



BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA



FORM 125 - APPEAL

Before completing this form, please review the instructions on the reverse side.
Print or type all information unless otherwise indicated.

Pursuant to §§ 3100 and 3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken from the

administrative decision of: Name of administrative officer and title
Matthew Le Grant, Zoning Administrator, Department of Consumer and Regulatory Affairs

made on Date of decision May 13, 2011 that states "the fast food establishment use at Peking Garden at 2008 18th St NW, which was authorized by the issuance of Certificate of Occupancy CO54337, is a lawful use under the Zoning Regulations."

Address(es) of Affected Premises	Square(s)	Lot(s)	Zone Districts
2008 18th Street, NW	2555	47	C-2-A

Present use of Property: Fast food establishment, including food deliveries

Proposed use of Property: N/A

Name of Owner of Property: Messrs. James M. Washington and Barry J. Washington

Address: 2900 Hatboro Place, Upper Marlboro, MD 20774

Phone No(s): 301-574-0601 Fax No.: Unknown E-Mail: Unknown

Name of Lessee: Mei Qu Zheng t/a Peking Garden Carryout

Address: 2008 18th Street, NW, Washington, DC 20009

Phone No(s): 202-588-0888 Fax No.: Unknown E-Mail: Unknown

Name of Appellant, if other than Owner: Advisory Neighborhood Commission 1C

Address: P.O. Box 21009, Kalorama Station, Washington, DC 20009

Phone No(s): 202-340-7476 Fax No.: None E-Mail: WReynoldsANC@aol.com

I/We certify that the above information is true and correct to the best of my/our knowledge, information and belief. Any person(s) using a fictitious name or address and/or knowingly making any false statement on this appeal is in violation of D.C. Law and subject to a fine of not more than \$1,000 or 180 days imprisonment or both. (D.C. Official Code § 22-2405)

Date: June 6, 2011 Signature of Appellant*: *W Reynolds*

To be notified of hearing and decision (Appellant or Authorized Agent*):

Name: Wilson Reynolds, Chairperson - Advisory Neighborhood Commission 1C

Address: P.O. Box 21009, Kalorama Station, Washington, DC 20009

Phone No(s): 202-340-7476 Fax No.: None E-Mail: WReynoldsANC@aol.com

* If an appeal is filed by the agent of the Appellant, Form 125 - Appeal shall be accompanied by a letter signed by the Appellant authorizing the agent to act on its behalf in this appeal.

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

FOR OFFICIAL USE ONLY

Board of Zoning Adjustment
District of Columbia
CASE NO. 18256
EXHIBIT NO. 1

Exhibit No. 1

Case No.

18256

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

**APPEAL OF)
ADVISORY NEIGHBORHOOD COMMISSION 1C)
FROM A DETERMINATION OF THE)
ZONING ADMINISTRATOR PERTAINING TO)
MEI QU ZHENG T/A PEKING GARDEN CARRYOUT)
2008 18TH STREET, NW, WASHINGTON, DC 20009)
CERTIFICATE OF OCCUPANCY #CO 54337)
SQUARE 2555, LOT 0047 (C-2-A))**

INTRODUCTION

Advisory Neighborhood Commission 1C (ANC 1C), representing the Adams Morgan community, files this Appeal pursuant to sections 3100 and 3200 of the Zoning Regulations (11 DCMR §§ 3100, 3200) from a determination of the Zoning Administrator, rendered via electronic mail on May 13, 2011, holding that “the fast food establishment use at Peking Garden, at 2008 18th St NW, which was authorized by the issuance of Certificate of Occupancy CO54337, is a lawful use under the zoning regulations.” A copy of the Zoning Administrator’s determination and accompanying explanation is attached hereto.

The Chairperson, Vice Chairperson, and members of ANC 1C’s Planning, Zoning, and Transportation (PZT) Committee were notified of this determination via e-mail from the Zoning Administrator on May 13, 2011, and ANC 1C considered the matter further at its regularly scheduled, publicly-noticed monthly meeting on Wednesday, June 1, 2011, during which the ANC voted by a roll call vote of 5-0, a quorum being present, to approve the attached Resolution authorizing its Chairperson and/or Vice Chair to file this appeal. The grounds for the Appeal are stated in further detail below.

FACTUAL BACKGROUND

On November 9, 1979, the then-owner of the premises in question, Mr. James M. Washington, was issued a Certificate of Occupancy (No. B117084) “for the following purpose(s): Retail Food Delicatessen; Carryout (No Seating).” At some later time, but at least by 1997, Mr. Washington discontinued the operation of that business, and the premises at 2008 18th Street, NW remained vacant for a period of at least six if not more years. The premises are located in a C-2-A District, and the rear of the property directly abuts an R-5-B District.

