

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

Appeal of Edward Hanlon

Appeal No. 18429

**DCRA'S RESPONSE TO APPELLANT'S MOTION FOR
RECONSIDERATION**

Appellant Hanlon moves for reconsideration of the December 5, 2013 order denying his appeal. Because none of Hanlon's arguments have merit, the motion should be denied.

FACTS

Darren Binder obtained a permit to perform construction at 1530 Swann St NW. 1530 Swann St NW is a 3 story dwelling. The 3rd story is a partial story. A deck was located on the uncovered portion of the 2nd story roof. The 2nd story roof deck existed prior to the issuance of the permit. The proposed construction would remodel the existing deck and add a new 3rd story roof deck. The new deck would be uncovered.¹

Appellant Hanlon, who lives in that area, filed an appeal challenging the permit. Among other things, he alleged that the construction cannot be performed as a matter of right because it results in non-compliant height and court width, is inconsistent with the Dupont Circle Overlay, and is an improper

¹ The facts are taken from the Findings of Fact in the Board's December 5 order.

addition to a nonconforming structure. The Board rejected all of these arguments.

Appellant now moves for reconsideration arguing that he has uncovered new facts establishing that the Board erred in its decision. He also contends that a deck impermissibly crosses a boundary line.

ARGUMENT

1. Appellant's supposed new facts do not establish grounds for reconsideration.

In moving for reconsideration, Appellant argues that the Board was misled when it was told that the 2nd floor roof deck would not have a roof. He claims that he himself only recently became aware of the fact that the 2nd floor deck has a roof. His position is that a deck with a roof constitutes an improper addition. There are three reasons why this argument is without merit.

First, at the outset it is important to point out that Appellant is just plain wrong when he claims the Board was misled. Appellant accuses DCRA's prior attorney of making an incorrect statement at the hearing. The allegedly false statement was the attorney's argument that the "roof deck here is not covered." But it seems obvious that this statement, which notably is in the singular, was in reference to the new 3rd floor roof deck, not the preexisting 2nd floor roof deck. So contrary to Appellant's argument, there was no false statement made at the hearing.

Second, Appellant has always contended that the 2nd floor roof deck would have a roof. See Appellant's Supplemental Prehearing Statement, p 4 ("This 9.3 foot extension extends out over the previously open deck that pre-existed on top

of the second floor roof.... This then functions as a new roof for a second floor addition to the back of the house.”); Appellant’s Supplemental Statement in Response to the District of Columbia’s Prehearing Statement, p 14 (“the Third Story Roof Deck and in effect provides a roof for part of the pre-existing Second Story Roof Deck.”) So it is just not accurate for Appellant to now claim that his argument about the supposed 2nd floor roof is new.

Third, assuming for the sake of argument that the construction differed from what was approved by the Board,² correcting that issue would be an enforcement matter for the Zoning Administrator. The Board has no jurisdiction over the issue. Rather, the Board is limited to deciding cases based on the record before it at the time of the hearing. If it turns out that the construction is different then what was approved, the recourse is an “enforcement [action] by the ZA [which] is a discretionary act to which no individual has a legal right.” Exhibit 1, Appeal No. 18256 of Advisory Neighborhood Commission 1C, p 9.

2. The Board has no jurisdiction to decide whether a deck crosses a property line.

Appellant’s other argument is that a deck impermissibly crosses a property line. This argument should be rejected because Appellant could have raised the argument before but failed to do so. See 11 D.C.M.R. 3126.6 (“No request for rehearing shall be considered by the Board unless new evidence is submitted that could not reasonably have been presented at the original hearing.”)

² Based on the photos submitted by Appellant, it is far from clear that the construction differed from the permit drawings. The drawings show that the 3rd floor roof deck was to jut out over the 2nd floor roof deck. Exhibit 2, Drawing A-4. It appears that it is this jutting portion of the 3rd floor deck that Appellant is claiming is a roof.

In addition, the argument in no way involves the interpretation of the Zoning Code. Rather, Appellant contends that a permit that authorizes building over the property line violates DC Code § 6-404. As the Board noted in its December 5 order, the Board only has authority to hear an appeal based on an interpretation of a zoning regulation.

CONCLUSION

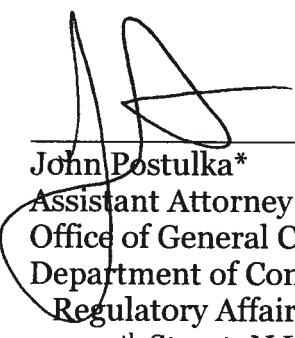
For the reasons stated above, the Board should deny the motion for reconsideration.

