

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**
441 4th Street, N.W.
Washington D.C. 20001

2012 JAN -5 AM 11:52

Appeal of ANC 1C

Appeal No. 18256

DISTRICT OF COLUMBIA'S MOTION TO DISMISS

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully submits its motion to dismiss the appeal filed by the Appellant, Advisory Neighborhood Commission 1C ("ANC 1C") on June 6, 2011. In its appeal, ANC 1C asks the Board to revoke Certificate of Occupancy no. 54337 (the "2003 CO") issued to Peking Garden Carryout ("Peking Garden") on May 13, 2003 as it believes it was issued in error. Where an ANC believes a certificate of occupancy was issued in error, it can file an appeal (at no cost) with the Board; however, such appeal must be filed within 60 days. *See* 11 DCMR § 3112.2(a). An appeal cannot be properly brought more than 8 years after the issuance of a certificate of occupancy. Accordingly, the Board must dismiss this appeal as untimely.

DCRA's records show that since 1979 two certificates of occupancy have been issued for 2008 18th St., NW (the "Property"). First, on November 9, 1979, CO no. B117084 (the "1979 CO") was issued to James M. Washington permitting a "retail food delicatessen; carryout (no seating)" called Fish Hut Deli. *See Exhibit A* attached hereto. Then, on May 13, 2003, DCRA issued the 2003 CO to Mei Qu Zheng permitting a "carryout (no seating)" called Peking Garden

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Carryout.¹ See Exhibit B attached hereto. Appellant alleges that Fish Hut Deli closed in 1997 and the Property was vacant until Peking Garden's occupancy.

In its appeal, Appellant raises several objections to the 2003 CO. Specifically, Appellant asks the Board to revoke the 2003 CO because 1) The change of ownership designation on the 2003 CO is in error; 2) "Carryout" was not was not a use classification recognized by the Zoning Regulations when the 2003 CO was issued; 3) The CO was issued in error because Peking Garden's right to operate a fast food establishment at the Property lapsed; 4) Peking Garden's use of the Property is not nonconforming as defined by § 199.1; and 5) that the 2003 CO should not have been issued because the of the discontinuance provision of § 2005.1. See Appellant's Appeal dated June 6, 2011 ("Appeal") at p. 5-7.

Peking Garden was been operating under the 2003 CO since it was issued. Accordingly, all of the Appellant's objections to DCRA's review and issuance of the 2003 CO should have been raised at the time it was issued.

Timeliness is a jurisdictional issue. When an appeal is not timely filed, the Board lacks jurisdiction to hear it. See *Economides v. D.C. Bd. of Zoning Adjustment*, 954 A.2d 427, 434-435 (D.C. 2008). Under 11 DCMR § 3112.2(a), an appeal of a decision concerning the Zoning Regulations must be filed within sixty days from the date the person "reasonably should have had notice or knowledge of the decision complained of." Here, the decision to grant Peking Garden's certificate of occupancy was made in May 2003. In addition to the issuance of the 2003 CO, the fact that Peking Garden has been openly operating in Appellant's community since 2003 served as additional notice of DCRA's decision and eviscerates any potential claim of the

¹ A "carryout" is a use synonymous that of a "fast food establishment". The term "carryout" was removed from the Zoning Regulations in 2007. See Zoning Commission Order no. 6-23 (effective September 28, 2007).

presence of “exceptional circumstances” that would warrant an extension of the filing deadline in this case.

The ANC acknowledges that the Peking Garden, a small Chinese fast-food establishment, has been operating uneventfully for years. So why now does the ANC raise a challenge to the Peking Garden’s 8 ½ year old certificate of occupancy? In their appeal, the ANC matter-of-factly explains its motivation. The ANC believes that Peking Garden has recently been a bad neighbor with respect to its use of an alley. *See* Appeal at p. 3. Apparently, the ANC believes that delivery drivers are blocking access to the alley and are driving too fast down the alley. *Id.* at p. 3-4. Assuming this is true, one can imagine that this use of the alley may be frustrating for neighbors of the restaurant; however, filing an untimely and frivolous appeal with this Board does nothing to resolve these issues concerning the use of the alley.

Appellant is attempting to use the Zoning Administrator’s email of May 13, 2011 to revive its opportunity to appeal; however, this email did not contain any new administrative “determinations” or “decisions” that could give rise to an appeal. In his May 13th email, the Zoning Administrator was responding to an inquiry from Alan Roth, the ANC’s attorney in this matter, as to the validity of the 2003 CO. In that email the Zoning Administrator explained that Peking Garden’s 2003 CO is valid and was properly issued. This was not a new decision, but rather is an affirmation of the original decision to issue the certificate of occupancy. The Board has previously held that such affirmations are not separately appealable and do not re-start the 60-day appeal period. *Appeal No. 17966-A of Stephen Bruce* at p. 2 (September 13, 2010) (emails from DCRA staff confirming validity of permit do no re-start appeal period); *see also Appeal no. 16982 of J. Brendan Herron Jr. and ANC 3F* at p. 9-10 (March 11, 2003).

