

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

RECEIVED
D.C. OFFICE OF ZONING
2012 JAN 11 PM 2:12

APPEAL OF) ADVISORY NEIGHBORHOOD COMMISSION 1C) FROM A DETERMINATION OF THE) ZONING ADMINISTRATOR PERTAINING TO) MEI QU ZHENG T/A PEKING GARDEN CARRYOUT) 2008 18 TH STREET, NW, WASHINGTON, DC 20009) CERTIFICATE OF OCCUPANCY #CO 54337) SQUARE 2555, LOT 0047 (C-2-A))	APPEAL NO. 18256
---	------------------

**OPPOSITION OF ADVISORY NEIGHBORHOOD COMMISSION 1C
TO DISTRICT OF COLUMBIA'S MOTION TO DISMISS**

Appellant Advisory Neighborhood Commission 1C (ANC 1C) respectfully submits this Opposition to the motion to dismiss filed January 5, 2012 by appellee Department of Consumer and Regulatory Affairs (DCRA). DCRA's motion asserts that this Appeal was not timely filed as required by 11 DCMR § 3112.2(a) and that therefore the Board of Zoning Adjustment (Board or BZA) lacks jurisdiction to consider it. ANC 1C, however, believes that its Appeal was filed well within the time permitted by § 3112.2(a) and, for the reasons set forth below, urges that the motion to dismiss be denied.

Section 3112.2(a) of the Zoning Regulations provides that "[a]ny person aggrieved by any . . . decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board." Absent exceptional circumstances, such an appeal must be filed within 60 days "from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier."

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18256
EXHIBIT NO. 201

Board of Zoning Adjustment
District of Columbia
CASE NO. 18256
EXHIBIT NO. 20

In this case, “the person appealing the administrative decision” is ANC 1C – and its Appeal was filed on June 6, 2011, a mere 24 days after receiving (or, to put it more precisely, receiving notice of) a May 13, 2011 e-mail from the Zoning Administrator to SMD 1C01 Commissioner Stacey Moye and one of her constituents, Alan Roth, in reply to an e-mail from ANC 1C Chairperson Wilson Reynolds. Chairperson Reynolds on May 3rd had forwarded various questions to DCRA Director Nicholas Majett, Zoning Administrator Matt LeGrant, and Mr. Justin Bellow (a staff member in Mr. LeGrant’s office).¹ Chairperson Reynolds’ e-mail was “cc’d” to Commissioner Moye and Mr. Roth, as well as to ANC Commissioners Steve Lanning and Kathie Boettrich. The latter two Commissioners, together with Chairperson Reynolds, comprised the ANC’s Planning, Zoning, and Transportation (PZT) Committee. Chairperson Reynolds, on behalf of the PZT Committee and the ANC, asked those DCRA officials for a response to the questions Mr. Roth had raised at a May 2nd PZT Committee meeting.

Chairperson Reynolds and Commissioners Lanning and Boettrich, as well as Director Majett and Mr. Bellow, were all cc’d on the Zoning Administrator’s May 13th e-mail addressed to Commissioner Moye and Mr. Roth. The Zoning Administrator’s e-mail failed to answer all of the questions that had been posed in Chairperson Reynolds’ May 3rd inquiry, but acknowledged that questions had been raised about whether the business at issue in this case, Peking Garden, “might be improperly classified as a fast food establishment” and about “the amount of delivery that the business does.” The Zoning Administrator’s e-mail concluded with the following paragraph:

¹ This e-mail, and the further ones described below, can all be found in Exhibit 27 to the Appellant’s Prehearing Statement.

“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 [*sic*], in accordance with the requirements in Chapter 31 of Title 11.” (Emphases added.)

Following a further e-mail from Chairperson Reynolds on May 23rd seeking a progress report on the Zoning Administrator’s promised investigation of the food delivery use at Peking Garden, and an e-mail from the Zoning Administrator on May 27th postponing a report on that investigation until at least June 9th, ANC 1C voted 5-0 at its regularly scheduled June 1st meeting to file this Appeal. The Appeal was filed five days later, on June 6th.²

“As a threshold matter, the Board must determine what is the ‘decision complained of.’” *Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F* (Mar. 11, 2003), at 8; *see also, Appeal No. 17430 of Rodut Associates of DC, LP* (Mar. 21, 2006), at 5 (“the threshold question is to identify the administrative decision being complained of.”) Although much of the background for ANC 1C’s Appeal is cast in terms that may raise doubts about the legality and sufficiency of Peking Garden’s 2003 C of O, the true gravamen of the ANC’s complaint is the quite recent

² The Zoning Administrator’s promise of an “investigation of the possible food delivery service use” placed a Hobson’s Choice in the ANC’s path – either wait indefinitely for an investigation and report that might never come (and, in fact, *has never come*) and lose the right to appeal the May 13th determination, or appeal the May 13th determination in hopes that an investigation might actually produce enforcement action. A series of BZA decisions, including one on which DCRA relies here – *Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F* (Mar. 11, 2003) – made clear the path the ANC was required to follow.