Respectfully Submitted,

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Date: 12/20/13



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December 2013, a copy of the foregoing Brief was served via e-mail to:

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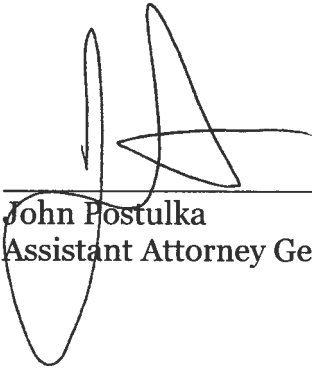
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AND

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Appellant

Date: 12/20/13



John Postulka
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Exhibit 1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18256 of Advisory Neighborhood Commission 1C, pursuant to 11 DCMR §§ 3100 and 3101, from a determination by the Zoning Administrator, Department of Consumer and Regulatory Affairs, made May 13, 2011, that a fast food establishment (Peking Garden Carry Out) was a lawful use authorized by its certificate of occupancy (CO54337) and allegedly refusing enforcement action against a food delivery in the C-2-A District at premises 2008 18th Street, N.W. (Square 2555, Lot 47).¹

HEARING DATES: October 25, 2011, January 17, 2012, and February 28, 2012
DECISION DATE: March 13, 2012

ORDER DISMISSING APPEAL

This appeal was submitted on June 6, 2011 by Advisory Neighborhood Commission (“ANC”) 1C (“Appellant”), whose boundaries encompass the property that is the subject of the appeal. The appeal, as finally amended, sought reversal of a determination by the Zoning Administrator (“ZA”) with respect to the operation of a certain business on the ground that the ZA’s alleged refusal to take enforcement action was erroneous, and requested “such relief ... as the Board shall deem appropriate.” Following a public hearing concluded on February 28, 2012, the Board voted to dismiss the appeal for lack of jurisdiction.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated June 10, 2011, the Office of Zoning (“OZ”) provided notice of the appeal to the Office of Planning (“OP”); to the ZA, with copies to the Department of Consumer and Regulatory Affairs (“DCRA”), to James Washington and Barry Washington, the owner of the subject property and his agent, respectively, and to Peking Garden, which leases the property; the Councilmember for Ward 1; ANC 1C; and Single Member District/ANC 1C01. Pursuant to 11 DCMR § 3112.14, on July 28, 2011, OZ mailed

¹ This case was advertised as an appeal “from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made May 13, 2011, to issue a certificate of occupancy (CO54337) allowing a fast food establishment (Peking Garden Carry Out) and food delivery in the C-2-A District at premises 2008 18th Street, N.W. (Square 2555, Lot 47).” The caption has been modified to reflect the Appellant’s amendment of the appeal during the course of the proceeding.

BZA APPEAL NO. 18256

PAGE NO. 2

letters providing notice of the hearing to the Appellant, to the ZA, and to the owner and lessee of the subject property. Notice was also published in the *D.C. Register* on July 29, 2011 (58 DCR 6406).

Party Status. The Appellant, DCRA, and the owner of the subject property, James Washington, were automatically parties in this proceeding. There were no other requests for party status.²

Appellant's case. This appeal concerns the business operated at the subject property, Peking Garden, and an email sent by the ZA to the Appellant on May 13, 2011 ("May 13 email").³ Specifically, the ANC asserted that the May 13 email constituted a determination by the ZA that the business was operating in conformance with the use authorized by its certificate of occupancy and a refusal by the ZA to take any enforcement action despite the ANC's contention that the business had "morphed" into another, more intensive use, as a food delivery service, that was not authorized but required approval as a special exception.

