

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18031 of West End Citizens Association, pursuant to 11 DCMR §§ 3100 and 3101, from a November 4, 2009 decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No CO1000323, for a grocery store in the R-5-E District at premises 2140 F Street, N W (Square 81, Lot 811)

HEARING DATE: February 23, 2010
DECISION DATE: February 23, 2010

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18031

DECISION AND ORDER

EXHIBIT NO. 22

PRELIMINARY MATTERS

On November 10, 2009, West End Citizens Association ("WECA" or "Appellant") filed this appeal challenging the November 4, 2009 issuance of Certificate of Occupancy ("C of O") No 1000323 ("2009 C of O"). The Department of Consumer and Regulatory Affairs ("DCRA") issued the 2009 C of O to Foggy Bottom Grocery, LLC ("FoBoGro" or "Intervenor"), thereby permitting the use of the premises at 2140 F Street, N W ("subject property") for a "Retail Grocery Store (sales of cigarettes and medicine) with accessory prepared food shop." Exhibit No 16, Attachment No 11. The Appellant claims that the 2009 C of O improperly expands the use of a nonconforming one-story grocery store into a three-story grocery store with an accessory prepared food shop without the necessary zoning relief from the Board of Zoning Adjustment ("Board").

The Board heard the appeal on February 23, 2010 and, for the reasons stated below, voted 4-0-1 to deny the appeal.

FINDINGS OF FACT

The Subject Property

1 The subject property is owned by The George Washington University ("GWU") and is

441 4th Street, N W , Suite 200/210-S, Washington, D C 20001

Telephone (202) 727-6311

Facsimile (202) 727-6072

E-Mail dczra@dc.gov

Web Site www.dcoz.dc.gov

BZA APPEAL NO. 18031

PAGE NO. 2

located at address 2140 F Street, N W., in Square 81, Lot 811, and in an R-5-E zone district.

2. The building on the subject property has three stories, consisting of a basement, a first, or main, floor, and a second floor with a mezzanine or loft area over part of the second floor.¹ The building also has a second floor rear deck with exterior stairs to the ground
- 3 The basement can be entered from outside the front of the building after descending a short staircase.
4. The subject property has housed a retail grocery store since 1946.
- 5 It is not known what the zoning of the property was between 1946 and when the modern zoning map became effective on May 12, 1958, therefore, it is not known whether the grocery use was a conforming or nonconforming use between 1946 and May 12, 1958.
- 6 The 1958 map shows the property as being within the R-5-D District All R-5-D properties were rezoned into new R-5-E zones by the Zoning Commission on November 13, 1992 as a result of the publication of Zoning Commission Order No 721
7. Because a grocery store is not a matter-of-right use in any residence zone established on or after May 12, 1958, the grocery store on the subject property became a nonconforming use at least as of May 12, 1958 See, Definition of "Nonconforming Use" at 11 DCMR § 199 1
- 8 A nonconforming use may not be extended to portions of a structure not devoted to that nonconforming use at the time of the enactment of, or amendment to, Title 11 that rendered it nonconforming 11 DCMR § 2002.3
- 9 In 2009, the Intervenor purchased the existing grocery store business and subsequently entered into a lease with GWU, in order to continue the grocery store use
- 10 On August 28, 2008, the Zoning Administrator ("ZA" or "Appellee") issued a C of O to FoBoGro which had permitted all 1,835 square feet of the building on the subject property to be used as "retail, cigarettes and medicine, grocery store, sandwich shop" ("2008 C of O") Exhibit No. 16, Attachment No 3. The ZA left blank the space on the C of O that would have indicated the number of floors to be occupied by the use
11. The 2008 C of O was revoked by the ZA effective 10 days from the revocation letter of October 14, 2009 – more than a year after it was issued -- as having been issued in error. The error was that the 2008 C of O permitted a "sandwich shop" and that term does not appear in the Zoning Regulations and no eating establishment is permitted as a principal use in a residence zone