Beginning with an amendment to the Zoning Regulations in 1985, carryouts ceased to be a use category recognized by the regulations and a new use encompassing carryout service, known as “fast food establishments,” were no longer permitted as a matter of right in C-2-A Districts but rather required a special exception. Beginning with a further amendment in 1993, a “food delivery service” in a C-2-A District likewise required a special exception. Under sections 733.8, 733.9, 734.7, and 734.8 of the Zoning Regulations, approval of a special exception for these uses in a C-2-A District requires “sufficient off-street parking . . . to accommodate the needs of patrons and employees” and “no dangerous or other objectionable traffic conditions.”

Despite these requirements, on May 13, 2003, Mr. Mei Qu Zheng filed an application for a Certificate of Occupancy at the same premises for the operation of a sole proprietorship with the trade name “Peking Garden Carryout.” The proposed use indicated on the application was “Carryout, No Seating.” The documentation associated with the Peking Garden application indicates that on the same day as the application was filed, dated, and signed by Mr. Zheng – May 13, 2003 – an examiner in the DCRA Zoning Division by the name of “R. Joseph” accepted

the application for filing, received an issuance fee of \$42.00, indicated that inspections were required, approved the electrical and fire inspections (the building and plumbing inspections apparently having been approved on April 29th), and issued a new Certificate of Occupancy (No. CO 54337) to “Sole Proprietor: Mei Qu Zheng” to operate his business, “Peking Garden Carryout,” with a use description of “Carryout No Seating.”

The Peking Garden C of O indicates that it was issued pursuant to a “Change of Ownership” – but this is curious because there was no change of ownership of either the property itself or Mr. Washington’s previous and long-discontinued business, the Fish Hut Deli. In fact, Mr. Zheng himself did not check the “Ownership Change” box on the C of O application form, instead checking the box for a “New Bldg”. And contrary to the approved use on the new C of O, Peking Garden shortly after its opening also began offering food delivery service. Nonetheless, the business operated fairly uneventfully for most of the last several years, providing no reason for neighboring residents or the ANC to investigate the circumstances and legal status surrounding Peking Garden’s C of O.

Then, within the last several months, Mr. Zheng, his wife, and Peking Garden’s delivery drivers began using the narrow adjacent alley, located between the 1800 blocks of Vernon and California Streets, NW as, in effect, their parking lot. Their vehicles would regularly block ingress to and egress from the alley for the vehicles of residents on the neighboring streets and for other vehicles seeking to use the alley. On occasion, their delivery cars would actually block the sidewalk at the alley exit on 18th Street, NW, requiring pedestrians to enter the roadway before continuing on their way. Until recent streetscape construction began on 18th Street, their

cars would even parallel-park on 18th Street by backing into the space where the alley curb cut is located. And their drivers would regularly travel through the alley at high rates of speed, endangering residents and other pedestrians, as well as pets.

After failing to persuade the proprietor and his delivery drivers to cease and desist from these unlawful activities, a neighboring resident researched the status of Peking Garden's use, C of O, and the applicable zoning regulations, and sought zoning enforcement from the Zoning Administrator to put an end to these abuses. Several months and e-mails later, after unsuccessful efforts to obtain such relief from the Zoning Administrator, that resident sought assistance from his ANC Commissioner, ANC 1C Vice Chair Stacey A. Moye, and other members of the ANC, including Chairperson Wilson Reynolds. Following a May 2, 2011 duly-noticed public meeting of the ANC's Planning, Zoning, and Transportation (PZT) Committee at which this matter was discussed at length, Chairperson Reynolds sought a further response from the Zoning Administrator and other DCRA officials to various questions being raised by the neighboring resident. On May 13, 2011, the Zoning Administrator responded to the resident, Commissioner Moye, Chairperson Reynolds, and the other Commissioners on the PZT Committee, rejecting certain of the arguments being proffered for zoning enforcement, failing to respond to others (or to questions about others), and stating as follows:

“Except for the investigation of the possible food delivery service use, I have determined that the fast food establishment use at Peking Garden, 2008 18th St NW, which was authorized by the issuance of Certificate of Occupancy CO 54337, is a lawful use under the zoning regulations. Appeals of my determination may be made to the Board of Zoning Adjustments [sic], in accordance with the requirements of Chapter 31 of Title 11.”