The ANC challenged "the Zoning Administrator's determination, rendered via email on May 13, 2011, 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.'" ANC 1C alleged that, "[b]ased on that determination, the Zoning Administrator refused to revoke the C of O in question or to impose monetary penalties on the establishment." In a motion to amend its appeal, filed January 11, 2012, ANC 1C clarified its request for relief by stating that "the determination of the Zoning Administrator and his refusal to take enforcement action was erroneous and should be reversed" and relief should be granted in the form of "reversal of the Zoning Administrator's May 13th determination and of his consequent refusal to take enforcement action against the establishment at issue here." According to ANC 1C, "revocation of [the] C of O is not necessarily the only tool the Board, the Zoning Administrator, other units of DCRA, or other District authorities have at their disposal to deal with Peking Garden's zoning violations once the ANC is able to demonstrate that the Zoning Administrator's determination and refusal to act were erroneous." ANC 1C, citing *Economides v. District of Columbia Board of Zoning Adjustment*, 954 A.2d 427 (D.C. 2008), "would clarify that it seeks reversal of the Zoning Administrator's May 13, 2011 decision, leaving the appropriate remedies to be determined either by the Board in the exercise of its discretion or by DCRA and the Zoning Administrator in the full exercise of their legal duties and responsibilities." (Exhibit 21.)

In a supplemental prehearing statement submitted February 14, 2011, ANC 1C provided additional explanation of "what new administrative decisions in the Zoning Administrator's May 13th email to the ANC that gave rise to an appealable issue over which the Board has

² The lessee, Mei Qu Zheng, trading as Peking Garden Carry Out, did not participate in this proceeding.

³ The ANC initially asserted several grounds for appeal, relating generally to the issuance of the 2003 certificate of occupancy, that were subsequently dropped, including claims of error related to references to a change in ownership, the lapse of a nonconforming use, and permission to continue a prior use that had been discontinued.

jurisdiction.” According to the Appellant, “If the holder of a 2003 C of O is operating *today* well beyond the scope of that C of O, it is the Zoning Administrator’s duty to address that zoning violation when it is called to his attention. The BZA should not simply permit the Zoning Administrator to hide behind a so-called ‘determination’ that the *original* C of O itself was validly issued, or that the use stated in the C of O was a lawful one, *if the actual use* being made of the premises is not *currently* lawful. Such a determination amounts ... to a ‘decision’ or a ‘refusal’, either of which is appealable under section 3112.2(a) of the Zoning Regulations.” The Appellant asserted that “this case turns on a party’s *behavior* – specifically, on the gradual ‘morphing’ of the occupant’s use from one stated in the C of O to one neither applied for nor contemplated nor permitted by that C of O.” (emphasis in original) The Appellant contended that “the central question before the Board in this case is whether the Zoning Administrator erred in deciding on May 13, 2011 to take no action against Peking Garden when its delivery operations, in violation of its C of O and the Zoning Regulations, were called to his attention by ANC 1C.”

Intervenor’s argument. The Intervenor argued that, because the Zoning Regulations do not establish a time limit for the ZA to conclude an investigation or require the ZA to provide updates on the status of an investigation, the Board was not in a position to make a determination that there had been an appealable violation.

Motion to dismiss. On January 5, 2012, DCRA submitted a motion to dismiss the appeal as untimely, because an appeal “cannot be properly brought more than 8 years after the issuance of a certificate of occupancy.” According to DCRA, the ZA’s May 13 email “did not contain any new administrative ‘determinations’ or ‘decisions’ that could give rise to an appeal” but “simply confirm[ed] the validity of the 2003 CO and Peking Garden’s rights to operate under it,” so that the May 13 email could not be used by the ANC “to revive its opportunity to appeal.” DCRA asserted that timeliness is jurisdictional, and therefore that the appeal must be dismissed. (Exhibit 18.)

In its response in opposition to the motion, filed January 11, 2012, the Appellant argued that “the true gravamen of the ANC’s complaint is the quite recent 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.” The ANC explained that the “Zoning Administrator’s promise of an ‘investigation of the possible food delivery service use’ [contained in the May 13 email] 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.” (emphasis in original) The Appellant asserted that its “aggrievement before the BZA is less the 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.”*⁴ (emphasis in original) The Appellant argued that “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.’” ANC 1C asserted that, “[s]ince 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” and DCRA’s motion should be denied. (Exhibit 20.)

FINDINGS OF FACT

1. The subject property is located at 2008 18th Street, N.W. (Square 2555, Lot 47). The property is owned by James Washington and leased to Mei Qu Zheng, trading as Peking Garden, which operates a business at the property.
2. The subject property is zoned C-2-A.
3. Effective May 13, 1985 a fast food establishment was permitted in that zone only if approved by the Board as a special exception. (See 11 DCMR § 733 and Z.C. Order Nos. 460 (emergency action) and 468 (final action).)
4. Effective June 11, 1993, a fast food delivery service was permitted in that zone only if approved by the Board as a special exception. (See 11 DCMR § 734 and Z.C. Order No. 734.)
5. As described by the ANC, the owner of the subject property, James Washington, was issued a certificate of occupancy on November 9, 1979 “for the following purpose(s): Retail Food Delicatessen; Carryout (No Seating).” That business closed by 1997 and the property remained vacant for at least six years. Another certificate of occupancy was obtained in 2003 by a business owned by Mei Qu Zheng for use of the subject property as “Carryout, No Seating.”