In Herron, the Board ruled that the purpose of the 60-day appeal period from the date of the *original* decision is to ensure that permit holders can exercise their rights free from the risk that a subsequent confirmation of those rights by DCRA would give rise to a new opportunity to appeal. *Appeal no. 16982 of J. Brendan Herron Jr. and ANC 3F* at p. 9. In that case, a neighbor and the ANC objected to a building permit issued by DCRA. Because the appellants failed to file a timely appeal of the issuance of the building permit, they characterized their claim as an appeal of DCRA's subsequent refusal to revoke the permit. *Id.* The Board dismissed the appeal as untimely, stating that "The Board does not find it in the interests of judicial economy or fairness to allow an appeal of a second or subsequent determination on the same basic issue, which can come months or years after the initial determination[.]" *Id.* The same principle must be applied here. In his May 13th email the Zoning Administrator was simply confirming the validity of the 2003 CO and Peking Garden's rights to operate under it, thus the appeal is time barred.

In this case, Appellant is asking the Board to revoke a certificate of occupancy for a business that has been operating under that certificate of occupancy since 2003. Allowing an angry neighbor or ANC, on a whim, to drag a long-established small business before this Board for a hearing on whether its certificate of occupancy will be revoked does little else than create burdensome litigation and uncertainty for businesses across the District. To allow this appeal to go forward creates the exact type of uncertainty that the Board squarely rejected in Herron.²

For these reasons, the appeal must be dismissed.

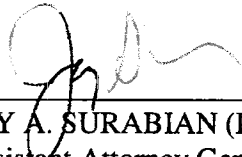
² In the event the Board does not follow its precedents in Herron and Bruce, the appeal is still untimely as Mr. Roth was informed in writing by the Zoning Administrator's staff that the 2003 CO was in compliance as early as February 28, 2011 (more than 60 days prior to the filing of this appeal). See Exhibit C attached hereto.

Respectfully Submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

MELINDA M. BOLLING
General Counsel

January 5, 2012



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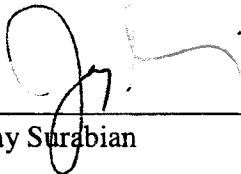
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by email and/or first class mail, this 5 day of January 2012, to the following:

ANC 1C
c/o Alan Roth, Esq.
P.O. Box 21009, NW
Washington, DC 20009
aroth@ustelecom.org

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

Bradley Thomas, Esq.
4201 Connecticut Ave., NW
Washington, DC 20008
batlaw@bradleythomaslaw.com



Jay Surabian

CERTIFICATE OF OCCUPANCY

No. **8117084**

Washington, D.C., **Nov. 9,** 19 **79**

Permission is hereby granted to **James M. Washington**
to use the **1st floor** floor(s) of the building located on Lot **47** Square **2555**
known as premises **2008 18th St NW** for the following
purpose(s): **Retail Food ~~Store~~ Delicatessen; CarryOut (No Seating)**

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES
AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated,
ONLY for the premises, or part thereof, and for the purpose(s), indicated
above, and IS NOT TRANSFERABLE to another person or premises under ANY
conditions. ANY CHANGE in the type of business, ownership of business, or
part of premises used therefor, will render this Certificate VOID and a NEW
Certificate must be obtained.

DEPARTMENT OF LICENSES, INVESTIGATIONS AND INSPECTIONS, GOVT. OF DIST. OF COL.
OFFICE COPY.

ZONE

FEE \$ **20.00**

C2A
[Signature]
Chief, Permit Branch
Permit Clerk

A

Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
344 North Capitol Street, N.E. Room 2100
Washington, D.C. 20002
Tel: (202) 442-2470 Fax: (202) 442-4063

Consumer
Protection
Division
BUREAU

C of O

B

CERTIFICATE OF OCCUPANCY

PERMIT NO.

