

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18881-A on the Motion for Reconsideration of the Application of Nando's of Woodley Park, LLC, pursuant to 11 DCMR §§ 3104.1, 3103.2, and 1304.1 for special exceptions from the 25 percent street frontage limitation under § 1302.5(a) and the fast food establishment prohibition under § 1307.5, and a variance from the enclosure wall requirements of § 721.3(j) to establish a fast food establishment in the WP/C-2-B District at premises 2631 Connecticut Avenue, N.W. (Square 2204, Lot 161).

HEARING DATE: December 16, 2014

DECISION DATE: February 10, 2015

**FIRST RECONSIDERATION
DECISION DATE:** June 9, 2015

**DECISION TO REOPEN
RECORD:** October 20, 2015

**SECOND RECONSIDERATION
DECISION DATE:** November 2, 2015

ORDER ON RECONSIDERATION

By order dated April 24, 2015, ("Order") the Board of Zoning Adjustment ("Board") granted an application submitted by Nando's of Woodley Park, LLC ("Applicant") for special exceptions and an area variance to establish a fast food establishment in the WP/C-2-B District. (Exhibit 68.) The parties to the proceeding were: the Applicant; Advisory Neighborhood Commission ("ANC") 3C; the Woodley Park Community Association ("WPCA"); and Salim Zaytoun, the owner of a nearby restaurant, whom the Board consolidated with WPCA into a single party.

On May 1, 2015, the Applicant filed a Motion for Reconsideration ("Motion") of Condition No. 1 of the Order ("Condition No. 1"), which limits the validity of the Board's approval to a period of five years beginning on the effective date of the Order. (Exhibit 1.)¹ In the Motion, the

¹ This and all future references to exhibit numbers in the body of the order refer to those exhibits filed in Application 18881-A.

Applicant states that the five-year term prevents the Applicant from fulfilling its obligations under the lease agreement for the subject property. The lease provides for an initial term of 10 years, beginning when renovations are complete and a certificate of occupancy is granted, and grants the Applicant two options to renew for an additional five years each. The Applicant further states that it will be investing over \$1 million to renovate the property and that it would not be able to amortize this investment within the term set by Condition No. 1. Accordingly, the Motion requests that the term be extended to 20 years, provided that the relief granted would expire if the Applicant ceases to operate at the property before that time. Alternatively, the Applicant proffers the following conditions in lieu of imposing a term:

1. Food shall be served only in/on non-disposable tableware² and shall be served to patrons by staff (as opposed to self-service);
2. Wait staff shall clear and clean the tables after guests finish their meals; and
3. Carry out service shall be clearly subordinate to the principal on-premises use.

On May 13, 2015, WPCA filed an Opposition to the Motion (“Opposition”). (Exhibit 2.) WPCA argues that extending the term to 20 years would render it essentially meaningless and that the Applicant should instead modify its lease arrangement to be consistent with the Board’s Order. WPCA further states that the conditions the Applicant proposes in lieu of a term would not address the community’s concerns over the potential adverse impacts of allowing another eating establishment in the area.

On May 20, 2015, the Applicant filed a reply to WPCA’s Opposition (“Reply”). (Exhibit 3.) The Reply argues that the Opposition is not timely and that, in contrast with the rationale underlying Condition No. 1 as stated by WPCA, the condition was intended to prevent a “typical” fast food establishment from replacing the Applicant’s establishment without the need for zoning relief. ANC 3C did not participate in the reconsideration.

At a public meeting on June 9, 2015, the Board voted to deny the motion for reconsideration.

Prior to issuance of its written order denying reconsideration, the Board received a letter dated October 6, 2015, from ANC 3C³ informing the Board that the Applicant had cancelled its plans to locate in Woodley Park due to the five-year limit on approval of the application. The ANC asserted that the five-year limit had resulted in a *de facto* denial of the application and

² This portion of the proposed condition already is stated in existing Condition No. 5.

³ The letter was signed by two ANC commissioners who were authorized in the initial ANC resolution dated November 17, 2014, to act on behalf of the ANC either specifically or as a designee. (See Exhibit 58 in BZA Case No. 18881.) However, because the letter was not approved by the ANC at a properly noticed meeting with a quorum present, the issues and concerns expressed in the letter are not entitled to great weight pursuant to D.C. Official Code § 1-309.10 (d). Nevertheless, the substance of the letter represented a relevant submission by a party to this proceeding.

disregarded the overwhelming community-wide support to having the Applicant open a restaurant at this location. The ANC advised the Board that the Applicant was willing to proceed with its proposed food establishment at the Woodley Park location if the approved term of the Board's Order was extended to ten years.