¹For zoning purposes, a basement is considered a "story " 11 DCMR § 199 1 defines "basement" as "that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade "

BZA APPEAL NO. 18031

PAGE NO. 3

12. After receiving the letter which would revoke the 2008 C of O, representatives of FoBoGro met with the ZA and explained the nature of the grocery store use intended. They provided the ZA with substantial written information about the subject property.
13. The FoBoGro representatives informed the ZA that the grocery business would sell unprocessed foods such as fresh fruits, vegetables, and meats, processed and packaged foods, beer and wine, cosmetics and toiletries, over the counter medicines, tobacco, and seasonal products
14. The FoBoGro representatives also informed the ZA that the grocery business would sell sandwiches, salads and other, similar foods, prepared fresh on the premises for off-premises consumption, but not as its principal activity.
15. The ZA was advised that the grocery operation would have display shelving, freezers, refrigerated display containers, service counters, and a food preparation area, but would not have any indoor or outdoor seating and would not engage in any type of food delivery service
16. Based upon these representations, the ZA, issued C of O No. 1000323 to the Intervenor, FoBoGro, on November 4, 2009
17. The 2009 C of O permitted FoBoGro to operate a retail grocery store with an accessory prepared food shop at the subject property. Exhibit No. 16, Attachment No 11.
18. The 2009 C of O permitted all three floors and all 1,835 square feet of the premises to be used for the grocery store and accessory prepared food shop uses. The ZA entered the number "3" as the number of floors that could be occupied by the grocery store use
19. The Appellant, WECA, timely appealed the issuance of the 2009 C of O, claiming that it, in two ways, impermissibly expands the nonconforming use without zoning relief from this Board. (1) by permitting, along with the grocery store, an "accessory prepared food shop," and (2) by permitting the nonconforming use on the basement and second floor, which Appellant asserts were not devoted to the grocery store use at the time the use became nonconforming.

The Number of Floors Devoted to a Grocery Store Use on May 12, 1958

1. As reflected in prior operations

20. The first floor has always been devoted to the grocery store use
21. There is no evidence as to whether the basement or second floor was devoted to a grocery store use when the use became nonconforming

BZA APPEAL NO. 18031

PAGE NO. 4

22. There is no evidence in the record of any use of the subject building or any part of the subject building for residential uses
23. The owner of the grocery business immediately preceding the Intervenor's purchase of the business used the main floor for display and sales, the basement for storage and food preparation, and the second floor for more inventory storage, as well as for the business office of the grocery store operation. A bathroom for the use of the owner and employees of the grocery store is also located on the second floor. Hearing Transcript at 312, lines 21-22 and 313, lines 1-12.

2. As authorized in prior certificates of occupancy

24. The record does not include the 1946 certificate of occupancy that authorized the establishment of the grocery store use or any amended certificates issued before the use became nonconforming
25. There are 11 past C of Os in the record for the grocery store use issued after the property was mapped into the R-5-D zone, dating from October 2, 1958, to September 18, 2000; the last being the C of O issued to the owner immediately preceding the Intervenor. Exhibit No. 17, Attachment G
26. Five of these C of Os, dated 1958, 1961, 1972, 1975, and 1980, authorized the use of the first floor of the building for the grocery store use. These C of Os do not address use of the basement or the second floor by the grocery store.
27. Two of the past C of Os, both issued in 1977, authorized the use of the first and second floors of the building for the "retail grocery," but do not address use of the basement.
28. Two of the past C of Os, dated 1982 and 1989, authorized the use of only the second floor of the building for the retail grocery. These C of Os do not address use of the first floor or basement by the grocery store.
29. The two most recent C of Os issued for the grocery store use, dated 1994 and 2000, authorized the use of the basement and second floor of the building for the grocery store use. These C of Os do not address the grocery store's use of the first or main floor
30. Applicants for grocery store C of Os do not typically specify where storage space will be located on their C of O applications, as storage space is considered part of the principal grocery store use
31. According to DCRA's records, no other C of Os have ever been issued for the subject building, therefore no other legal non-residential use has ever existed in the building

CONCLUSIONS OF LAW & OPINION

The Board is authorized by Section 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2008 Repl), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. The burden of proof rests with the Appellant, 11 DCMR § 3119.2.