CO 54337

THIS PERMIT IS VALID ONLY FOR THE PREMISES
OF THE PROJECT ADDRESS

DATE: 5/13/2003

ADDRESS:	FLOOR(S):	PKCLID: 2555	-0000-	0047
2008 18TH ST NW	1ST FL	(square)		(sq)
		WARD: 1	ZONE: C2A	

PERMISSION IS HEREBY GRANTED TO:	TRADING AS:
SOLE PROPRIETOR: MEI QU ZHENG	PEKING GARDEN CARRYOUT

APPROVED USES:	PREVIOUS USES:
OTHER - SEE DESCRIPTION	OTHER - SEE DESCRIPTION

TYPE:	BZ NO:	OCCUPIED SQ FOOTAGE:	OCCUR LOAD:	EXPIRATION DATE:
CHANGE OF OWNERSHIP		745		NONE

DESCRIPTION OF USE:	FEE:
CARRYOUT NO SEATING	\$75.00

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, VALID ONLY for the Premise at the above address or part thereof, and for the purpose(s) indicated above, and IS NOT TRANSFERABLE to another premise or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

David A. Clark DIRECTOR	PERMIT CLERK: THINGOC NACHOAN
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Surabian, Jay (DCRA)

From: Bellow, Justin (DCRA)
Sent: Monday, February 28, 2011 11:46 AM
To: Roth, Alan
Cc: LeGrant, Matt (DCRA)
Subject: RE: Peking Garden, 2008 18th Street, NW

Mr. Roth,

New fast-food establishments in C-2-A zones are, as you put forth in your email, not a matter of right use and would require a special exception from the Board of Zoning Adjustments. After our conversation on Friday, I had the opportunity to look at the C of O history for 2008 18th St NW. Based on your characterization of the business, I believe that they are properly permitted as a "carryout"/ "fast food establishment" because a valid C of O allowing a fast food establishment predated changes in the zoning regulations that disallowed these types of establishments in C-2-A zones.

The changes in the zoning regulations that disallowed fast food establishments in C-2-A went into effect in 1985. Any fast food establishment that was already in existence in a C-2-A zone was allowed to remain in operation. In 1979, a C of O was issued for 2008 18th St NW for "retail food, delicatessen, carryout" use. In 2003, a change of ownership C of O was issued for "carryout" use.

Since the carryout or fast food establishment use was established prior to 1985, the business is exempt from the 1985 zoning code changes and is properly permitted.

If you have questions or would like to discuss this further, please contact me.

Best regards,

Justin Bellow
Government of the District of Columbia
Office of the Zoning Administrator | Department of Consumer and Regulatory Affairs
1100 4th St SW, 3rd Floor | Washington, DC 20024
W 202.442.4576 | F 202.442.4871 | justin.bellow@dc.gov

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Call **911** to report in-progress threats or emergencies.

To learn more, visit <http://www.mpdcc.dc.gov/operationtipp>.

From: Roth, Alan [<mailto:aroth@ustelecom.org>]
Sent: Friday, February 25, 2011 4:25 PM

To: Bellow, Justin (DCRA)
Cc: LeGrant, Matt (DCRA)
Subject: FW: Peking Garden, 2008 18th Street, NW

Justin,

Thanks again for your call earlier this afternoon, and for letting me expand on my description of the situation I wrote to Mr. LeGrant about.

Just to clarify, and as we discussed, the reason I'm fairly certain that this use is illegal is because the establishment almost certainly fits the Zoning Regs' definition of "fast food restaurant" – "a place of business, other than a 'prepared food shop,' where food is prepared on the premises and sold to customers for consumption and at least one of the following conditions apply:

"(a)

"(b) Customers pay for the food before it is consumed. One characteristic that would satisfy this element would be building permit plans that depict a service counter without seating unless the applicant certifies that the intended principal use is for a restaurant or grocery and that the counter is part of a carry out service that is clearly subordinate to that principal use; or

"(c) Food is served on/in anything other than non-disposable tableware. Characteristics that would satisfy this element include, but are not limited to: the building permit plans do not depict a dishwasher or do depict trash receptacles in public areas."

It will be obvious to any inspector that approximately 80-90% of the GFA in this establishment consists of the kitchen and front counter, at which orders are taken and payment is made when food is delivered to walk-in customers, and where bags of prepared food are handed off to delivery drivers. In the small front area between the counter and the windows/door, there are a few chairs lined up along the window ledge with no tables – essentially, a waiting area – and one small table that could accommodate two people at most. I've never seen food there served in anything other than the usual paper, Styrofoam, and plastic containers used by a carry-out or delivery service.

Although I have no ability to determine what percentage of the establishment's receipts come from food deliveries, as opposed to carry-out service, they do a very brisk delivery business, especially in the evenings. As I read the definition in the regulations, obtaining 75% of receipts from deliveries makes the establishment a "food delivery service" *per se*; but even if the delivery percentage is less than 75%, the establishment is considered a "food delivery service" if "the principal use is production of prepared food for delivery to customers located off the business premises."

Whether this establishment is a "food delivery service" may need further investigation. But the case for labeling it a "fast food restaurant" is rock-solid. And in a C-2-A District like this one, especially one abutting a Residence District, either of those uses is not a matter of right. It is only available with a special exception, which I'm pretty sure this establishment never applied for or obtained.