On October 20, 2015, following the review of the ANC correspondence, the Board voted on its own motion to reopen the record to allow the parties until November 2, 2015 to file responses to the ten-year term proposed by the ANC.⁴ The Board received responses in support of a ten-year time limit from the Applicant and the property owner. The cover letter from the Applicant's counsel stated that it was amending its motion for reconsideration to accept a ten-year term. In addition, the Applicant again offered the three additional conditions pertaining to the operation of the use, but this time in conjunction with the term limit. The Applicant also requested that the term begin upon the issuance of a certificate of occupancy for the use, rather than as of the final date of the order as required by § 3131.1.

WPCA filed a letter in opposition to a ten-year time limit on the grounds that it would not adequately protect the community from the adverse effects of increased trash and rodents.

On November 3, 2015, the Board voted to rescind its earlier denial of the Motion, grant the amended Motion, enlarge the time limit on approval to a ten-year term, and modify the conditions of the Order to reflect the revised language proffered by the Applicant in its November 2, 2015 submission.

CONCLUSIONS OF LAW

Pursuant to 11 DCMR § 3126.2, a party may file a motion for reconsideration of any decision of the Board within 10 days after a final written order is issued. A motion for reconsideration must state specifically all respects in which the final decision is claimed erroneous, the grounds of the motion, and the relief sought. (11 DCMR § 3126.4.) Although the Board concluded that the Applicant's Motion did not provide a sufficient basis to reconsider its decision to limit its approval to a five-year term, it concluded that the Applicant's agreement to a ten-year term, with the addition of conditions pertaining to the operation of the use, justifies its reconsideration of the case and allows for the imposition of the ten-year term.

Before addressing the merits, the Board first finds that WPCA's Opposition was timely. Under §§ 3121.7 and 3110.3, a response to a motion served by mail must be filed within 10 days after service. The Applicant states in its Reply that the Motion was served on WPCA via mail on May 1, 2015, while the Opposition states that WPCA was served via email on May 9, 2015. Neither party filed any evidence to support their allegations. The Motion itself states that the Office of Planning was served via email and that ANC 3C was served by mail, but it does not indicate how

⁴ The Board has the inherent authority to re-deliberate upon its decisions after a vote but prior to the final order. See *Application No. 16970-B of National Child Research Center* (2004) (Board re-deliberated following vote to deny both enrollment increase and new construction, opened record for submissions, and voted to grant new construction).

WPCA was served. Absent any evidence, the Board finds that the Applicant has not carried its burden on this issue. Accordingly, the Board finds that the period to file a response to the Applicant's Motion did not begin to run until May 9, 2015. Thus, the Opposition, filed on May 13, 2015, was within the applicable period provided by §§ 3121.7 and 3110.3.

With respect to the merits of the Motion as initially filed, the Board finds that it does not provide a basis for reconsidering Condition No. 1. The Applicant suggests that the Board was not aware of its proposed lease, and had it known of the lease's existence, the Board would have imposed a 20-year term so as not to "conflict" with the lease. First, the Board was aware of the Applicant's lease arrangement when it made its decision to impose the five-year term. A representative of the Applicant testified to the proposed term of the lease at the public hearing on December 16, 2014. (Hearing Transcript of December 16, 2014, at 60:8–10.) Second, the Board rejects the Applicant's premise that the Board cannot impose a term of approval that is less than the term of a lease. The term of a lease is based upon the commercial best interests of private parties, whereas the imposition of a special exception term is based upon the best interest of the public. To the extent these two considerations conflict, the best interests of the public prevails.⁵

However, with the Applicant now agreeing to a ten-year term in combination with the conditions the Applicant originally offered in the alternative to a term, this balance of private and public interests is now achieved. Although the Board's order identified an increase in trash and rodent infestation as a potential concern, the Board remains confident that Condition Nos. 2 and 4 will adequately control potential trash and rodent problems. Those conditions require the Applicant to use the existing trash compactor at the site and provide trash pick-up service at least five times per week. Moreover, Condition No. 6 requires the Applicant to communicate with the ANC and WPCA on a quarterly basis, thus creating a more immediate, frequent, and effective mechanism to evaluate compliance.

