

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal by Marie Birnbaum from decision by the	)	
Zoning Administrator, Department of Consumer and	)	
Regulatory Affairs, to issue Certificate of Occupancy	)	BZA Appeal No. 18948
No. CO1500286 to allow a retail establishment in the	)	
R-4 District at premises 1023 East Capitol Street, S.E	)	
(Square 967, Lot 4)	)	
_____	)	

Opposition of Appellant To Motion to Dismiss

Introduction

Appellant Marie E. Birnbaum hereby responds to the motion to dismiss filed by Park Concepts, LLC, dba Surroundings Flowers, owner of the property that is the subject of the above captioned appeal (hereinafter “Owner”). The Owner argues that the instant appeal should be dismissed because it is premised on an error in the original Certificate of Occupancy (“C of O”), which has been corrected by the D.C. Department of Consumer and Regulatory Affairs (“DCRA”). The motion is not well-taken and should be denied.

Background

According to the Owners’ motion to dismiss, Park Concepts LLC purchased the property at 1023 East Capitol St SE in 2008, the basement of which has a Certificate of Occupancy (“C of O”) as a “Retail Grocery Store.” This use was a nonconforming use in the R-4 district, in which retail establishments are not permitted either as a matter of right or by special exception. 11 DCMR §.330. On July 1, 2008, Park Concepts LLC obtained a business license for a grocery store with the trade name Surroundings. At some point after purchasing the property, the Owner decided to use a portion of the space occupied by the grocery store “to use as a market which sells flowers and plants under its trade name “Surroundings.” Motion to Dismiss, at 1.

On October, 29, 2014, DCRA issued C of O No. CO1500286 to Park Concepts for a “grocery store/flower shop” operating in 850 square feet of first floor space at 1023 E. Capitol Street, S.E. Subsequently, DCRA issued a corrected C of O No. CO1500286, which in all respects is identical to the earlier C of O except that the box indicating the “Floor(s) Occupied” was changed from First Floor” to “Basement.” *See* Attachment 4 to Owners’ Motion to Dismiss. According to the Owners’ motion to dismiss, this corrected C of O was issued to correct “an inadvertent typographical error” in the original C of O.

According to the descriptive brochure on the website of Surroundings (<http://www.surroundings.bz>), Surroundings is a floral design service and gift shop located at 1023 E. Capitol Street, N.E. that sells a variety of gift items ranging from flowers and garden elements to “antiques” and “curiosities.” *See* Exhibit A. Surroundings also provides “full service floral décor for events of any size,” ranging from dinner parties to weddings, as well as planning and consulting services for “gardens,” including the sale of “garden structures, gazebos, arches, trellises, [and] benches.” *Id.*

According to the owners’ motion to dismiss, “Park Concepts 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.” Motion to Dismiss, at 1. Photographs taken of the 11th Street entranced by DCRA’s inspector Keith Lambert on February 6, 2014, show a large fountain, planter, benches, and garden structures located on public space. *See* Exhibit B, attached.

These photographs also show that, using public space, the Owner enclosed space under shed roofs toward the rear of the property to add interior space and to provide a new entrance to the separate business called Surroundings. The Owner also reconstructed and enlarged a

staircase at the rear, adding storage space underneath the staircase, again using public space. At the front of the building, the Owner raised the grade level of the parked space; paved a patio; and began to store business materials there. The Owner also erected a lighted metal structure around a Victorian fountain. There is no indication that building permits were obtained for any of these structures or patio work. <http://pivs.dcr.dc.gov/OBPAT/Default.aspx>.

Surroundings has since removed most of these garden structures and materials and has filed an application with the D.C. Department of Transportation (“DDOT”) for a public space permit. *See* Exhibit C.

Discussion

The Owner’s motion to dismiss is predicated entirely on the argument that the corrected C of O, indicating that the square foot amount of basement interior space will remain the same notwithstanding the additional new use of the space for a “flower shop,” demonstrates that there has been no “enlargement” of the nonconforming use that requires zoning relief from this Board. As a result, the Owner does not address the fundamental issue in this appeal: that the nonconforming use of the property has changed from grocery store to flower/furniture store, which is a new nonconforming use, which is not permitted in the most restrictive zone district in which the current nonconforming grocery store use is permitted. The Owner also fails to address the fact that they are seeking to enlarge the space used by the new nonconforming use by locating part of this new use on public space. For the reasons set forth in more detail below, the issues raised in this appeal are well-taken, and the motion to dismiss should be denied.

