as Exhibit 3 is an email exchange with Barbara Kahlow of WECA and a GWU Hatchet article in March 2009, showing that WECA had notice about the intended plans to renovate Foggy Bottom Grocery and extend the hours of business.

Further saith not Affiant.


Kristopher D. Hart

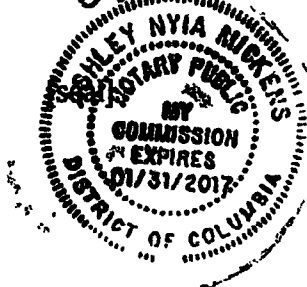
City of Washington)
District of Columbia)

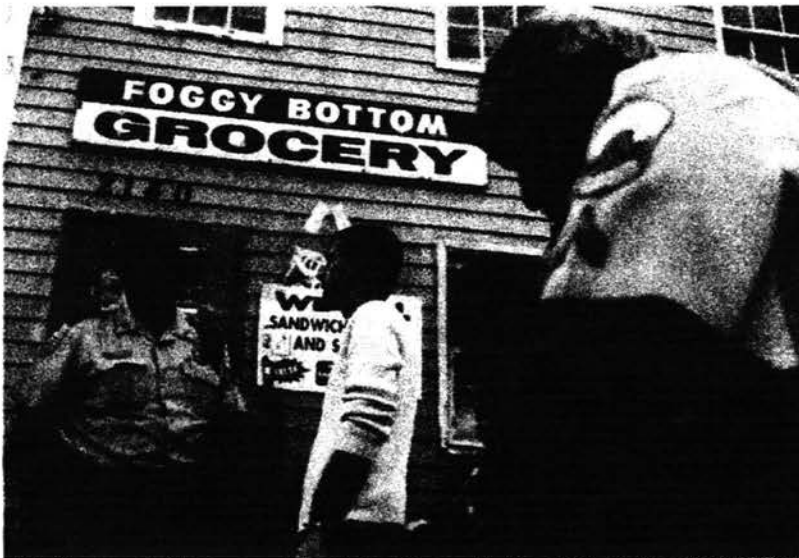
On this 26th day of November 2013, Kristopher D. Hart appeared before me, a Notary Public, and having presented proper identification he executed the foregoing affidavit under oath.


Notary Public

My Commission Expires:

01/31/2017





MPD officers speak with an owner of Foggy Bottom Grocery after the robbery. Tim Gowa/Hatchet Staff Photographer

More than a week after the Foggy Bottom Grocery was robbed at gunpoint, the Metropolitan Police Department is reporting no arrests have been made in connection with the case.

The store, located at 2140 F St., ~~was robbed~~ in the early afternoon on Oct. 11 by a man armed with a handgun, according to police and witnesses. The man, who was chased by a local woman for two blocks, escaped the scene with more than \$500 in cash.

"The case is currently open and there have not been any arrests with this case yet," wrote MPD Lieutenant Norman Power in an e-mail. "However, we are still investigating this case."

Power said he was working with a very limited suspect description.

"The only lookout that I have is a black male in his 20s to 30s, about 6'0" and thin," wrote Power. "He was wearing a dark colored hat, blue jeans, and an orange or red shirt."

[Permalink](#)

[Comments](#)

Tuesday, Oct. 21, 2008 11:49 p.m.

Pizza I will extend late-night service

by Sarah Scire

This post was written by Hatchet Reporter Lauren French.

Former late-night hangout Pizza Italia will expand its business hours starting Friday, Oct. 24 in hopes of bringing back customers.

"After the first Hatchet article I got new customers coming in who want a place to eat late at night," said Sam Parks, the owner of "Pizza I." "Some people even made a Facebook group called 'Save Pizza I.'"

The restaurant, located on the corners of 19th and F streets, is now open until 9 p.m. Monday through Thursday and until 3 a.m. on Friday and Saturday.

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Ex. 1

The GW Hatchet

[Back to article](#)

Foggy Bottom Grocery to kick off soft opening this week

Grocery portion to open first; deli will open after break

by Gabrielle Bluestone
Special Contributor

Issue: March 11, 2010 | News

The new Foggy Bottom Grocery will open its doors Thursday for a soft opening intended to give recently hired employees experience running the store.

Though the opening is only for invited "family and friends," owner Kris Hart said his operation's grocery area will be welcoming walk-in customers over spring break. The deli will open when students return to school after break.

The opening has been a long time coming. Originally slated to open in September 2009, zoning issues, D.C. Alcoholic Beverage Regulation Administration hearings and delays caused by record snowfall in D.C. repeatedly pushed the opening date back.

A small group of community members representing the West End Citizens Association had protested the store's opening, saying the extended hours would disturb the neighborhood and the owners would be violating the store's certificate of occupancy by operating a deli from the lower level.

But after months of contention and discussion at neighborhood group meetings, including the Advisory Neighborhood Commission 2A - which voted to support Hart - and the Foggy Bottom Association, ABRA issued the store an alcohol license and set the hours of operation from 7 a.m. to midnight, daily. The D.C. Board of Zoning Adjustment ruled Feb. 23 that the store could operate on all three floors, dismissing an appeal filed by Barbara Kahlow, the secretary of WECA.

"I always felt throughout the whole process that we were right," Hart said. "The one thing that's frustrating is I've run into people on the street and they're like, 'Oh it's too bad the community is fighting you,' and it's like, 98 percent of the community was behind us. It was just a few people, that's all it takes."

Now, with the store's shelves stocked with groceries and ready to open, Hart said the transformation has been major.

"[When we bought the store] it was a little decrepit, it was really falling apart and it was a little scary walking in here, the tiles were all broken, you'd have to scare the rats out before you walked in," Hart said.

The store will sell its first products Thursday to invited guests to give the employees training, said Devlin Keating, the chief operating officer of the store. The employees will be an integral aspect of the store, Keating said.

"We made it part of our hiring process, too; we didn't hire people with the best experience in the world at a grocery store, because listen, it's a grocery store, it's not rocket science," Keating said. "But, I do think putting an emphasis on people who showed up to their interview with a smile - that's what's going to set us apart."

Ex. 2

<http://www.gwhatchet.com/2009/03/12/foggy-bottom-grocery-may-become-sandwich-shop/>

<http://blogs.gwhatchet.com/newsroom/2008/10/22/no-arrests-made-in-foggy-bottom-grocery-robbery/>

<http://www.gwhatchet.com/2009/04/30/whats-the-deal-with-anniversary-park/>

Thank you,

Kris

From: "Barbara Kahlow"
Date: Fri, 12 Jun 2009 06:38:22 -0400
To: <khart@fobogro.com>
Subject: RE: Letter to Petition for Extended Hours

Kris – I read your news in last nite's GW Hatchet Wow Did GW agree to pay for much of the needed construction work? I surely hope so

As for later hours, I need to know more DCSnacks at 1776 G is not in a residentially zoned area And, does Pita Pit carry any alcohol? – Barbara

From: Kris Hart [<mailto:khart@fobogro.com>]
Sent: Friday, June 12, 2009 1:28 AM
To: 'Barbara Kahlow'
Cc: 'M. Devlin Keating'; dblake@fobogro.com
Subject: RE: Letter to Petition for Extended Hours

Barbara.

Sorry it took me some time to respond to your email. We have been busy signing the lease, which we did complete yesterday.

Ex 3