The Appellant, WECA, appeals the issuance of the 2009 C of O to FoBoGro on November 4, 2009. That C of O permitted FoBoGro to operate a “retail grocery store (sales of cigarettes and medicine) with accessory prepared food shop” on three floors and in all 1,835 square feet of the subject building. The Appellant claims that the ZA erred in issuing the 2009 C of O because, in Appellant’s opinion, it impermissibly 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’ ... without the needed variance relief by” this Board. Exhibit No. 1, at 1.

The Appellant concedes that the grocery store use is nonconforming, which means that the use was established when the Zoning Regulations permitted a grocery store at the property, but that use subsequently became prohibited as a consequence of a change of zoning. 11 DCMR § 199.1, Definition of “Nonconforming use.” The Appellant does not contend that the grocery use was discontinued for more than three years since it became nonconforming; therefore, it has not been abandoned pursuant to 11 DCMR § 2005. As a nonconforming use, it cannot be expanded in any way without zoning relief (11 DCMR § 2000.2) nor can it be extended to portions of a structure not devoted to it at the time it became nonconforming, 11 DCMR § 2002.3

The Appellant makes two separable claims of error, both based on the grocery store’s nonconforming status. The Appellant first asserts that the addition of prepared foods, such as freshly-made sandwiches, to the grocery store use, labeled by the ZA on the 2009 C of O as an “accessory prepared food shop,” violates the prohibition on expansion of a nonconforming use set forth in § 2000.2, and/or is a “change in use” which is not permitted without zoning relief pursuant to 11 DCMR § 2003. Second, the Appellant asserts that the use of the whole building, as opposed to only the first floor, by the grocery store use, violates the prohibition on extending a nonconforming use set forth in § 2002.3.

Alleged Expansion of Use to Include Prepared Foods

The Appellant’s first claim of error must be denied because the preparation and sale of simple foods, such as the assemblage of sandwiches, for off-site consumption, is not an accessory use which has been “added” to the principal grocery store use, but is a part of that use. For this very reason, the Board recently dismissed an application to add the sale of prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs to a nonconforming grocery store use located in an R-4 zone district. *Application No 17906 of Se Y Jeong*, 56 DCR 6751(August 11, 2009)

BZA APPEAL NO. 18031
PAGE NO. 6

The Board in *Se Y Jeong* reasoned that grocery stores today sell a multiplicity of items that might not be traditionally categorized as “groceries,” such as periodicals, flowers, and DVDs and that these services become part of the principal grocery store use. The Board concluded 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” *Accord Application No 18044 Application of Rock Creek Market, LLC*, 57 DCR 3815 (April 22, 2010) (“addition of prepared foods to the store’s existing inventory of groceries constitutes a normal, customary part of the grocery store business, and will not convert the use to a prepared food shop”). Although the *Rock Creek Market* order was issued after the Board’s vote on the instant case, the Board need not ignore clear precedent when formulating the final order that actually represents its decision on a case pursuant to 11 DCMR 3125.3. (“A decision or order on an appeal or application shall be in writing.”)

Since the sale of prepared foods is part of the principal grocery store use, the designation of “accessory prepared food shop” on the C of O is unnecessary and of no legal significance. Intervenor may sell “prepared food” as that term is defined in the Zoning Regulations as a matter of right. The portion of Appellant’s appeal which contends otherwise is thus without merit and is denied.