⁴ An affidavit attached to the ANC’s response, prepared by Alan J. Roth, the ANC’s representative in this proceeding, also characterized the May 13 email as a decision by the Zoning Administrator “declining to take enforcement action,” although the affidavit also acknowledges a subsequent email from the Zoning Administrator reporting a delay, until at least June 9th, of “a report on an investigation [the Zoning Administrator] promised of Peking Garden’s delivery operations.” According to the Appellant, the ANC chairman emailed the Zoning Administrator on May 23, 2011 “seeking a progress report on the Zoning Administrator’s promised investigation of the food delivery use at Peking Garden,” and an email in response from the Zoning Administrator, sent May 27, 2011, “postpone[ed] a report on that investigation until at least June 9th.” (Exhibit 20.)

6. The ANC alleged that, after operating “fairly uneventfully for most of the last several years,” the business began using a nearby public alley “as, in effect, their parking lot,” with food delivery vehicles blocking both the alley and the abutting sidewalk as well as speeding in the alley. A neighborhood resident, with the assistance of the ANC, “sought zoning enforcement from the Zoning Administrator to put an end to these abuses.” In response, the ZA sent the email of May 13, 2011 to the ANC.
7. In that email, the ZA responded to a request to review the use at the subject property with regard to its compliance with the Zoning Regulations. The email addressed “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 ZA concluded that “carry-out or fast-food establishment use at [the subject property] was established in 1979,” before a 1985 amendment to the Zoning Regulations required fast-food establishments in C-2-A districts to secure special exception relief. “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.” (Exhibit 1.)
8. The May 13 email addressed the definition of “nonconforming use” set forth in § 199 of the Zoning Regulations.⁵ The ZA explained that fast food use of the subject property “cannot be classified as a non-conforming use” in accordance with the definition, and therefore the discontinuance regulations (11 DCMR § 2005.1), which apply only to nonconforming uses, were inapplicable. Although “the business may not have been in operation continuously since the fast food establishment was originally established in 1979, the use has not lapsed” because “established Certificates of Occupancy and their approved uses are continuously recognized even during periods of vacancy, unless a

⁵ That definition is:

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.

(11 DCMR § 199.)

The provisions cited in the definition specify that “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.” (11 DCMR § 3104.2) and “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. (11 DCMR § 3104.3.)

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.”⁶

9. With regard to questions raised by the Appellant “about the nature of the business, [and assertions] 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,” the May 13 email indicated that “DCRA has initiated an investigation of this aspect and [the Zoning Administrator] expect[s] the results by the end of this month” and would report them to the ANC.
10. By email sent to two commissioners of ANC 1C, among others, on May 27, 2011, the ZA indicated that “DCRA’s continuing investigation of this matter is ongoing” but would not be completed by May 31 as originally envisioned, although results of the investigation might be available by June 9. The ZA cited a need to have “all the relevant information” necessary “to base a determination that accurately reflects the business operation that is occurring.” (Exhibit 17.) According to ANC 1C, no results of the investigation were ever reported.
11. On June 1, 2011, ANC 1C adopted a resolution authorizing its chairman or vice chair to file an appeal of the ZA’s determination with the Board. The resolution was approved by unanimous vote (5-0) at a duly noticed public meeting held June 1, 2011, with a quorum present. (Exhibit 10.) At another public meeting, held on January 4, 2012 after proper public notice, with a quorum present, ANC 1C adopted a report by a vote of 8-0. The report stated ANC 1C’s belief “that the Zoning Administrator’s May 13, 2011 determination was clearly erroneous and should be reversed,” citing the absence of “any change of ownership in either the structure or in any business operating in the structure”; changes in the floor layout and use of the premises made by Peking Garden; improper designation of Peking Garden as a “carryout,” a use classification not available in 2003; the need for Peking Garden to obtain special exception approval since the prior certificate of occupancy had lapsed during the period of at least six years when the property was vacant; and the extension and enlargement of the use, through the provision of free food deliveries, beyond that permitted by the certificate of occupancy. The ANC recommended that the ZA’s determination should be overturned, Peking Garden’s certificate of occupancy should be revoked, and monetary penalties should be imposed. (Exhibit 19.)

