

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18710 of Michael Y. Chung, pursuant to 11 DCMR § 3103.2 for a variance from the use provisions of § 701.1 to allow a fast food establishment¹ in the C-1 District at premises 607 Chesapeake Street, S.E. (Square 6208, Lot 106).

HEARING DATE: February 25, 2014
DECISION DATES: April 1, 2014 and April 8, 2014

DECISION AND ORDER

On November 27, 2013, Michael Y. Chung (the “Applicant” or “Owner”) filed an application with the Board of Zoning Adjustment (the “Board”) requesting a use variance to allow a fast food establishment at the subject property. The Board determined that the Applicant had not met the legal test for granting a use variance. Thus, the Board voted to deny the variance. A full discussion of the facts and law supporting this conclusion is found below.

PRELIMINARY MATTERS

Authorization

The Applicant in this case is the property owner, Michael Y. Chung. Mr. Chung authorized Henry Akinnuoye as his authorized agent. (Exhibit 23.) Mr. Akinnuoye is a “Managing Consultant” with the NDS Construction Management firm. (Attachment to Exhibit 1.)

The Application

The application was for a use variance from § 701.1 of the Zoning Regulations to allow a fast food establishment in the C-1 zone district.

Referral by the Zoning Administrator

The application was referred to the Board by the Zoning Administrator (“ZA”) of the District

¹ The relief sought was for a “fast food restaurant”. However, the caption was amended to reflect the proper use classification, a “fast food establishment”.

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Department of Consumer and Regulatory Affairs (“DCRA”). (Exhibit 2.) The relief sought was consistent with the relief recommended by the ZA.

Notice of Public Hearing

Notice

Pursuant to 11 DCMR 3113.13, notice of the hearing was sent by the Office of Zoning to the Applicant, all owners of property within 200 feet of the subject site, Advisory Neighborhood Commission (“ANC”) 8D, and the District of Columbia Office of Planning (“OP”).

Posting

The Applicant posted placards at the property regarding the application and public hearing in accordance with 11 DCMR §§ 3113.14 through 3113.20. He also submitted an affidavit to this effect in accordance with 11 DCMR §§ 3113.19 and 3113.20. (Exhibit 24.)

ANC 8D

The subject site is located within the jurisdiction of ANC 8D, which is automatically a party to this application. However, in this case, the ANC did not file a report regarding the application and did not participate in the Board proceedings.

Requests for Party Status

The Board received no requests for party status.

Persons in Support/Opposition

No persons appeared at the hearing to testify in support of the application or in opposition to the application. Nor were any letters received from persons in support of or in opposition to the application.

Government Reports

OP Report

OP reviewed the application and prepared a report recommending support of the application, noting that DCRA mistakenly authorized a fast food establishment by a Certificate of Occupancy issued in 2008 and that granting the variance would permit the continuation of a neighborhood service use. (Exhibit 22.) OP’s representative, Stephen J. Mordfin, also testified to this effect at the public hearing. (Transcript (“Tr.”) February 25, 2014, p. 31-32.)

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District of Columbia Department of Transportation (“DDOT”) Report

DDOT submitted a report stating that it had no objection to the requested variance. (Exhibit 21.)

FINDINGS OF FACT

1. The subject property is located at 607 Chesapeake Street, S.E., in Square 6208, Lot 106, in the C-1 zone district.
2. The property is improved with a one-story building with three commercial spaces and was built in 1956.
3. While a “restaurant” use is allowed in the C-1 zone, the Zoning Regulations expressly prohibit “fast food establishments” in the zone. (11 DCMR § 701.4(w).)
4. A fast food establishment is first permitted in a C-2-B District. (11 DCMR § 721.3 (f).)
5. The property has been used as a fast food establishment named “Harry’s Wings & Things” for approximately 10 years.
6. The record contains no evidence that the use was established pursuant to a Certificate of Occupancy.
7. DCRA issued a change of ownership Certificate of Occupancy (“C of O”) on August 24, 2006 (the “2006 C of O”) to a previous owner. (Exhibit 7.) In the portion of the 2006 C of O that describes prior and approved uses, the C of O indicated “other – see description.”
8. Under “description” the C of O stated “fast food restaurant no seats”. The description further stated that the premises was an existing fast food restaurant and that the C of O was being issued to permit the owner to seek a use variance for such a restaurant.
9. Although the description indicated “certificate expires 08.07.07,” within the 2006 C of O box labelled “expiration date” there is the word “none.”
10. There is no evidence that a use variance was ever granted for the property to be operated as a fast food restaurant or establishment.
11. DCRA issued a second change of ownership C of O in 2008, (the “2008 C of O”) to the Vineyard, LLC. (Exhibit 7.) The 2008 C of O described the occupancy as “carryout no seats” and the type of occupancy as “ownership change”.
12. As with the 2006 C of O, the 2008 C of O indicated “none” within the box labelled “expiration date.”