At its regularly scheduled, duly-noticed monthly public meeting on Wednesday, June 1, 2011, ANC 1C voted by a roll call vote of 5-0, a quorum being present, to approve the attached Resolution authorizing its Chairperson and/or Vice Chair to file this appeal.

EXCEPTIONS TO THE ADMINISTRATIVE DECISION

The Zoning Administrator's May 13th determination was erroneous in several respects, as follows:

- 1) The authority for issuance of a "change of ownership" C of O appears to reside in section 1402.3 of the Zoning Regulations, "provided there is no proposed change in use or occupancy load." But in this case, there was no change of ownership – of either the premises or the business being operated on the premises, the latter having been discontinued at least six years prior to the 2003 Peking Garden application. Thus, the C of O itself is invalid on its face as a "change of ownership" C of O.
- 2) In the absence of a change of ownership, the only other authority for allowing a prior use to be continued under a C of O even after that use would no longer be allowed as a matter of right is found in section 3203.8. But that authority is subject to several conditions, one of which is that "[t]he use shall be designated in the certificate of occupancy in terms of a use classification that is established by this title" (section 3203.8(a)) and another of which is that "[a]ny amendment of the use authorized by the certificate shall comply with the provisions of this title in effect on the date that the certificate is amended" (section 3203.8(c)). Since "carryout" was no longer a use classification in effect in May 2003 – indeed, it was a classification that no longer existed at that point – it was improper for the Peking Garden C of O to designate the approved use as a "carryout." And if DCRA had more appropriately amended the use to designate Peking Garden as a "fast food establishment," that amendment of the C of O would no longer comply with Title 11 because in May 2003 it was no longer a matter of right use in a C-2-A District but rather would have required a special exception.
- 3) Even if section 3203.8 formed the ostensible basis for issuance of the 2003 C of O, section 3203.10 goes on to provide that such a C of O "shall not be renewable if permitted to lapse unless processed in accordance with all provisions of this title." The term "lapse" is not defined in the Zoning Regulations, leaving us under section 199.2(g) to consult Webster's Unabridged Dictionary, which defines "lapse" to mean "the termination of a right or privilege through neglect to exercise it within some period of time"; "interruption"; or "discontinuance". While the relevant "period of time" is not specified by Webster's or the regulations, some persuasive authority can be found in section 2005.1, which as to nonconforming uses provides that "[d]iscontinuance . . . for any period of more than three (3) years, shall be construed as prima facie evidence of no

intention to resume active operation.” And in any event, a failure to operate one’s business on the subject premises and maintenance of those premises in a vacant state for six years or longer should certainly be construed as a “lapse.” Had the Zoning Administrator done so, Peking Garden’s application would have been required to go through the special exception process.

- 4) The Zoning Administrator rejected the claim that Peking Garden’s use of the premises as a carryout or fast food establishment was nonconforming on the grounds that the definition of “nonconforming use” under section 199.1 specifically excludes “a use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment.” The Zoning Administrator, however, ignored the final sentence of that definition, which provides: “That nonconforming use shall be considered a conforming use, *subject to the further provisions of §§ 3104.2 and 3104.3.*” (Emphasis added.) Those sections state:

“3104.2 - In the case of a use that was originally permitted and lawfully established as a matter of right and for which the Zoning Regulations now require special exception approval from the Board of Zoning Adjustment, *any extension or enlargement of that use shall require special exception approval from the Board.*

“3104.3 – In determining whether to approve any extension or enlargement under §3104.2, the Board shall apply the standards and criteria of the Zoning Regulations to the entire use, rather than to just the proposed extension or enlargement.”

It is evident that Peking Garden’s provision of food deliveries had the effect of significantly extending and/or enlarging its permitted use beyond the “Carryout No Seating” originally approved in the “change of ownership” C of O. The Zoning Administrator should have ruled that offering food delivery, whether or not a “food delivery service” as defined in section 199.1 of the Zoning Regulations, constituted an extension or enlargement requiring special exception approval under sections 3104.2 and 3104.3.

- 5) While the Zoning Administrator in his determination insisted that the three-year discontinuance provision in section 2005.1 was inapplicable to this case by its own terms – because it applies only to a “nonconforming use” and, under his reading of that definition in section 199.1 (as discussed above) Peking Garden was not engaged in such a nonconforming use, his narrow and cramped reading of section 2005.1 exalts form over substance and ignores another essential provision of the regulations – namely, section 2000.2, which reads:

“Within the districts established by this title, or in amendments that may later be adopted, there exist structures, uses of land, and uses of structures that were lawful before this title was adopted or amendment, but that would be prohibited, regulated, or restricted under the terms of this title or future

amendments to this title. *It is the intent of this title that nonconformities may not be enlarged upon, expanded, or extended, nor may they be used as a basis for adding other structures or uses prohibited elsewhere in the same district.*” (Emphasis added.)