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(1) (2008 Repl.), to hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer in the

⁶ Since the date of the email, the Zoning Regulations were amended to provide for the lapse of special exception uses under the same circumstances that result in the lapse of a nonconforming use. (See 11 DCMR § 3132.)

BZA APPEAL NO. 18256

PAGE NO. 7

carrying out or enforcement of the Zoning Regulations. Appeals may be taken by any person aggrieved by any "...administrative decision based in whole or in part upon any zoning regulation or map...." (D.C. Official Code § 6-641.07(f).)

In this case, ANC 1C argues that the May 13 email constituted a determination by the ZA that the business at the subject property was operating in conformance with the use authorized by its certificate of occupancy, and a refusal to undertake any enforcement action in response to the ANC's claims that the business was in fact operating outside the scope of the authorized use. The Board does not agree, and does not find any claim of error by the ANC within the Board's jurisdiction to address; accordingly, the appeal must be dismissed.

The May 13 email reported the ZA's conclusion that "the fast food establishment use at Peking Garden,... which was authorized by the issuance of Certificate of Occupancy CO54337, is a lawful use." That is, the May 13 email indicated the ZA's finding that a fast food establishment use would be lawful at the subject property, consistent with its certificate of occupancy. This conclusion was based on the ZA's review of the specific uses of the property that had been authorized by certificates of occupancy; the designation of those uses as "delicatessen" and "carryout," terms no longer used on certificates of occupancy; subsequent changes to the Zoning Regulations that made fast food establishments subject to special exception approval; and the definition of "nonconforming use." Based on those factors, the ZA reasonably determined that the use of the subject property as a "fast food establishment" would be a lawful use.⁷

⁷ The Board finds no merit in the ANC's contention that the Zoning Administrator erred by "ignoring" or omitting a portion of the definition of "nonconforming use" set forth in § 199 of the Zoning Regulations from the May 13 email. As the Appellant notes, that definition specifically excludes any "use lawfully in existence at the time of adoption or amendment of [the Zoning Regulations] that would thereafter require special exception approval...." ANC 1C argued that the Zoning Administrator "ignored the final sentence of that definition," which states that the exception to the definition of nonconforming use "shall be considered a conforming use, subject to the further provisions of §§ 3104.2 and 3104.3." Those provisions specify that in the case of a use that was originally permitted and established as a matter of right, but for which the Zoning Regulations now require a special exception, "any extension or enlargement of that use" requires special exception approval, and that, in determining whether to approve any extension or enlargement, the Board must consider the entire use, not only the proposed extension and enlargement.

The ANC alleged that the use of the subject property had been enlarged because "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....The Zoning Administrator should have ruled that offering food delivery ... constituted an extension or enlargement requiring special exception approval...." (Exhibit 1.) However, the ANC makes no allegation that the space or area at the subject property devoted to the use in question had ever been extended or enlarged physically, and thus §§ 3104.2 and 3104.3 are inapplicable. Rather, the ANC's argument was that the permitted use had "morphed" into a food delivery service use – that is, an allegation that the actual use of the property had changed to another use entirely and was no longer consistent with the use authorized by its certificate of occupancy. A change in use, even in case of an attendant change in the intensity of the use, does not constitute an expansion or enlargement of a use of property as those terms are used in the definition of "nonconforming use."

The Appellant apparently reads the May 13 email as a determination by the ZA that the subject property is currently being used as a fast food establishment.⁸ However, the May 13 email primarily responded to inquiries about whether use as a fast food establishment – a term currently used in the Zoning Regulations – would be consistent with the certificate of occupancy held by the business operating at the subject property, which authorized use as a “carryout,” a term not used in the Zoning Regulations. The ZA determined that, under the circumstances attendant to the subject property, “fast food establishment” use was consistent with the use permitted by the certificate of occupancy and was a lawful use under the Zoning Regulations. The May 13 email did not constitute a finding or determination by the ZA that the operation of the business by Peking Garden is in fact now operating as a fast food establishment. Instead, by noting “[e]xcept for the investigation of the possible food delivery service use,” the email also reflected the ZA’s conclusion that an investigation should be undertaken to determine whether the business was operating outside the scope of its permitted use.