The Board's principal concern was with the impact of a new fast food establishment on the overlay. The additional language proffered by the Applicant for Condition No. 5 will help protect the community from the adverse effects associated with a typical fast food establishment in the event another fast food establishment leases the space prior to the end of the ten-year limit. In addition to the current requirement that all food and drinks be served on/in non-disposable tableware, Condition No. 5 as revised will now require wait staff to serve all food and alcoholic beverages to patrons and to clear and clean tables after patrons finish their meals. Further,

⁵ The Applicant appears to disagree with the Board's view that the Board cannot lawfully condition its approval on the fast food establishment being operated only by the Applicant. The Applicant is correct that the Board may, with the consent of an applicant, impose a condition on its operations "that is not strictly confined to the regulation of the use of land." *President & Directors of Georgetown Coll. v. D.C. Bd. of Zoning Adjustment*, 837 A.2d 58, 77 (D.C. 2003). However, the proposed limitation in ownership is not a restriction placed upon how this use may be operated, but upon who its operator must be. As such it is *prima facie* unlawful. See *Nat'l Black Child Dev. Inst. v. District of Columbia Bd. of Zoning Adjustment*, 483 A.2d 687, 691 (D.C. 1984); *Olevson v. Zoning Bd. of Review of Town of Narragansett*, 44 A.2d 720, 722 (R.I. 1945) (holding that a zoning board was without power to limit the operation of a boarding and rooming house to the current owner "because it amounts really to a mere license or privilege to an individual and does not relate in its proper sense to the use of the property and the zoning thereof.").

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Condition No. 5 requires that carry-out service must be clearly subordinate to the principal on-site use. As with any condition of a BZA order, noncompliance furnishes grounds for revocation of the certificate of occupancy. (12 DCMR A § 110.5.5.2.)

While the Board continues to believe that the additional language would not justify permitting the proposed fast food establishment without any term, the Board concludes that a ten-year term will suffice. The Applicant demonstrated that its proposed restaurant would be a far better use of the property than the matter-of-right options being considered by the owner. However, the Board's initial term clearly doomed the project, which is a result the Board never intended. The Board's order describes its support for the proposed use. Further, as a result of the ANC's participation in this reconsideration proceeding, the Board is now fully aware of the "strong community-wide support" for the proposed use and the detriment to the community that would result should the original five-year term remain in place.

The Board acknowledges the concerns expressed by WPCA, but believes that the threat of increased rodent infestation is relatively small whereas the value to the neighborhood of permitting this use is great. Further, the Applicant has every interest in assuring that no adverse impacts would result if it wishes to avail itself of the full 20 years permitted under its lease options. Thus, a 10-year term, in combination with all of the conditions being imposed on this use, will achieve a result that is in the best interests of all concerned.

The Board also grants the Applicant's request that the term should begin upon the date that the certificate of occupancy for the use is issued notwithstanding § 3131.1. Subsection 3100.5 of the Board's rules of practice and procedure permits the Board for good cause shown, to waive most of the provisions of Chapter 31, including § 3131, if the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law. The purpose of the term is to allow the Board to evaluate the impact of the use while in operation. It therefore serves no purpose to commence this term before those operations begin. While WPCA no doubt would object to this additional time, the Board does not believe that making the length of its approval coterminous with the actual operation of the use will prejudice any right WPCA might have.

For all of these reasons, the Board hereby **ORDERS** that the amended motion for **RECONSIDERATION** is **GRANTED** and it is **FURTHER ORDERED** that Conditions Nos. 1 and 5 are amended as follows:

1. The Board's approval shall be valid for a period of **TEN (10) YEARS** beginning on the date that the certificate of occupancy for the approved fast food establishment use is issued.
5. All food and drinks consumed on the premises shall be served on/in non-disposable tableware with no exceptions. Wait staff shall serve all food and alcoholic beverage to patrons and shall clear and clean the tables after guests finish their meals. Carry out service shall be clearly subordinate to the principal on-premises use.

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VOTE: 3-0-2 (Marnique Y. Heath, Jeffrey L. Hinkle, and Robert E. Miller to Grant; Frederick L. Hill not present, not voting; one Board seat vacant)

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: January 27, 2016

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.