Alleged Expansion of Use to Portions of Building not devoted to that Use on May 12, 1958

The Appellant’s second claim of error is that the 2009 C of O impermissibly allowed an extension of the alleged one-story grocery store use to all the floors of the subject building. The grocery store use was lawfully established around 1946 and the use has continued uninterrupted since then. It is not known whether the property was rezoned between 1946 and May 12, 1958. However the zoning map adopted as of the latter date shows the property in the R-5-D district in which grocery stores are not permitted.

Assuming that the grocery store use became nonconforming on May 12, 1958, the use could not thereafter “be extended to portions of a structure not devoted to that nonconforming use” as of that date. 11 DCMR § 2002.3

The Appellant, who has the burden of proof on this issue, presented no evidence as to which portions of the building were devoted to the grocery store use on the date the use became nonconforming. DCRA and the Intervenor did not demand that such evidence be presented, but instead accepted the assumption that whatever proof of past operations might exist would accurately reflect the extent of the use on the date the use became nonconforming. Specifically, both parties focused on how the recent prior tenants of the property operated the store.

As to this issue, the Board accepts the testimony of the Intervenor’s representative, who was an employee of the grocery store under the last owner, that all three floors of the building were devoted to the grocery store use. The first floor was devoted to display and sales, the basement was used to prepare food, and the second floor was used for storage of items and receipts. The

BZA APPEAL NO. 18031
PAGE NO. 7

basement also contained storage of product inventory, as well as then-unused kitchen equipment. Hearing Transcript at 312, lines 21-22, and 313, lines 1-12

The Appellant agreed with this description. In its December 15, 2009 filing, the Appellant states that the grocery use “had a grocery on one floor, one floor of storage, and one floor of offices.” Exhibit No. 13. During cross-examination, the Appellant testified that this was correct and reiterated that “[m]ost 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.” Hearing Transcript at 218, lines 17-20.

Where Appellant and the other parties disagree is whether the areas used for administrative support and storage of inventory can be considered to be devoted to the grocery store use. Appellant contends such areas are not so devoted. The Board rejects such a contention. All retail uses must have areas within which inventory is stored and administrative support provided. These areas are as integral to the retail operations as the areas where goods are displayed and sold to the public. If this store were on a single floor there would be no doubt that areas used for storage and office purposes would be considered as being devoted to a grocery store use. A different result should not occur when these support functions are on different floors.

Since there is uncontroverted evidence that the basement and the second floor were devoted to grocery store uses, and having accepted the parties’ invitation to consider the prior tenant’s operations as reflecting the store’s operations at the time the use became nonconforming, the Board concludes that all three floors of the building were devoted to the grocery store use as of that date.

DCRA also provided all of the C of Os issued since the property was mapped R-5-D. The following chart lists the C of Os in chronological order and indicates the floor or floors where the grocery use was authorized.

Year(s)	Location
1958, 1961, 1972, 1975,	First floor
1977	First and second floors
1977	First and second floors
1980	First floor
1982	Second floor
1989	Second floor
1994 and 2000	Basement and second floor

BZA APPEAL NO. 18031
PAGE NO. 8

DCRA argues that since all of the floors were mentioned in these C of Os, it must mean that all were authorized for that use in 1946. The Board considers that to be a reasonable inference. However, this argument would require the Board to find that from 1982 until the issuance of the current C of O, no C of O ever listed the first floor as the place where a portion of the grocery use was located. This omission is difficult to reconcile with the undisputed fact that the first floor has always been used for the display and sale of grocery items.

