



BEFORE THE ZONING COMMISSION AND
BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA



FORM 129 – ADVISORY NEIGHBORHOOD COMMISSION (ANC) REPORT

Before completing this form, please review the instructions on the reverse side.

Pursuant to §§ 3012.5 and 3115.1 of Title 11 DCMR Zoning Regulations, the written report of the Advisory Neighborhood Commission (ANC) shall contain the following information:

IDENTIFICATION OF APPEAL, PETITION, OR APPLICATION:

Case No.:	18256	Case Name:	Appeal of ANC 1C re Mei Qu Zheng T/A Peking Garden Carryout
Address or Square/Lot(s) of Property:	2008 18 th ST, NW - SQ 2555, LOT 47		
Relief Requested:	Revocation of CO #54337 and/or Imposition of Monetary Penalties		

ANC MEETING INFORMATION

Date of ANC Public Meeting:	01 / 04 / 2012	Was proper notice given?:	Yes ☒ No ☐
Description of how notice was given:	Posting on ANC 1C website (www.anc1c.org), publication in Dupont Current, posting on Adams Morgan Yahoo Groups list-serv (all more than 7 days before meeting), and transmission via e-mail of notice to residents and stakeholders requesting such notice.		
Number of members that constitutes a quorum:	5	Number of members present at the meeting:	8

MATERIAL SUBSTANCE

The issues and concerns of the ANC about the appeal, petition, or application as related to the standards of the Zoning Regulations against which the appeal, petition, or application must be judged (*a separate sheet of paper may be used*):

See attached report.

The recommendation, if any, of the ANC as to the disposition of the appeal, petition, or application (*a separate sheet of paper may be used*):

See attached report.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18256
EXHIBIT NO. 19

AUTHORIZATION

ANC	1C	Recorded vote on the motion to adopt the report (i.e. 4-1-1):	8-0
Name of the person authorized by the ANC to present the report:	Wilson Reynolds or Stacey Moye, or Alan Roth		
Name of the Chairperson or Vice-Chairperson authorized to sign the report:	Chairperson Wilson Reynolds		
Signature of Chairperson/ Vice-Chairperson:	<u>W Reynolds</u>		Date: <u>Jan 4 2012</u>

ANY APPLICATION THAT IS FOUND TO BE INCOMPLETE MAY NOT BE ACCORDED "GREAT WEIGHT" PURSUANT TO
11 DCMR §§ 3012 AND 3115.

Board of Zoning Adjustment
District of Columbia
CASE NO. 18256
EXHIBIT NO. 19

**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	)	BZA Appeal No. 18256
MEI QU ZHENG T/A PEKING GARDEN CARRYOUT	)	ANC 1C
2008 18TH STREET, NW, WASHINGTON, DC 20009	)	
CERTIFICATE OF OCCUPANCY #CO 54337	)	
SQUARE 2555, LOT 0047 (C-2-A)	)	

**REPORT OF
ADVISORY NEIGHBORHOOD COMMISSION 1C**

Pursuant to sections 3012.5 and 3115.1 of the Zoning Regulations, Advisory Neighborhood Commission 1C (ANC 1C) presents this Report in support of its Appeal in the above-captioned case.

Background

ANC 1C filed this Appeal on June 6, 2011 pursuant to sections 3100 and 3200 of the Zoning Regulations, following a June 1, 2011 roll call vote of 5-0, a quorum being present, at a regularly scheduled and duly noticed public ANC meeting.

This Report was considered at ANC 1C's regularly scheduled monthly meeting on Wednesday, January 4, 2012, following proper notice of that meeting to the public. The motion to adopt this Report to the BZA was made by Commissioner Stacey Moye, duly seconded, and approved by a recorded vote of 8-0. ANC 1C consists of 8 Commissioners, thus requiring the presence of 5 Commissioners to constitute a quorum. At the January 4th meeting at which this report was considered, all 8 Commissioners were present.