“[T]here is nothing preventing a potential appellant from filing a timely appeal before the BZA while continuing to try to resolve any issues with DCRA. The fact that a potential appellant is working with DCRA to resolve issues does not ‘substantially impair’ the ability of that potential appellant to appeal to the BZA.”

Herron, supra, at 10; *see also, Appeal No. 17430 of Rodut Associates of DC, LP* (Mar. 21, 2006), at 6 (“a party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal”); *Appeal No. 17329 of Georgetown Residence Alliance* (July 12, 2005), at 5 (“During this 86 day period, Appellant pursued other avenues to resolve its dispute and engaged in extensive communications with the Zoning Administrator and HPO staff. However, a party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal.”).

metamorphosis of the establishment into a kind of high-volume food delivery operation that did not appear to be contemplated in that 2003 C of O – and more specifically, the blind eye that the Zoning Administrator appears to have turned to that expansion or enlargement of the “carryout” use approved in 2003 or, before that, in the building owner’s preceding 1979 C of O for a delicatessen and carryout.³ As the ANC’s original Appeal papers explained at pp. 3-4, and as DCRA’s own motion appears to acknowledge at p. 3:

“[T]he 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.”

In short, although 12A DCMR § 110.1.2.1 places no time limit on the mandatory revocation of an erroneously issued C of O, the ANC’s aggrievement before the BZA is less the

³ DCRA’s motion to dismiss mistakenly states that “Appellant alleges that Fish Hut deli closed in 1997.” In fact, the ANC’s Appeal states that after being granted a C of O in 1979, the building owner “[a]t some later time, but at least by 1997, . . . discontinued the operation of that business” and that the premises “remained vacant for a period of at least six if not more years.”

Zoning Administrator's original issuance of the Peking Garden C of O than *his refusal to administer and enforce the provisions of the Zoning Regulations that limit or bar the extension or enlargement of uses beyond that permitted in the C of O*. Those Zoning Regulations include sections 3104.2 and 3104.3, which required the Zoning Administrator or DCRA to inform Peking Garden that its use of the property was no longer compliant with the law and that it was required to cure that violation or face legal action. *See Economides v. District of Columbia Board of Zoning Adjustment*, 954 A.2d 427, 446 (D.C. 2008). Similarly, because section 3203.8 requires that "[a]ny amendment of the use authorized by the certificate shall comply with the provisions of this title [Title 11] in effect on the date that the certificate is amended," the Zoning Administrator should not have allowed Peking Garden to enormously expand its business into a high-volume food delivery operation, and thereby extend or enlarge its permitted carryout use, without insisting on a formal amendment of the C of O. *See also* 11 DCMR § 2000.2 (stating the intent of Title 11 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").

In seeming recognition that the Appeal was timely filed, DCRA now attempts to paper over the Zoning Administrator's own characterization of his May 13th e-mail as "my determination," as well as his admission that this determination was appealable to the BZA, by arguing that "[t]his was not a new decision, but rather is an affirmation of the original decision to issue the certificate of occupancy." Citing the *Herron* case and *Appeal No. 17966-A of Stephen Bruce* (Sept. 13, 2010), DCRA argues on page 3 of its motion that "such affirmations are not separately appealable and do not re-start the 60-day appeal period." In *Herron*, after tracing at

some length the history of what would be considered “the decision complained of” there under past decisions *involving building permits*, and discussing the confusion those precedents had caused, the Board took the extraordinary step of overruling a decision it had issued only the previous year, stating:

“The Board thus holds that *when an appeal challenges the grant or denial of a building permit or subdivision*, no subsequent communication from DCRA may be appealed, including, but not limited to, a refusal to issue a stop work order or take other enforcement actions.” *Id.* at 10 (emphasis added).

