



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



FORM 150 – MOTION FORM

THIS FORM IS FOR PARTIES ONLY. IF YOU ARE NOT A PARTY PLEASE FILE A
FORM 153 – REQUEST TO ACCEPT AN UNTIMELY FILING OR TO REOPEN THE RECORD.

Before completing this form, please review the instructions on the reverse side. Print or type all information unless otherwise indicated. All information must be completely filled out.

CASE NO.: 18948

Motion of:

☐ Applicant

☒ Petitioner

☐ Appellant

☒ Party

☐ Intervenor

☐ Other _____

PLEASE TAKE NOTICE, that the undersigned will bring a motion to:

Dismiss

Points and Authorities:

Please state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion, including relevant references to the Zoning Regulations or Map and where appropriate a concise statement of material facts. If you are requesting the record be reopened, the document(s) that you are requesting the record to be reopened for must be submitted separately from this form. No substantive information should be included on this form.

The appeal of Marie E. Birnbaum alleges that the Zoning Administrator of DCRA issued a Certificate of Occupancy No. CO1500286 to "allow a first-floor retail establishment in the R-4 District at premises 1023 East Capitol St. SE (Square 967, Lot 4)." As shown in the attached supporting documentation, the listing of "first floor" instead of "basement" on the C of O was an inadvertent error which DCRA has now corrected. Further, the C of O in question makes no new non-conforming use as the appeal alleges. The supporting documentation contains evidence that zoning had previously determined that Park Concepts, LLC may sell flowers and plants from the basement level of 1023 East Capitol St. SE without violating any zoning regulations under the C of O issued to that level which allows the space to be used as a retail grocery store. Accordingly, similar to the case cited in the attached documentation, the appeal "does not challenge any decision based in whole or in part upon the Zoning Regulations and therefore must be dismissed for lack of jurisdiction."

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd 4th day of January Month, 2015

I served a copy of the foregoing Motion to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of Planning

in the above-referenced ZC or BZA case via:

☒ Mailed letter

☐ Hand delivery

☐ E-Mail

☐ Other _____

Signature:

Print Name:

Park Concepts LLC, John Kuykendall, Managing Member

Address:

1023 East Capitol St SE, Washington DC 20003

Board of Zoning Adjustment
District of Columbia

Phone No.:

202-329-9547

E-Mail:

surroundings@comcast.net

CASE NO.18948
EXHIBIT NO.15

Case No. 18948 - Appeal of Marie E. Birnbaum

Statement of Facts & Supporting Documentation

1. Charles Hudman and John Kuykendall, a married couple, own 100% of Park Concepts, LLC dba Surroundings Flowers (“Park Concepts”).
2. In 2008, Park Concepts purchased 1023 East Capitol St SE, a mixed use property which has a basement level that has a Certificate of Occupancy (“C of O”) as a “Retail Grocery Store.” The upper level are two apartment units that are zoned residential.
3. After purchasing the property, Park Concepts purchased the existing market that operated in the entire basement level known as “Lincoln Park Market,” refurbished the interior and leased part of the space to P&C Market while retaining a portion for Park Concepts to use as a market which sells flowers and plants under its trade name “Surroundings.”
 - **See Attachment 1 – C of O Permit No. 170278 issued on 7/16/2008 to Park Concepts LLC Trading As: Surroundings with Description of Use: Retail Grocery Store; Floor: Basement (“2008 C of O”).**
4. A few months prior to the issuance of the C of O, Hudman/Kuykendall met with various DCRA public space and zoning officials who confirmed that selling flowers and plants using the C of O of a “Retail Grocery Store” would not violate any zoning regulations since grocery stores sell flowers and plants.
5. In 2009, Hudman/Kuykendall moved into the first floor residential one-flat unit at 1023 East Capitol St SE and rented out the second floor flat. In more recent years, they have occupied the entire residential portion of the house (first and second floor). Because the residential flats are used as their home, Hudman/Kuykendall sought to beautify the overall surroundings of the property for their own enjoyment and use as well as for the enjoyment of the Capitol Hill community similar to other homeowners on Capitol Hill.
6. Although Hudman/Kuykendall continued to own their former home at 1121 G Street NE when they moved into 1023 East Capitol St SE, they leased out their former house and made it fully known to neighbors that they reside in the residential portion of 1023 East Capitol St SE.
 - **See Attachment 2 - Ms. Birnbaum incorrectly listed 1121 G Street, NE on both the “Form 125 Appeal” and “Affidavit of Service” as the address for Hudman/Kuykendall making it appear as though Hudman/Kuykendall do not live in the residential portion of the mixed use property.**
7. From the time of purchase until present, Hudman/Kuykendall have made significant improvements to the property, transforming it from an eyesore to what many residents on Capitol Hill refer to as being an “oasis of beauty.”
8. Pursuant to inquiries made by a DCRA official and as part of ensuring that all licenses were correct and current, on October 29, 2014, Hudman/Kuykendall requested that the C of O for the basement level of 1023 East Capitol St SE (C of O Permit No. 170278) state “Grocery Store/Flower Shop” so that it would be clear to everyone that no zoning laws were being violated by selling flowers and plants using the Retail Grocery Store C of O which was consistent with what we had been told in 2008.

