

12/3/13 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. I testified before the Board of Zoning Adjustment (BZA) in this case on February 23, 2010, i.e., over 3 5 years ago.

As I stated on February 23, 2010,

“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 relief<sup>1</sup>. 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 and very near six high-rise apartment buildings<sup>2</sup>.”

Since that hearing, the WECA researched records of the U.S. Census Bureau and discovered that, in fact, there was residential use in the other two floors of 2140 F Street, N.W. In 1940, there were three occupants, including a 51-year old female widowed head of household and two of her children. The head of household was the proprietor of a retail grocery. Data from later decennial censuses are not available because such data are sealed for 72 years.

On August 16, 2012 and December 19, 2012, the DC Court of Appeals confirmed that FoBoGro's expansion to three floors was, in fact, illegal. Today, we are discussing FoBoGro's October 27, 2013 brief on Laches and Estoppel. It makes two basic arguments, both of which are false: (a) that FoBoGro acted in good faith, and (b) that WECA acted in bad faith. The WECA's November 19, 2013 Response to the Intervenor's Brief addresses both from a legal standpoint. I will today present more evidence about (a).

#### FoBoGro History

On August 21, 2008, Kris Hart applied for a Change in Ownership CofO. However, Mr. Hart did not purchase the grocery business until months later – on November 20, 2008 (see p. 6 of FoBoGro's filing). Further, Mr. Hart and his partners did not sign a lease with the property owner until June 11, 2009. Attached is a copy of a June 12, 2009 e-mail from Mr. Hart to me indicating this exact date. FoBoGro's filing admits that construction began on October 1, 2009.

<sup>1</sup> 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.

<sup>2</sup> The six include: The Monroe House at 522-21<sup>st</sup>, Potomac Park at 510-21<sup>st</sup>, The Letterman at 2030 F, The Statesman at 2020 F, The Empire at 2000 F, and The York at 532-20<sup>th</sup>.

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and ended soon after the October 14<sup>th</sup> CofO revocation (see p 7 of FoBoGro's filing) In fact, the grocery business was shuttered from October 2008 to May 2010

In its July 29, 2009 research at the DC Alcoholic Beverage Regulation Administration (ABRA) and other DC offices, the WECA learned of an August 16, 2007 letter from then Zoning Administrator Bill Crews to Mr Hart in which he informed Mr Hart about the BZA's April 16, 1998 Denial Order for the former owner's 1-floor expansion request (BZA #16259) and advised that a "Use Variance" was needed before FoBoGro could open On February 23, 2009, I personally informed Mr Hart about the same Denial Order, which indicated that a BZA "Special Exception" was needed before FoBoGro could open Since that time, the WECA was awaiting a BZA Application

Instead, on July 17, 2009, ABRA published a Notice in the DC Register of a proposed "Substantial Change" Application, including for late closing hours (to 2 AM and 3 AM versus the old hours only until 10 PM) This was the first public notice of Substantial Changes from the former Foggy Bottom Grocery's operation. The WECA then timely filed with ABRA an August 31, 2009 Protest, which detailed the past zoning history and needed zoning relief for the expansion The WECA's Protest arguments were thus well known by FoBoGro before the October 1, 2009 construction start and the November 4, 2009 CofO issuance

As a consequence, FoBoGro had notice as early as August 16, 2007 from DC and as early as February 23, 2009 from the WECA The WECA contends that any expenses incurred by FoBoGro – both before and after June 11, 2009 lease was signed – were, thus, at risk

Further, the WECA believes that DC should immediately revoke the illegal CofO for three floors of commercial use.

Thank you for your consideration of the WECA's views on Latches and Estoppel

Attachment

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**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](mailto: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.

Insofar as hours, I would agree to having the operations of the store stay open until 12 midnight Sun-Thurs and 1 AM Fri-Sat as you suggested. Do you think we could agree that solely delivery options could go til later? Understanding Pita Pit and DCsnacks go until 2 AM during the week and 3 AM during the weekend I would like to compete with their hours. Of course we would only have bikes for delivery, which do not cause disruptions or create noise and helps keep students from venturing into the neighborhood since our business is on campus.

Let me know your thoughts.

Thanks Barbara. I look forward to working with you on this exciting project.

Best,

Kris

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Kris Hart  
Owner  
Foggy Bottom Grocery  
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c. 215 740 2663