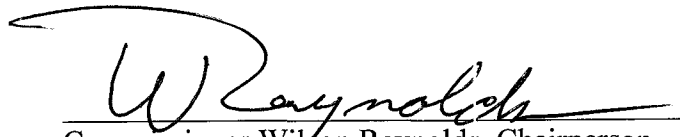
The Zoning Administrator and the BZA should give the discontinuance provision of section 2005.1 the full meaning and import it deserves, based on the strong intent reflected in section 2000.2 above.

For all these reasons, the determination of the Zoning Administrator was erroneous and should be reversed. Peking Garden’s C of O, No. CO54337, should accordingly be revoked pursuant to section 1406.1, which states that any C of O may be revoked “if the actual occupancy does not conform with that permitted or because of any misrepresentation in the application having a substantial bearing on the safety of the occupancy, or if due to any material circumstances, it is found to have been issued in error.”

HOW THE APPLICANT INTENDS TO PROVE ITS CASE

Much of this case rests upon interpretations of the Zoning Regulations. However, in laying the factual foundation for the BZA’s consideration of those legal issues, ANC 1C will rely on the sworn testimony of witnesses, including neighboring residents, certified copies of the C of O applications submitted by Mr. Washington and Mr. Zheng, as well as certified copies of the C of Os they were each granted, and other photographic and documentary evidence.

Respectfully submitted,



Commissioner Wilson Reynolds, Chairperson
Advisory Neighborhood Commission 1C

Date: June 6, 2011

From: LeGrant, Matt (DCRA) [mailto:matt.legrant@dc.gov]
Sent: Friday, May 13, 2011 3:36 PM
To: Roth, Alan; Moye, Stacey (ANC 1C01)
Cc: slanning@malaborers.org; Kathie.boettrich@gmail.com; Majett, Nicholas (DCRA); Bellow, Justin (DCRA); wreynoldsanc@aol.com
Subject: RE: Peking Garden, 2008 18th Street, NW

Stacey Moye and Alan Roth:

In recent communications I was asked to review the use at 2008 18th St NW as to its compliance with the District's zoning regulations. Specifically, I was asked whether Peking Garden should be treated as a non-conforming use and what effect a lapse in the operation of the business would have on the validity of the Certificate of Occupancy.

The carry-out or fast-food establishment use at was established in 1979, by the issuance of Certificate of Occupancy B117084, which was prior to the 1986 amendment to the Zoning regulations that required fast-food establishments in C-2-A districts to secure a special exception relief from the BZA. Peking Garden assumed the rights to operate the fast food establishment use with the issuance of C of O #54337 on May 13, 2003. The use, therefore, is grandfathered and is allowed to continue.

The definition of nonconforming use, which is set forth in the Zoning Regulations, under 11 DCMR 199.1 states:

Nonconforming use - any use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective, that does not conform to the use provisions for the district in which the use is located. *A use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use.* That nonconforming use shall be considered a conforming use, subject to the further provisions of §§ 3104.2 and 3104.3. [Emphasis added in *italics*.]

Since the use was established in 1979, prior to the 1986 amendment to the Zoning regulations that required fast-food establishments in C-2-A districts to secure a special exception, the use cannot be classified as a non-conforming use, in accordance with the above definition. Therefore, since the discontinuance regulations cited in 11 DCMR 2005.1 apply to non-conforming uses only, they do not apply to Peking Garden because it is not a non-conforming use.

Even though the business may not have been in operation continuously since the fast food establishment was originally established in 1979, the use has not lapsed. Based on past rulings by the Board of Zoning Adjustments, established Certificates of Occupancy and their approved uses are continuously recognized even during periods of vacancy, unless a building permit or Certificate of Occupancy was issued denoting a change in use, or if the building was razed. Neither of these occurred in this case.

Mr. Roth also raised questions about the nature of the business, asserting that the business might be improperly classified as a fast food establishment and that the amount of delivery that the business does, may instead qualify it as a food delivery service. DCRA has initiated an investigation of this aspect, and I expect the results by the end of this month, which I will report to you.