9. Unfortunately, when DCRA issued the updated version of the C of O, the agency incorrectly listed “first floor” rather than “basement” as being the floor to which the C of O for a retail grocery store pertained.
10. It is obvious that this was an inadvertent typographical error when one compares the updated version of the C of O to the 2008 C of O. The permits have the same square and lot number. Also as acknowledged by Ms. Birnbaum in her appeal, the C of O issued on October 29, 2014 specifies “850 square feet” which is the same square footage on the 2008 C of O for the basement level. Ms. Birnbaum even admits that it is “unclear” as to what “first floor” means on the reissued C of O. Further, as Ms. Birnbaum correctly states on her Form 125-Appeal, “there is a second C of O for two flats above.” That C of O, remains unchanged.
 - **See Attachment 3 – C of O Permit No. CO 170275 issued on 7/16/2008 to Park Concepts LLC with Description of Use: “Two Family Flat”; “Floors 1st, 2nd FLR.”**
11. DCRA has since corrected the inadvertent typographical error.
 - **See Attachment 4 – C of O Permit No. CO 1500286 issued on 10/29/2014 to Park Concepts LLC Trading As: Surroundings Flowers**

The Appeal Must Be Dismissed For Lack of Jurisdiction

In *Board Order No. 18249 of Larry Heyman*, 59 DCR 9 (2012) (“*Heyman Order*”), the property owner correctly identified the square and lot number on a building permit application but when DCRA issued the permit, it contained an incorrect lot number due to a typographical error. An appeal was then filed based on the incorrect information. Shortly thereafter, the typographical error was brought to DCRA’s attention, and the DCRA re-issued the permit to reflect the correct lot number.

In dismissing the appeal, the Board of Zoning Adjustment (“Board”) found that “the appeal does not challenge any decision based in whole or in part upon the Zoning Regulations and therefore must be dismissed for lack of jurisdiction.” *Id.* at 11. The Board concluded, “[b]ecause the Appellant does not allege any error based in whole or in part upon any Zoning Regulations, the Zoning Act does not confer any authority on the Board to consider this appeal.” *Id.* The Board further stated, “[e]ven assuming that the Board had jurisdiction over this appeal, the errors alleged by the Appellant have been made moot by a subsequent event or are speculative in nature.” *Id.* The Board then stated,

the issue is moot because the typographical error on the original building permit was subsequently corrected by DCRA through the issuance of a revised permit. ‘A case is moot when the legal issues presented are no longer ‘live’ or when the parties lack a legally cognizable interest in the outcome.... The central question is ... whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties.’ *N St. Follies, Ltd. Partnership v. District of Columbia Bd. of Zoning*, 949 A.2d 584, 588-589 (D.C. 2008) (other citations omitted). The Board shall not consider informal requests for advice or moot questions. (11 DCMR § 3100.7.)

Similar to the *Heyman Order*, when Hudman/Kuykendall requested the reissuance of the C of O, they correctly identified the C of O as Permit No. 170278 which had "basement" listed as the floor on which a retail grocery store is permitted to operate; however when the DCRA reissued the C of O, "first floor" was indicated due to a typographical error. Also similar to the *Heyman Order*, shortly after Ms. Birnbaum's appeal was filed, the DCRA corrected the typographical error and reissued the C of O after the inadvertent error was brought to the agency's attention. Accordingly, similar to the *Heyman Order*, the Board should act expeditiously in dismissing Ms. Birnbaum's appeal.