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13. The present owner of the property purchased it in 2013 in reliance upon its existing use as a fast food establishment and the existence of a Certificate of Occupancy that permitted it to operate as a carry out with no seats, which is an equivalent use.
14. The present owner's application for a change of ownership C of O was denied by the Zoning Administrator by letter dated November 5, 2013. The ZA indicated that the use applied for, "fast food establishment," was not permitted in the C-1 zone and therefore a use variance was required.
15. A large number of service and retail uses are permitted in the C-1 zone as a matter-of-right. (11 DCMR §§ 701.1 and 701.4.)
16. The C-1 zone also permits several other uses as special exceptions, if approved by the Board. (11 DCMR § 704.1 and §§ 706-712.)
17. The Applicant presented no evidence as to any difficulty in converting the space to a use that is allowed under the Zoning Regulations and there is nothing exceptional about the property itself to suggest that any difficulty exists.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.07(g)(3)(2001)), to grant variances from the strict application of any Zoning Regulations. In order to grant the use variance relief needed to establish the fast food establishment, the Applicant must satisfy the three-prong test set out in the Zoning Act and re-stated at 11 DCMR § 3103.2, that (1) its property has an exceptional size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulties or undue hardship if the Zoning Regulations are strictly applied; and (3) the requested variance will not result in substantial detriment to the public good or the zone plan.

Here, the Applicant must meet the stricter "undue hardship" test for a use variance for the fast food establishment. *See, Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972) ("A use variance cannot be granted unless a situation arises where reasonable return cannot be made of the property in a manner consistent with the Zoning Regulations."); *Bernstein v. D.C. Bd. of Zoning Adjustment*, 376 A.2d 816 (D.C. 1977) ("[I]t must be shown that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may reasonably be used.")

Turning to the first prong of the variance test, the Board finds that DCRA's erroneous issuance of the 2008 C of O and the Applicant's reliance upon that action in purchasing the property constituted an exceptional condition. The District of Columbia Court of Appeals has recognized that an exceptional situation or condition "need not be inherent in the land, but can be caused by

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subsequent events extraneous to the land.” *De Azcarate v. D. C. Bd. of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978). The zoning history of a property, including past actions of governmental authorities, can constitute the “events extraneous to the land” which create the requisite exceptional situation or condition. *Monaco v. D.C. Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097 (D.C. 1979). In *Monaco*, a zoning history that implicitly approved a use and thereby gave rise to good faith, detrimental reliance by the property owner, helped to establish the necessary exceptional situation.

In this case, the zoning history includes an explicit unconditional approval of a fast food establishment use on the property. In that sense, this case is very much like *Application No. 17960 of Lucia and Claudio Rosan* (2009), *affirmed*, *Oakland Condominium v. District of Columbia Bd. of Zoning Adjustment*, 22 A.3d 748 (D.C. 2011). In *Rosan* the Board granted a use variance to permit the expansion of a nonconforming rooming house from eight to 12 rooms. Prior to purchasing the property the applicants in *Rosan* observed 15 rooms in use and a Certificate of Occupancy that permitted the operation on all floors without a room limitation. After purchasing the property, the applicants sought an ownership change C of O to permit 12 rooms. DCRA denied the request, believing that the existing C of O was intended to limit the number of rooms to eight. The Board concluded that these facts and the “troubled regulatory history ... constitute the exceptional situation necessary to meet the first prong of the use variance test.” In this case, based upon the 2008 C of O and the long-standing operation of a fast food establishment on the property, the Applicant, when purchasing the property, reasonably concluded that continuation of the fast food use would be permitted.

However, the Applicant never established that this reliance on the 2008 C of O resulted in an undue hardship. Unlike the applicants in *Rosan*, who proved that the four additional rooms could not be put to any permitted use, the Applicant here never established why the property could not be used for any of the uses allowed by right or by special exception in a C-1 zone district. The Applicant had opportunities to present such evidence at the public hearing on February 25, 2014 and was even allowed to supplement the record after the hearing. Yet the Applicant failed to produce any additional documentation. The burden of proof rested with the Applicant. Since the Applicant failed to meet his burden of proof, the Board had no choice but to deny the request for relief.

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)(3)(B)) requires that the Board’s written orders give “great weight” to the issues and concerns raised in the recommendations of the affected ANC. In this case, the ANC did not submit a report. Therefore, there is nothing for the Board to give great weight to.

The Board is also required under D.C. Official Code § 6-623.04(2001) to give “great weight” to OP recommendations. The Office of Planning Report relied upon the unique zoning history in finding both an exceptional circumstance and what it characterized as “a “practical difficulty,”

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even though the correct standard was “undue hardship.” However a unique zoning history cannot be used to show undue hardship. As noted, the Board in the *Rosan* case still required demonstration that the additional rooms could not be used for any use permitted in the zone district in which the property was located. Because OP did not undertake that same analysis in this application, its report was incomplete and for that reason its recommendation of approval is not persuasive.

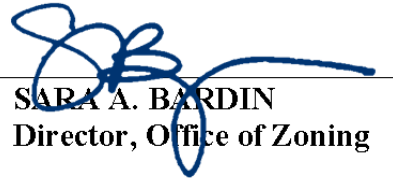
Therefore, for the reasons stated above, it is hereby **ORDERED** that the application is hereby **DENIED** for a use variance for a fast food establishment.

VOTE: **4-0-1** (Lloyd J. Jordan, Marnique Y. Heath, Jeffrey L. Hinkle, and Peter G. May voting to DENY the variance, and S. Kathryn Allen, not present, not voting.)

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: March 13, 2015

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.