I hope that helps your investigators focus attention on the key issues in this complaint. And once again, I appreciate your responsiveness and your consideration.

Please let me know if there's any other information you need, or anything else I can do to get

this situation addressed.

Best wishes for a good weekend,
Alan Roth

Alan J. Roth
Senior Executive Vice President
United States Telecom Association
607 14th Street, NW - Suite 400
Washington, DC 20005
(202) 326-7300 (main)
(202) 326-7248 (direct dial)

From: Roth, Alan
Sent: Friday, February 25, 2011 10:22 AM
To: matt.legrant@dc.gov
Subject: FW: Peking Garden, 2008 18th Street, NW

Mr. LeGrant, sorry I missed your call-back this morning. I did e-mail you – sent the explanation below to you yesterday after leaving my voice mail message.

My cell # is 202-669-1650 in case you can't get me at my desk, but I'd value the opportunity to chat with you about this if there's anything about my e-mail explanation that's unclear. Alternatively, if you understand the situation I've described and would prefer to respond by e-mail, I'd just appreciate knowing what action you can take.

Thanks again,
Alan

Alan J. Roth
Senior Executive Vice President
United States Telecom Association
607 14th Street, NW - Suite 400
Washington, DC 20005
(202) 326-7300 (main)
(202) 326-7248 (direct dial)

From: Roth, Alan
Sent: Thursday, February 24, 2011 10:14 AM
To: matt.legrant@dc.gov
Cc: Michael Rodgers
Subject: Peking Garden, 2008 18th Street, NW

Dear Mr. LeGrant,

I just left you a voice mail in follow-up to a voice mail I left you last week but hadn't heard back from you on. As suggested on your outgoing message, I'm trying e-mail as well, although a conversation might be easier or more efficient.

Specifically, I'm writing to request zoning enforcement on the Chinese fast food/delivery establishment known as Peking Garden, located at 2008 18th St, NW, between Vernon and California Sts, NW, in Adams Morgan. The establishment is located in a C-2-A district, and the back of the property abuts an R-5-B district. I live around the corner at 1845 Vernon St, and

have for quite some time tolerated the establishment's delivery vehicles blocking our alley entrance on 18th St, parking in the alley, and speeding through our alley. Then, one of their drivers speeding through the alley almost hit our dog while she was being walked by my partner (who is copied here), and when I later then had to go around the block to 19th Street to enter my own alley because one of their delivery drivers had left his car blocking the curb cut on 18th Street, I decided I had had enough.

I was a member of the Adams Morgan ANC for 6 years, from 2001 to 2006, and was Chairman for the last 4 of those years. This establishment was outfitted and opened during that time. I wasn't the kind of Commissioner who looked to make trouble for anybody and everybody, and so I didn't go out of my way at the time to make trouble for this gentleman (or for his landlord, who coincidentally I'm told has a stop-work order on the adjacent premises, 2010 18th St, because he allegedly installed an illegal staircase and/or second floor) – but the owner of this take-out joint has been so combative, obnoxious, and dismissive of my complaints and concerns that I feel the time has come to seek enforcement action from your office.

In spite of several discussions with the owner, his wife, and several delivery drivers, and the fact that the owner could in all likelihood rent the use of a parking space right across the street, in the parking lot owned by Lauriol Plaza at the corner of 18th and California, and the fact that I recently brought to him a copy of the zoning map and all the pertinent zoning regulations demonstrating that he's in violation – because he doesn't have a matter of right use and doesn't (at least to the best of my knowledge doesn't have and couldn't qualify for a required special exception -- I think I'd have known about that as the ANC Commissioner if he'd applied for one at the time he opened) – he has basically dismissed me after telling me he consulted his lawyer who told him not to worry about it because I'm "not the police."

I'd be pleased to discuss this in further detail with you or a member of your staff, but I fear the real issue will be that his drivers' violations are only evident in the evening hours, when you and/or your staff are off duty. Technically I don't think that should matter from the standpoint of enforcement, since the nature of his establishment on its face is a violation of the regs, but if evidence were needed (in the event a special exception were now to be sought) of the establishment creating "dangerous or other objectionable traffic conditions," (sections 733.9 and 734.8) or of there being "sufficient off-street parking . . . to accommodate the needs of patrons and employees" (sections 733.8 and 734.7), the evening hours would be the time to gather than evidence.

I respectfully request that you seek monetary penalties from this establishment and/or the landlord pursuant to section 3201.1, and that you request the OAG's office to pursue an abatement of this illegal use pursuant to section 3202.2.

Thank you for your consideration. My direct dial number at work and my cell phone number are both listed below.

Best,
Alan Roth

*Alan J. Roth
Senior Executive Vice President
United States Telecom Association
607 14th Street, NW - Suite 400*