Dismissal of the Appeal Advances the Public Interest

According to the Attestation Letter in this proceeding signed by Stephen Varga, Office of Zoning, "letters of notice have been prepared and mailed to all owners of property within 200 feet of the subject property based on the list of owners submitted by the Applicant as required by instructions on the BZA Application Form" Although 1023 East Capitol St. SE is located in Advisory Neighborhood Commission ("ANC") 6B, the street on which the property is located, East Capitol Street, is the border between ANC 6B and ANC 6A. Accordingly, because homes on the opposite side of the street would be within 200 feet, it appears that letters of notice have been sent to residents in both ANC6A and ANC6B (although we do not know the actual recipients of the letter since the service list that Ms. Birnbaum submitted to Mr. Varga has not been provided to us).

- Since residents of both ANC6B and ANC6A are impacted by this proceeding, this motion to dismiss is being served on the ANC Single Member District Representatives where the residents within 200 feet reside as well as the ANC Chairperson in both of those ANCs.
- We request that Mr. Varga provide a copy of this Motion to Dismiss to all of our neighbors within 200 feet to whom he provided the notice of appeal so that they are aware of the typographical error that DCRA has corrected. Providing our neighbors with this document may at least begin to remove the cloud of suspicion that the notice has caused regarding our legitimate right to operate a market which sells flowers and plants utilizing a C of O for a retail grocery store in the basement level as well as our right to peacefully live in the upper residential units as our home and beautify the overall surroundings of the property similar to most homeowners on Capitol Hill.

Further, as demonstrated by the Joint Letter of Opposition being filed concurrently herewith, neighbors residing in both ANC6B and ANC6A as well as throughout the Capitol Hill area believe the Board should dismiss this appeal.

We declare under penalty of perjury that the foregoing is true and correct.

Executed on January 24, 2015

Park Concepts, LLC dba Surroundings Flowers

Charles Hudman John Kuykendall

Charles Hudman & John Kuykendall, Managing Members

ATTACHMENT 1

Department of Consumer and Regulatory Affairs
 Permit Center
 941 North Capitol Street NE Room 2100
 Washington DC 20002
 Tel: (202) 442-4589

Government
 of the District
 of Columbia
 D.C. RA 93A

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.

CO 170278

THIS PERMIT IS VALID ONLY FOR THE PREMISES
 OF THE PROJECT ADDRESS

DATE: 7/16/2008

ADDRESS: 1023 EAST CAPITOL ST SE	FLOOR(S): BASEMENT	PRCLID: 0967 (square)	-0000-	0004 (lot)
		WARD: 6	ZONE: R4	

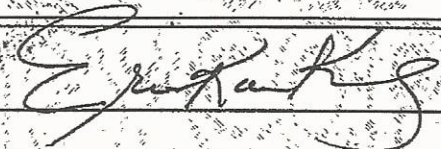
PERMISSION IS HEREBY GRANTED TO: CORPORATION: PARK CONCEPTS LLC ID No.: L37076	TRADING AS: SURROUNDINGS
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APPROVED USES: RETAIL	PREVIOUS USES: RETAIL
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TYPE: CHANGE OF OWNERSHIP	BZA NO.:	OCCUPIED SQ. FOOTAGE: 850	OCCUP. LOAD:	EXPIRATION DATE: NONE
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DESCRIPTION OF USE: RETAIL GROCERY STORE	FEE: \$75.00
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THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, VALID ONLY for the premise at the above address or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

Director  Linda K. Argo	PERMIT CLERK:  MAMADOU NDAW
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ATTACHMENT 2



BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA



FORM 125 - APPEAL

Before completing this form, please review the instructions on the reverse side.
Print or type all information unless otherwise indicated.