The *Bruce* decision merely followed the holding in *Herron*. Those cases, however, turned on the dates on which certain building permits were issued and, in *Herron*, the date on which a property was subdivided into two lots – not, as in this Appeal, allegations of a business’s improper expansion or enlargement of a use beyond that authorized in a C of O, beginning many years after issuance of that C of O. With an overly facile and simplistic characterization of the ANC’s Appeal here, DCRA’s motion seeks merely to distract the Board’s attention from the zoning violations associated with Peking Garden’s delivery operations.⁴

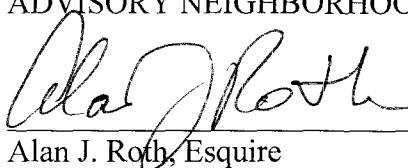
Finally, while DCRA’s motion attempts in a footnote to attribute to the Appellant – ANC 1C – all of the knowledge that Mr. Roth had of this matter as far back as February 28, 2011, the fact is that ANC 1C had no knowledge of Roth’s inquiries and e-mail exchanges with the Zoning Administrator until he brought them to the attention of Chairperson Reynolds and Commissioner Moye on May 1, 2011. On that day, Roth requested for the first time an opportunity to present his concerns at the next PZT Committee meeting, which as it happened was scheduled for the

⁴ Indeed, the Zoning Administrator’s failure to follow through on his promised investigation of Peking Garden’s food delivery operations and to deliver to the ANC by June 9th a report on that investigation – which, to the best of the ANC’s knowledge, has never actually been done or completed – should itself be deemed a “decision, determination, or refusal made by an administrative officer or body . . . in the administration or enforcement of the Zoning Regulations.” 11 DCMR § 3112.2(a).

following evening, May 2nd. Chairperson Reynolds' May 3rd e-mail and subsequent communications with DCRA arose out of that meeting. Even if the ANC could be charged with constructive knowledge of the allegations and complaints that Roth had registered with the Zoning Administrator, such constructive knowledge did not exist before before May 1st at the earliest. Thus, the filing of this Appeal by June 6th places the matter well within the 60-day period required by section 3112.2(a). *See Economides, supra*, 954 A.2d at 436-37 (wife's prior knowledge or suspicion of building permit issuance or construction, and community's general knowledge of construction activity, could not be attributed to husband-appellant or ANC).⁵

Since Peking Garden's expanded delivery uses and abuses did not manifest themselves plainly until late 2010, and since knowledge of those uses and abuses was not attributable to ANC 1C until May 1, 2011 at the earliest, ANC 1C's June 6, 2011 Appeal of the Zoning Administrator's May 13, 2011 "decision, determination, or refusal" was timely. DCRA's motion to dismiss should accordingly be denied.

Respectfully submitted,
ADVISORY NEIGHBORHOOD COMMISSION 1C



Alan J. Roth, Esquire
Duly Authorized Representative for
Advisory Neighborhood Commission 1C

Date: January 11, 2012

⁵ DCRA's motion to dismiss, on page 3, mischaracterizes the Zoning Administrator's May 13th e-mail as a response "to an inquiry from Alan Roth, the ANC's attorney in this matter." In point of fact, Mr. Roth at that juncture was not acting as the ANC's attorney but rather simply as a resident and constituent. Only during further discussions with Chairperson Reynolds and Commissioner Moye following the May 13th e-mail did Roth volunteer to serve as the ANC's pro bono counsel in the event the ANC elected to file an appeal – a matter that was discussed at the ANC's June 1st meeting and memorialized in Chairperson Reynolds' authorization filed with the Appeal on June 6th for Roth to act in that capacity. These facts are attested to in a sworn affidavit from Mr. Roth, appended to this Opposition as Attachment A.

CERTIFICATE OF SERVICE

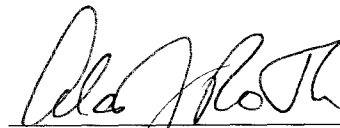
I hereby certify that, in accordance with 11 DCMR § 3111.3, a copy of the foregoing Opposition, together with the accompanying Attachment A, were sent by electronic mail and/or deposited in the United States mail, first-class postage prepaid, and thereby served on the following persons, on this 11th 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
Jay.Surabian@dc.gov

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
batlaw@bradleythomaslaw.com

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



Alan J. Roth, Esquire

**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	)	APPEAL NO. 18256
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)	)	

AFFIDAVIT OF ALAN J. ROTH

1. My name is ALAN J. ROTH. I reside at 1845 Vernon Street, NW, Washington, DC 20009. This affidavit is submitted in support of Appeal No. 18256 by Advisory Neighborhood Commission 1C (ANC 1C) generally, and specifically in opposition to the District of Columbia's motion to dismiss ANC 1C's Appeal on the ground of untimeliness.

2. I have lived at my current address for almost 15 years, since the spring of 1997, together with my partner, Mr. Michael A. Rodgers. When we first moved to Vernon Street, the storefront at 2008 18th Street, NW was unoccupied and appeared to have been unoccupied for quite some time before that.

3. During 2003, following renovations and other work inside 2008 18th Street, NW, including the installation of kitchen and cooking equipment, a new front counter, and a small customer seating area, a new Chinese carryout by the name of Peking Garden opened for business on those premises.