In order to make these C of Os conform to the store's actual operations, the reference to "second floor" in the C of Os issued between 1982 and 2000 must be interpreted as referring to the first floor and the reference to "first floor" in the two 1977 C of Os must be deemed a reference to the basement. This interpretation is consistent with the basement's status as the building's first story and the first floor's status as the second story. See footnote 1. Applying this interpretation to the C of Os would result in the following changes as indicated in underline:

Year(s)	Location
1958, 1961, 1972, 1975,	First floor
1977	<u>Basement</u> and <u>first</u> floors
1977	<u>Basement</u> and <u>first</u> floors
1980	First floor
1977	<u>Basement</u> and <u>first</u> floors
1982	<u>First</u> floor
1989	<u>First</u> floor
1994 and 2000	Basement and <u>first</u> floors

This would mean that no C of O ever intended to mention the true second floor (the third story). However, it would not matter if none of the C of Os had ever mentioned the first or third stories. DCRA points out that C of O applicants usually do not specify storage (or other similar ancillary space needs) on their applications, because they are considered part of the principal use. Exhibit No. 17, at 6. Therefore, it follows that a C of O issued for a grocery store need not specify that a particular floor, story, or part of a building be used for storage, but it may still be so used, as such use would constitute a part of the principal use for which the C of O was issued.

This interpretation is reasonable as applied to this property. It would be a poor business decision, which, in this case, would have been repeated many times over the course of 51 years, from 1958 to 2009, to leave two-thirds of a property vacant, while putting one-third of the property to a retail use. The Board finds it unlikely that applicants for the C of Os that referenced only the first floor (either by calling it the first floor or referring to it as the second floor) intended to leave the basement and actual second floor unused, and in fact there is no evidence of a different use in either of these areas. See, e.g., Hearing Transcript, at 221, lines

BZA APPEAL NO. 18031

PAGE NO. 9

17-21, 239, lines 7-22; 240, lines 1-3; 241, lines 18-22, 242, lines 17-21, 290, lines 20-22, and 291, lines 1-8.

In any event, the expansion limitation of § 2002.3 is based upon the areas actually devoted to a use that later became nonconforming, not the areas listed on a C of O as encompassing that use. The Board has already resolved that all three floors were devoted to the grocery store use when that use became nonconforming.

Therefore, as to the C of O that is the subject of this appeal, the Board agrees with the ZA that, similar to simple food preparation, ancillary storage and office uses are “indeed ... allowable aspects of the primary grocery store use.” Hearing Transcript at 264, lines 11-13. Although the use of the basement and second floor for these purposes need not have been specified on the current C of O, the ZA properly concluded that the C of O should reflect the entire area that had been, and which may continue to be, lawfully devoted to grocery store uses. No error was made in doing so

Great Weight

The Board is required to give “great weight” to issues and concerns raised by the affected Advisory Neighborhood Commission (“ANC”) and to the recommendations made by the Office of Planning (“OP”). D.C. Official Code §§ 1-309 10(d) and 6-623 04 (2008 Repl) Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. OP does not participate in appeals ANC 2A, the ANC within which the subject property is located, filed a report with the Board dated January 26, 2010. Exhibit No 14 After noting that the ANC supports the business objectives of the owner of FoBoGro, the ANC Report takes no position on the appeal Therefore, there is nothing to which the Board can accord great weight.

For the reasons stated above, the Board concludes that the Appellant did not meet its burden of demonstrating that DCRA erred in issuing C of O No. 1000323 to FoBoGro, for a retail grocery store with accessory prepared food shop. The Board directs the ZA, however, to issue a new C of O to FoBoGro, eliminating the allusion to an “accessory prepared food shop,” as the Board now holds that simple prepared food items, such as those to be prepared, assembled, and sold from the subject grocery store constitute a part of the principal grocery store use, and do not constitute an “accessory use” to that principal use

It is hereby **ORDERED** that this appeal be **DENIED**, and that (1) a new certificate of occupancy be issued to Foggy Bottom Grocery, LLC for a retail grocery store, including prepared foods, and (2) the allusion to an “accessory prepared food shop” be eliminated

VOTE: 4-0-1

(Meridith H Moldenhauer, Michael G Turnbull, Marc D. Loud,
and Nicole C. Sorg to Deny; Shane L Dettman not participating)

BZA APPEAL NO. 18031

PAGE NO. 10

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT

A majority of Board members has approved the issuance of this Order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: AUG 24 2010

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.