Pursuant to §§ 3100 and 3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken from the

administrative decision of:

Name of administrative officer and title
Rabbiah A Sabbakhan, Director and James Rudisill, Permit Clerk of the DC Department of Consumer and Regulatory Affairs

made on

Date of decision
October 29, 2014

that states

that a Certificate of Occupancy has been issued to Park Concepts LLC, trading as Surroundings Flowers, for use of the first floor at 1023 East Capitol St SE Washington DC 20003

Address(es) of Affected Premises	Square(s)	Lot(s)	Zone Districts
1023 East Capitol St SE	0967	0004	R-4

Present use of Property:

Bottom floor is a grocery with one C of O. There is a second C of O for two flats above.

Proposed use of Property:

General business licence for retail, either combining the grocery and a florist/garden center or using the first above-ground floor for the flor

Name of Owner of Property:

Park Concepts LLC (John Kuykendall and Charles Hudman)

Address:

1121 G Street NE Washington DC 20002

Phone No(s):

(202) 546-2125

Fax No.:

E-Mail:

surroundingsdc1@gmail.com

Name of Lessee:

Charles Hudman doing business as Surroundings

Address:

1023 East Capitol St SE Washington DC 20002

Phone No(s):

(202) 546-2125

Fax No.:

E-Mail:

surroundingsdc1@gmail.com

Name of Appellant, if other than Owner:

Marie E Birnbaum

Address:

1015 East Capitol St SE Washington DC 20002

Phone No(s):

(202) 543-3427

Fax No.:

E-Mail:

mariebirnbaum@verizon.net

I/We certify that the above information is true and correct to the best of my/our knowledge, information and belief. Any person(s) using a fictitious name or address and/or knowingly making any false statement on this appeal is in violation of D.C. Law and subject to a fine of not more than \$1,000 or 180 days imprisonment or both. (D.C. Official Code § 22-2405)

Date:

12/19/2014

Signature of Appellant*:

Marie E Birnbaum

Waiver of Fee - Status of Appellant

☐

ANC

☐

DC Government Agency

☐

NCPD

☐

Citizens' Association/Association created for civic purposes that is not for profit

To be notified of hearing and decision (Appellant or Authorized Agent*):

Name:

Marie E Birnbaum

Address:

1015 East Capitol St SE Washington DC 20003

Phone No(s):

(202) 543-3427

Fax No.:

E-Mail:

mariebirnbaum@verizon.net

* If an appeal is filed by the agent of the Appellant, Form 125 - Appeal shall be accompanied by a letter signed by the Appellant authorizing the agent to act on its behalf in this appeal.

Board of Zoning Adjustment
Appellate Office
CASE NO. 18948
EXHIBIT NO. 1

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

Subject: Affidavit of Service-- BZA appeal 18948

From: Marie Birnbaum <mariebirnbaum@verizon.net>

Date: 12/20/2014 2:29 PM

To: BZASecretary@dc.gov

This morning, I used first class mail to send copies of my BZA Appeal 18948, depositing the envelopes at the US Post Office at 600 Pennsylvania Ave, SE, Washington DC 20003. I mailed copies of BZA Appeal 18948 as follows:

Rabbiah A Sabbakhan, Director

DC Department of Consumer and Regulatory Affairs

1100 4th Street SW

Washington DC 20024

James Rudisill, Permit Clerk

DC Department of Consumer and Regulatory Affairs

1100 4th Street SW

Washington DC 20024

John Kuykendall, Park Concepts LLC

1121 G Street NE

Washington DC 20002

Charles Hudman, Surroundings

1023 East Capitol St SE

Washington DC 20003

Brian Pate

ANC Commissioner

921 Pennsylvania Ave SE, Suite 305

Washington DC 20003

Stephen Hagedorn, ANC Commissioner-Elect

246 9th St SE

Washington DC 20003

ATTACHMENT 3

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.

CO 170275

THIS PERMIT IS VALID ONLY FOR THE PREMISES
OF THE PROJECT ADDRESS

DATE : 7/16/2008

ADDRESS :	FLOOR(S):	PRCLID : 0967 (square)	-0000-	0004 (lot)
1023 EAST CAPITOL ST SE	1ST,2ND FLR.	WARD : 6	ZONE :	R4

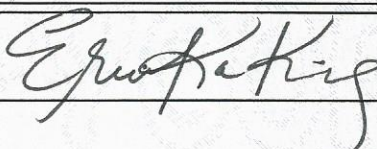
PERMISSION IS HEREBY GRANTED TO :	TRADING AS:
CORPORATION : PARK CONCEPTS LLC ID No.: L37076	