Issues and Concerns of the ANC

In 2003, the Department of Consumer and Regulatory Affairs issued a “Change of Ownership” Certificate of Occupancy (No. CO 54337) to “Sole Proprietor: Mei Qu Zheng” to operate a business to be known as “Peking Garden Carryout,” with a use description of “Carryout No Seating.” Over the course of 2010 and 2011, Peking Garden gradually but significantly expanded its provision of free delivery service from its premises. ANC 1C and neighboring residents sought revocation of the C of O in question and/or the imposition of monetary penalties on the establishment. This Appeal arose out of a May 13, 2011 determination by the Zoning Administrator 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.”

Contrary to the Zoning Administrator’s determination, however, the 2003 C of O was not for a “fast food restaurant,” which would ordinarily require a special exception in the C-2-A District where Peking Garden is located, but rather for a “carryout” – a use category that had not existed under the Zoning Regulations for more than 15 years before that. Although the premises had been vacant for at least six years prior to 2003 and probably for longer than that, the Zoning Administrator argued that Mr. Mei’s C of O was based on a 1979 C of O issued to the owner of the premises, Mr. James M. Washington, for a “retail food delicatessen; carryout (no seating).”

For the several reasons stated below, ANC 1C believes that the Zoning Administrator’s May 13, 2011 determination was clearly erroneous and should be reversed by the Board of Zoning Adjustment (BZA). Specifically:

- **No Actual Change of Ownership:** The legal authority for issuance of a “change of ownership” C of O is found in 12A DCMR § 110.1.2 for “changes in ownership of structures, land, or parts.” Issuance of a “Change of Ownership” C of O to Mr. Mei should never have occurred because *there was no change of ownership* in either the structure or in any business operating in the structure. Mr. Mei simply rented the premises from the prior C of O holder, Mr. James M. Washington, who together with his son Mr. Barry Washington still own the property and are Mr. Mei’s landlords.

Peking Garden’s C of O is thus invalid on its face. 12A DCMR § 110.1.2.1 provides that “certificates of occupancy that have been determined to have been erroneously issued on the basis of a change in ownership shall be revoked.”¹

- **Floor Layout and Use Changes:** Even if there had been a transfer of Mr. Washington’s property or business, changes Mr. Mei made in both the floor layout and use of the premises disqualified him from receiving a “change of ownership” C of O under 12A DCMR § 110.1.2. These changes included completely re-outfitting the previously vacant and unused premises with a new waiting and seating area, new front counter, and much more extensive kitchen, cooking, and venting equipment, as well as expanding from what had previously been a “retail food delicatessen; carryout (no seating)” under the 1979 C of O to not merely a Chinese carryout but also one that provided free delivery service.

The Zoning Administrator should have required Mr. Mei to apply for a new C of O pursuant to 12A DCMR § 110.1.3,² with all its attendant legal requirements, including the obtaining of a special exception.

- **“Carryout” Was Not a Permissible Use Classification:** Absent an actual change of ownership, the Zoning Regulations provide in section 3203.8 that a use “authorized by a Certificate of Occupancy may be established and continued pursuant to the terms of the certificate and the provisions of this title in effect on the date that the certificate is issued,” *but only subject to certain 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)),³ 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 available in May 2003, it was improper for DCRA to designate the approved use of Peking Garden’s premises as a “carryout.” If Mr. Mei had sought instead to amend the use to designate Peking Garden

¹ Section 199.2 of the Zoning Regulations provides, “For the purpose of this title, . . . the word ‘shall’ is mandatory and not discretionary.”

² 12A DCMR § 110.1.3 provides that “[f]or changes in use, occupancy load or tenant floor layout, a *new* Certificate of Occupancy *shall* be required.” (Emphases added.)

³ This provision of the Zoning Regulations closely parallels a related provision of the Building Code Supplement, 12A DCMR § 110.1.4, which requires that “[a] certificate of occupancy shall only be issued for stated uses, including accessory uses, as have been identified in the *Zoning Regulations*.”

as a “fast food restaurant,” that amendment 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. Rather, such an amendment would have required a special exception.