4. Until late 2010, Peking Garden's business operated relatively uneventfully. Then, gradually but noticeably in late 2010 and continuing to the present day, there has appeared to be a greater and greater increase in Peking Garden's delivery business. Michael and I began seeing

ATTACHMENT A

several different delivery drivers and vehicles coming and going during both daylight hours and at night, weekdays and weekends. The owner, his wife, and their delivery drivers would habitually block the narrow exit/entrance between the alley and 18th Street, often parking illegally against the brick wall of 2010 18th Street or the adjacent Ashley condominium building so that no one could get through. At other times, they would block the alley curb cut by parallel parking on 18th Street. They would park on private property. And their delivery drivers would regularly drive through the alley at unreasonable and unsafe speeds.

5. My efforts to obtain voluntary cooperation from Peking Garden's owner and his wife in putting an end to these traffic dangers and obstructions met with no success. This included my sharing with the owner's wife a copy of the relevant Zoning Map and Zoning Regulations, which prohibited expansion or enlargement of their carryout use to include delivery service, with the suggestion that she and her husband discuss this with an attorney. When I later spoke to the owner himself about this, his response was, "You are not [the] police. I don't have to listen to you."

6. There are a number of young children living in the 1800 block of Vernon Street, and it is not uncommon for them to play behind their homes and in the alley itself. It is also not uncommon for neighboring residents to use the alley as pedestrians, or to walk their dogs there. In early 2011, my partner Mr. Rodgers asked me to look into what more could be done to put a stop to Peking Garden's persistent, illegal, and dangerous activity following a particularly harrowing speeding incident involving one of Peking Garden's drivers.

7. On February 24, 2011, following some additional research into the Zoning Regulations and related laws, I called and e-mailed Zoning Administrator Matt LeGrant to seek assistance and enforcement from his office. After a lengthy exchange of increasingly frustrating and

nonresponsive e-mails and telephone conversations led nowhere with him and his staff, I contacted ANC 1C Chairperson Wilson Reynolds and my own ANC Commissioner, Stacey Moye, on Sunday, May 1, 2011, to ask for an opportunity to meet with the ANC's Planning, Zoning, and Transportation (PZT) Committee at its next scheduled meeting to discuss my concerns with this establishment and with the Zoning Administrator's handling of my complaints.

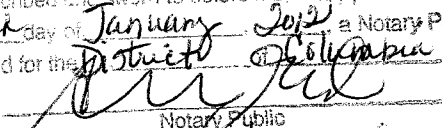
8. Prior to May 1st, the next meeting of the PZT Committee had already been scheduled to occur the following evening, Monday, May 2, 2011. I attended that meeting at the Kalorama Park Recreation Center and shared with Chairperson Reynolds, Commissioner Moye, Commissioner Steve Lanning, and the others present an oral summary of what had transpired over the previous several months.

9. On the next day, Tuesday, May 3, 2011, I shared with Chairperson Reynolds and Commissioners Lanning and Kathie Boettrich (the members of the PZT Committee), and with Commissioner Moye, copies of the most relevant e-mails that had been exchanged with the Zoning Administrator's office during the preceding several months. In follow-up, Chairperson Reynolds wrote to DCRA Director Majett, Zoning Administrator LeGrant, and a member of Mr. LeGrant's staff, indicating that "[a]s the PZT Committee is now aware of this case, I am sharing this with Mr. Majett, Mr. LeGrant, and Mr. Bellow asking for a response to your questions. . . . Let us see what can be done." A copy of that e-mail is included among the exchange of e-mails appended as Exhibit 27 to the ANC's Prehearing Statement.

10. In light of Mr. LeGrant's May 13th e-mail declining to take enforcement action, and his further e-mail in late May delaying until at least June 9th a report on an investigation he promised of Peking Garden's delivery operations, I discussed with Chairperson Reynolds and

Commissioner Moye the possibility of the ANC's appealing Mr. LeGrant's May 13th determination and refusal to take enforcement action. One issue that arose in those discussions was the ANC's own lack of resources to pay an attorney to handle the matter and the unavailability of the Commissioners themselves to draft, file, and handle such an appeal without legal assistance. During that period, and at the June 1, 2011 meeting of the full ANC, I volunteered my personal services on a pro bono basis to represent the ANC in the matter. Following a 5-0 vote on a resolution authorizing the filing of an ANC appeal, I drafted and submitted Form 125 and the accompanying text to the Board of Zoning Adjustment on behalf of ANC 1C, together with a letter from Chairperson Reynolds authorizing me to represent ANC 1C in the case.

Subscribed and sworn to before me, this 10th day of January, 2012.

Subscribed and sworn to before me, in my presence, this
1st day of January, 2012, a Notary Public
in and for the District of Columbia

Notary Public
My commission expires February 28, 2014


ALAN J. ROTH

ANDREA BURCH
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires February 28, 2014