APPROVED USES :	PREVIOUS USES :
TWO FAMILY FLAT	TWO FAMILY FLAT

TYPE :	BZA NO. :	OCCUPIED SQ. FOOTAGE:	OCCUP. LOAD:	EXPIRATION DATE:
CHANGE OF OWNERSHIP		2,200	2	NONE

DESCRIPTION OF USE: TWO FAMILY FLAT	FEE : \$75.00
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THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, VALID ONLY for the premise at the above address or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

Director  Linda K. Argo	PERMIT CLERK: MAMADOU NDAW 
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ATTACHMENT 4

Government of the District of Columbia
Department of Consumer and Regulatory Affairs

1100 4th Street SW
Washington DC 20024
(202) 442 - 4400
dcra.dc.gov



C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO. **CO1500286**

Issued Date: **10/29/2014**

Address: 1023 EAST CAPITOL ST SE		Zone: R-4	Ward: 6	Square: 0967	Suffix:	Lot: 0004
Description of Occupancy: GROCERY STORE/FLOWER SHOP						
Permission Is Hereby Granted To: PARK CONCEPTS, LLC		Trading As: SURROUNDINGS FLOWERS		Floor(s) Occupied BASEMENT		Occupant Load: No. of Seats
Property Owner: PARK CONCEPTS, LLC		Address: 1023 E CAPITOL ST SE WASHINGTON, DC 20003-3905		BZA/PUD Number:		Occupied Sq. Footage: 850
						PERMIT FEE: \$82.50
Building Permit Number (if applicable)		Type of Application:	Approved Building Code Use Retail or Wholesale Store - M: Approved Zoning Code Use: Retail establishment			
Conditions/ Restrictions: THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE, EXCEPT PLACES OF RELIGIOUS ASSEMBLY. Use complies with DCMR Title 11 (Zoning) and Title 12 (Construction). As a condition precedent to the issuance of this Certificate, the owner agrees to conform with all conditions set forth herein, and to maintain the use authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all spaces whose use is authorized by this Certificate and to require any changes which may be necessary to ensure compliance with all the applicable regulations of the District of Columbia.						
Interim Director: Melinda Bolling		Permit Clerk Keith Slade		Expiration Date:		
1/20/2015 TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639						



CERTIFICATE OF SERVICE BY E-MAIL

CERTIFICATE OF SERVICE I, John Kuykendall, do hereby certify that on January 24, 2015, a true and exact copy of the foregoing Motion to Dismiss was served by electronic mail, addressed as follows:

Rabbiah A Sabbakhan, Director
DC Department of Consumer and Regulatory Affairs
1100 4th Street SW
Washington DC 20024
rabbiah.sabbakhan@dc.gov

James Rudisill, Permit Clerk
DC Department of Consumer and Regulatory Affairs
1100 4th Street SW
Washington DC 20024
dcra@dc.gov

Marie E. Birnbaum
1015 East Capitol St. SE
Washington, DC 20003
mariebirnbaum@verizon.net

Matthew Le Grant, Zoning Administrator
DCRA
1100 4th St SW - Room 3100
Washington, DC 20024
matthew.legrant@dc.gov

Stephen Varga, AICP, LEED Green Assoc.
Senior Zoning Specialist
Office of Zoning
DC Board of Zoning Adjustment
441 4th Street, NW, Suite 200/210-S
Washington, DC 20001
dcoz@dc.gov

Ward 6 Councilmember Charles Allen
John A. Wilson Building, Suite 406
1350 Pennsylvania Avenue, NW
Washington, DC 20004
CAllen@DCCOUNCIL.US

Kristen Oldenburg, Chair, ANC6B
423 12th Street, SE
Washington, DC 20003
Kirsten6b04@anc6b.org

Stephen Hagedorn, ANC6B Single Member District Representative
246 9th St SE
Washington DC 20003
Steve6b05@anc6b.org

Phil Toomajian, Chair, ANC6A
631 10th St. NE
Washington DC 20002
philANC6A@gmail.com

Chris Ward
141 11th Street, NE
Washington, DC 20002
cward6a03@gmail.com



John Kuykendall
1023 East Capitol St SE
Washington, DC 20003
surroundings@comcast.net