- **The 1979 C of O Had Lapsed, Requiring a Special Exception for a New C of O:** Section 3203.10 of the Zoning Regulations provides that a C of O “shall not be renewable if permitted to lapse unless processed in accordance with all provisions of this title.” While the term “lapse” is not defined in the Zoning Regulations, the relevant definitions of that word in *Webster’s Unabridged Dictionary* – such as, “to go out of existence : fall into decay or disuse : DISAPPEAR, TERMINATE” – indicate that Mr. Washington’s failure to operate his business on the subject premises and his maintenance of those premises in a completely vacant state for at least six years should certainly qualify as a “lapse.” Had DCRA or the Zoning Administrator applied these provisions appropriately, Peking Garden’s C of O application would have been required to go through the special exception process.

- **Mr. Mei Extended and/or Enlarged His Use Beyond That Permitted in His C of O:** The definition of “nonconforming use” in section 199.1 of the Zoning Regulations has the effect, in certain cases, of deeming a nonconforming use to be a conforming use. But that “deeming” provision is subject to certain conditions that the Zoning Administrator ignored or failed to apply here. For example, even as to 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.” 11 DCMR § 3104.2.

Peking Garden’s provision of free food deliveries extended and/or enlarged its permitted use beyond the “Carryout No Seating” originally approved in its “change of ownership” C of O. The Zoning Administrator should therefore have ruled that Peking Garden’s delivery operations required a special exception.

- **Discontinuance of Mr. Washington’s Business for More than 6 Years Required Mr. Mei to Obtain a Special Exception:** Section 2005.1 of the Zoning Regulations provided in 2003 that “[d]iscontinuance for any reason of a nonconforming use of a structure or of land . . . for a period [now, “any period”] of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located.”

The Zoning Administrator refused to apply this provision because, in his opinion, Peking Garden was not engaged in such a nonconforming use based on the “deeming” provision in the definition of “nonconforming use” discussed above. But his reading of section 2005.1 exalts form over substance, ignores other relevant Zoning Regulations, and is inconsistent with the treatment given to similar situations in other BZA cases. Moreover, to the extent that Mr. Washington or Mr. Mei have a right to rely on any definition of “nonconforming use,” the relevant definition *in this case* was the one in effect when Mr.

Washington received his C of O in 1979 – when no such “deeming” provision existed, much less one subject to the conditions in the current definition.

The Zoning Administrator’s refusal to apply the discontinuance provision of section 2005.1 here was erroneous. Following the lead of prior Zoning Administrators and other pertinent BZA cases, he should have revoked the Peking Garden C of O.

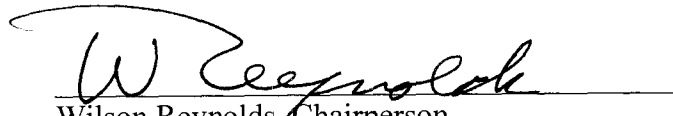
RECOMMENDATION AND VOTE

Based on the foregoing discussion of issues and concerns, ANC 1C recommends that its Appeal in this case should be granted, that the Zoning Administrator’s determination should be overturned, and that Peking Garden’s C of O, No. CO54337, should 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,” and/or imposition of monetary penalties to the extent authorized by D.C. Code § 6-641.07(f) (2001).

ANC 1C authorizes its Chairperson Wilson Reynolds, Vice Chairperson Stacey A. Moye, or its authorized representative in this case, Alan J. Roth, to present this Report to the BZA.

Respectfully submitted,

ADVISORY NEIGHBORHOOD COMMISSION 1C


Wilson Reynolds, Chairperson

Date: January 4, 2012

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 11 DCMR § 3111.3, a copy of the foregoing Prehearing Statement, together with the witness and exhibit lists on the preceding page and all exhibits attached hereto, were deposited in the United States mail, first-class postage prepaid, and thereby served on the following persons, on this 10th day of January, 2012:

Jay A. Surabian, Esquire
Assistant Attorney General
DCRA – Office of the General Counsel
1100 4th Street, SW – 5th Floor
Washington, DC 20024

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

Bradley A. Thomas, Esquire
4201 Connecticut Avenue, NW – Suite 400
Washington, DC 20008-1158

Messrs. James M. and Barry J. Washington
2900 Hatboro Place
Upper Marlboro, MD 20774



Alan J. Roth, Esquire