The Board also disagrees with the ANC that the May 13 email constituted a “refusal” by the ZA to enforce the Zoning Regulations. By couching his determination in the May 13 email with a reference to “the investigation of the possible food delivery service use,” the ZA acknowledged the ANC’s contention that the current use of the subject property was not as a fast food establishment and thus was not in compliance with the certificate of occupancy or with the Zoning Regulations. The ZA subsequently reported to the ANC that the “continuing investigation of this matter is ongoing” but would not be completed as soon as originally expected, citing a need for additional information. While the investigation did not proceed as expeditiously or with the result desired by the ANC, the scope and conduct of the enforcement action undertaken (or not) by the ZA in this case are not subject to review by the Board as an “order, requirement, decision, determination, or refusal made by an administrative officer ... in the administration or enforcement of the Zoning Regulations.”⁹

The Board concurs with DCRA that enforcement of the Zoning Regulations is a discretionary function left to the discretion of the ZA. *See* Appeal No. 16950, *West End Citizens Association* (April 1, 2004) (Board found no error in DCRA’s failure to issue fines where the Board found no lack of compliance with conditions in a prior order, and “doubt[ed] whether such a refusal could serve as grounds for an appeal in view of the absolute discretion normally afforded enforcement decisions,” citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). The Appellant has not shown any error by the ZA in the administration of the Zoning Regulations with respect to the conduct of an investigation or any other enforcement action potentially undertaken with respect to the use of the subject property. *See* Appeal No. 18239, *ANC 6A*, and Appeal No. 18241, *Northeast*

⁸ In restating a portion of the May 13 email in its opposition to DCRA’s motion to dismiss, the Appellant used italics to emphasize the Zoning Administrator’s statement that “*I have determined* that the fast food establishment use at Peking Garden ... is a lawful use under the zoning regulations.” (Exhibit 20.)

⁹ Neighborhood residents dissatisfied with the Zoning Administrator’s actions with respect to the ANC’s complaint are not necessarily without recourse. By statute, “any neighboring property owner or occupant who would be specially damaged” by a zoning violation may institute appropriate action in Superior Court to prevent an unlawful use “or to correct or abate such violation....” (D.C. Official Code § 6-641.09 (2001).)

BZA APPEAL NO. 18256

PAGE NO. 9

Neighbors for Responsible Growth (February 17, 2012) (Board has no authority to hear an appeal not based on an interpretation of a zoning regulation).

Especially considering that enforcement by the ZA is a discretionary act to which no individual has a legal right, the Board does not agree with the Appellant that a delay by the ZA in addressing the ANC's complaint constituted a denial or refusal to undertake enforcement action.¹⁰ The ANC's appeal was submitted to the Board on June 1, 2011, before the date specified by the ZA (June 9, 2011) for an anticipated update in his consideration of the ANC's complaint. The Board credits the ANC's allegation that no additional information has been received from the ZA, but finds no error in the administration or enforcement¹¹ of the Zoning Regulations as a result.

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)). In this case, ANC 1C is the appellant. For the reasons discussed above, the Board concludes that the ANC has not offered persuasive advice that would cause the Board to find that the appeal should not be dismissed for lack of jurisdiction.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to its claim of error in a determination by the Zoning Administrator, Department of Consumer and Regulatory Affairs, made May 13, 2011, with respect to the fast food use and investigation of alleged food delivery service use in the C-2-A District at 2008 18th Street, N.W. (Square 2555, Lot 47). Accordingly, it is therefore **ORDERED** that the appeal is **DISMISSED**.

VOTE: 5-0-0 (Meridith H. Moldenhauer, Marcie I. Cohen, Nicole C. Sorg, Lloyd J. Jordan, and Jeffrey L. Hinkle to Dismiss the appeal.)

¹⁰ Cf. *Citizens Ass'n of Georgetown v. Washington*, 291 A.2d 699 (D.C. 1972) (courts have held that unreasonable delay by an administrative agency in performing a required function might effectively constitute a denial of relief subject to judicial action) (emphasis added). The dissenting opinion in *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 13 (D.C. 1978), cited cases with delays in enforcement of up to 50 years in disagreeing with the majority decision on laches that allowed a zoning violation to continue, stating that courts have, virtually without exception, refused to apply laches in the zoning context in spite of far lengthier delays in enforcement than in that case (at most six years, possibly three years). The opinion noted that estoppel involves an affirmative action that misled someone, but where laches is involved the only fault of the city is inactivity, and that inactivity is not necessarily "wrong" but could result from an entirely justifiable decision to utilize scarce enforcement resources for more important matters. The dissenting opinion noted that "The zoning board cannot attend to every conceivable violation. Congress implicitly recognized this fact by enacting D.C. Code [§ 6-641.09], which allows private citizens to bring suit to enforce the zoning laws."