Except for the investigation of the possible food delivery service use, I have determined that the fast food establishment use at Peking Garden, at 2008 18th St NW, which was authorized by the issuance of Certificate of Occupancy CO54337, is a lawful use under the zoning regulations. Appeals of my determination may be made to the Board of Zoning Adjustments, in accordance with the requirements in Chapter 31 of Title 11.

Best Regards,

Matthew Le Grant

Zoning Administrator

Dept of Consumer and Regulatory Affairs

Government of the District of Columbia

1100 4th St SW - Room 3100

Washington, DC 20024

Phone: 202 442-4652

FAX: 202 442-4871

Email: matt.legrant@dc.gov

ANC 1C
Resolution Authorizing Appeal of Zoning Administrator Decision In Re: Certificate of Occupancy for Peking Garden

WHEREAS, a sole proprietorship operates under the trade name Peking Garden at 2008 18th Street, NW, within the boundaries of Advisory Neighborhood Commission 1C and Single Member District 1C01, and provides fast-food and delivery services from that location; and

WHEREAS, Peking Garden is located in a C-2-A Zone, where fast-food and food delivery services are not permitted as a matter of right under current zoning regulations and instead would require a special exception to operate legally; and

WHEREAS, the owner of the building had obtained a Certificate of Occupancy for a “retail food, delicatessen, carryout” use in 1979, prior to an amendment to the Zoning Regulations that took effect in 1985 disallowing such uses as a matter of right in a C-2-A Zone and instead requiring a special exception; and

WHEREAS, in May 2003, the Department of Consumer and Regulatory Affairs granted to Peking Garden a so-called “change of ownership” Certificate of Occupancy that had the effect of reviving a “retail food, delicatessen, carryout” use that had been discontinued and abandoned by the owner of that building more than six years prior to 2003, thus causing the 1979 C of O to lapse; and

WHEREAS, the current establishment has extended and enlarged the previously authorized, but abandoned, use by opening a fast food establishment and by offering extensive food delivery service; and

WHEREAS, no actual change of ownership occurred in 2003, either with respect to ownership of the building or ownership of the business; and

WHEREAS, the foregoing circumstances suggest that the “change of ownership” C of O was issued erroneously by DCRA; and

WHEREAS, in an April 7, 2011 e-mail to a neighboring resident, the Zoning Administrator determined that Peking Garden is a lawful fast-food establishment which has a valid Certificate of Occupancy, and reaffirmed that determination in a further e-mail dated May 13, 2011 and addressed to that resident, his ANC Commissioner, and the members of the ANC’s Planning, Zoning and Transportation (PZT) Committee; and

NOW, THEREFORE, BE IT RESOLVED, that ANC 1C hereby authorizes its Chairman, and/or Vice Chair to file with the Board of Zoning Adjustment an appeal of the Zoning Administrator’s above determinations, on the grounds set forth above or on such other grounds as shall be established by further investigation, and within sufficient time after approval of this Resolution to protect the rights of ANC 1C and the community.

APPROVED on June 1, 2011

Roll call vote of 5-0

Voting AYE Reynolds, Lanning, Kamanda, Mossi, Davis

CERTIFICATE OF SERVICE

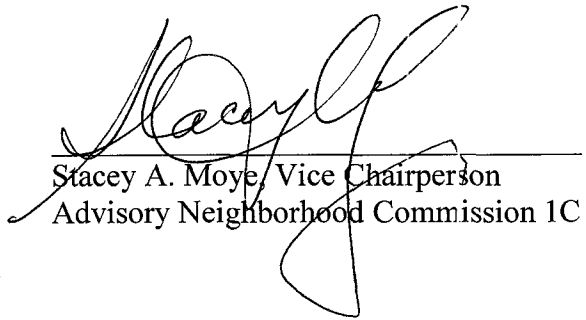
This is to certify that, in accordance with 11 DCMR § 3111.3, the foregoing Appeal and accompanying attachments were served by first class mail, deposited in the United States mail and properly stamped and addressed, on the following persons, this 6th day of June, 2011:

Mr. Matthew Le Grant
Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th Street, SW – Room 3100
Washington, DC 20024

Mr. Mei Qu Zheng t/a Peking Garden Carryout
2008 18th Street, NW
Washington, DC 20009

Mr. James M. Washington
2900 Hatboro Place
Upper Marlboro, MD 20774

Mr. Barry J. Washington
2900 Hatboro Place
Upper Marlboro, MD 20774



Stacey A. Moye, Vice Chairperson
Advisory Neighborhood Commission 1C