1. A Special Exception is Required to Use the Space for a Flower/Furniture Shop.

Under the Zoning Regulations, “a nonconforming use shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of this

title. . . “ 11 DCMR 2002.3. (emphasis added). “A nonconforming use of land or of land with structures incidental to the use of the land shall neither be extended in land area nor changed to any use except a use permitted in the district in which the property is located.” 11 DCMR 2000.6. However, if a special exception or variance is granted by this Board, “[a] nonconforming use may be changed to a use that is permitted as a matter of right in the most restrictive district in which the existing nonconforming use is permitted as a matter of right,” 11 DCMR § 2003.1. *See* BZA Application No. 16412 (Aug. 10, 1999) (granting special exception to Restaurant Nora to extend nonconforming restaurant use into adjacent building used for nonconforming office purposes).

Under the zoning regulations, a grocery store, gift shop, and flower stand or florist shop are specifically permitted as a matter of right to the same degree in the C-1 and higher density districts, and are also permitted in the CR district as “retail sales and services.” 11 DCMR 601.1(cc); 704.1(k), (l), and (m). However, the most restrictive zone in which a “furniture store” or “home furnishings sales” and “assemblage and repair incidental to the conduct” of those services and sales are permitted as a matter of right is the C-2 zone. *Id.* § 721.2(l), (m).

As noted above, Surroundings sells garden structures, gazebos, arches, trellises and benches, which are clearly furniture and/or home furnishings, and would therefore not be permitted in the C-1 zone, t, which is the most restrictive District in which the existing nonconforming use (grocery store) is permitted. *See* Application No. 11756 (Dec. 16, 1974) (The BZA denied a special exception for a change of a nonconforming use from servicing of copy machines to retail sales and stock room for fruits and flowers because sale of flowers to vendors who sell the goods to street consumers is a wholesale use permitted only in the C-M zone, and therefore is not permitted in the C-1 zone district, which is the most restrictive District in which

the existing nonconforming use (retail sales) is permitted.) Accordingly, the sale of garden structures and the services related to those sales is outside of the scope of the C of O issued for a “flower shop.”

Therefore, Surroundings is unlawfully engaging in these sales without a certificate of occupancy, in violation of 11 DCMR § 3203.1 (“no person shall use any structure, *land, or part of any structure or land* for any purpose until a certificate of occupancy has been issued to that person stating that *the use complies it the provisions of this title . . .*”) (emphasis added). This use should not be permitted without a variance.

2. The Expansion of the Flower/Furniture Store into the Public Space on 11th Street Constitutes an “Enlargement” of the Existing Nonconforming Use.

An additional reason for why the C of O was improperly issued is because the Owner is enlarging its flower /furniture shop by using the public space on 11th Street as well as space in the front of the property for the display/storage of garden material and structures. As noted above, the zoning regulations governing nonconforming uses specifically apply to “a nonconforming use **of land** or of land with structures incidental to the use of the land” and provide that neither shall “be extended in land area nor changed to any use except a use permitted in the district in which the property is located.” 11 DCMR § 2000.6 (emphasis added)

The BZA has ruled that an extension of a use to include an outdoor area (e.g., not “a structure”) would be considered an enlargement of a nonconforming use requiring a special exception. *See* BZA Application No. 13748 (Aug. 27, 1982) (the BZA granted a special exception to allow a restaurant to extend a non-conforming use to an outdoor café (albeit on private, not public, space), thus suggesting that the enlargement of a nonconforming use to an outdoor area would require special exception approval). Moreover, DDOT’s public space

regulations provide that “”The owner or occupant of a store located **in a residential-use district** (as designated under the zoning regulations) may, during the time the store is open for business, use the space outside the front of the store to the extent of four feet (4 ft.) from the building line for the display of goods, wares, and merchandise directly connected with the business transacted within the store; **Provided, that the use is conducted in compliance with the zoning regulations** and in accordance with the provisions of this section.” 24 DCMR § 112 (emphasis added). This DDOT regulation suggests that the public space permit cannot be granted to extend a non-conforming use into public space unless approved by the BZA.

The D.C. Comprehensive Plan supports an interpretation of the zoning regulations as applying the provisions of 11 DCMR § 2000.6 to extensions of nonconforming uses into public space. The policy of the Comprehensive Plan, Policy LU-2 3.8 Non-Conforming Commercial and Uses: is to "Reduce the number of nonconforming uses in residential areas Consistent with the zoning regulations, limit the expansion of such uses and fully enforce regulations regarding the operation to avoid harmful impacts on their surroundings (§311.1 0). Therefore, the proposed use of the public space constitutes an unlawful enlargement of the nonconforming use that should not be permitted as a matter of right.

Conclusion

For the foregoing reasons, the Owner’s motion to dismiss should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing opposition to the motion to dismiss were served electronically this 5th day of February 2015 upon at

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