¹¹ An allegation of an error in enforcement would typically arise from the issuance of a notice of infraction or notice of intent to revoke based upon a violation of the Zoning Regulations.

BZA APPEAL NO. 18256

PAGE NO. 10

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY:

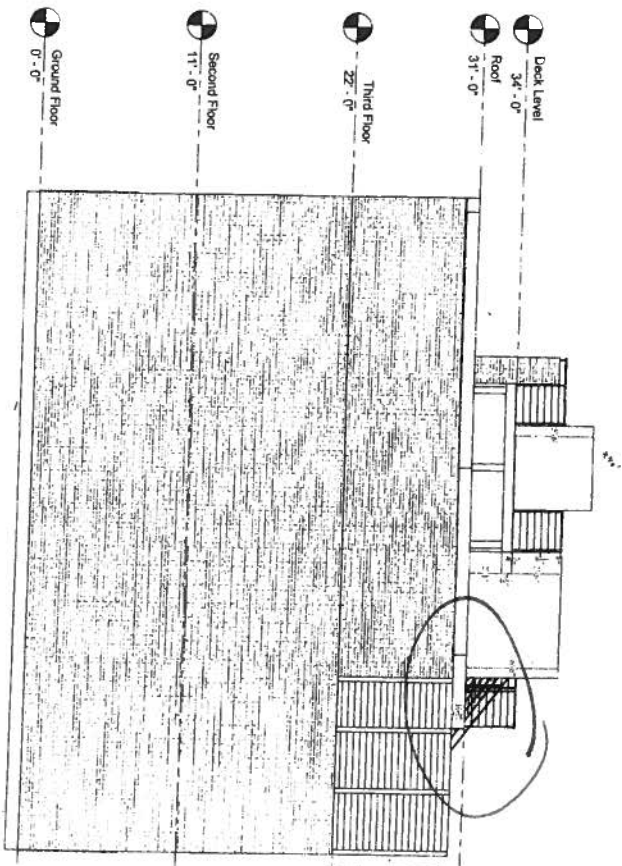


SARA A. BARDIN
Director, Office of Zoning

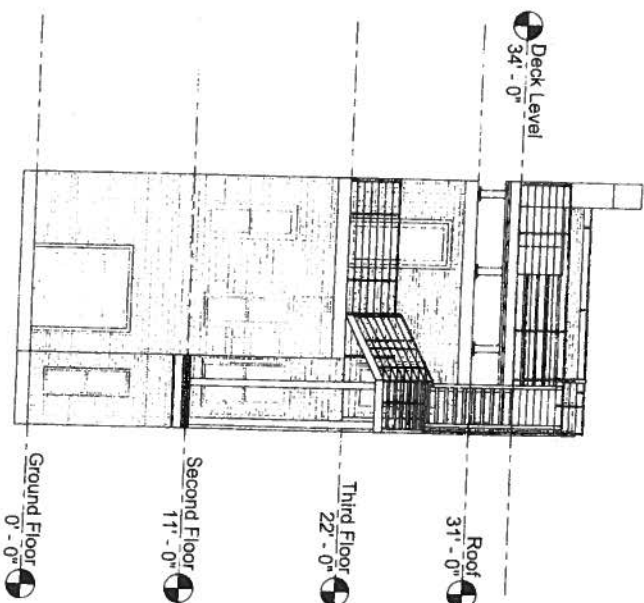
FINAL DATE OF ORDER: October 22, 2012

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

Exhibit 2



Building Elevation: North
Scale: 1/4" = 1'-0"



Building Elevation: West
Scale: 1/4" = 1'-0"

GENERAL NOTES

NO	Revised/Issue	Date



eurodesign

Project Name and Address
Darren Binder
1530 Swann Street NW
Washington, DC 20009

Project	Sheet
Roof Deck	A-4
Date	03/13/2012
Scale	1/4" = 1'-0"

APR 8 2012

1530 SWANN STREET NW
WASHINGTON, DC 20009
4111