

**Park Concepts, LLC dba Surroundings Flowers
1023 East Capitol St., SE
Washington, D.C. 20003**

March 7, 2015

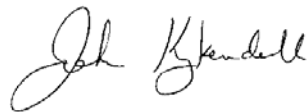
Stephen Varga, AICP, LEED Green Assoc.
Senior Zoning Specialist
Office of Zoning
Gov. of D.C. Board of Zoning Adjustment
441 4th Street, N.W., Suite 200/210-S
Washington, D.C. 20001

In re: Appeal of Marie E. Birnbaum
BZA Appeal No. 18948
Amended Service List to Response to Opposition of Appellant to Motion
to Dismiss

Dear Mr. Varga,

On March 7, 2015 Park Concepts, LLC dba Surroundings Flowers ("Park Concepts") submitted the attached Response to Opposition of Appellant to Motion to Dismiss and inadvertently omitted an individual on the service list. Attached hereto is the Opposition of Appellate to Motion to Dismiss with the amended service list which includes that individual. Please let me know if you have any questions.

Respectfully Submitted,



John M. Kuykendall III
Managing Member & Counsel to
Park Concepts, LLC dba Surroundings
Flowers
1023 East Capitol St SE
Washington, D.C. 20003
DC Bar #450987

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)	)	

Response to Opposition of Appellant to Motion to Dismiss

Park Concepts, LLC dba Surroundings Flowers ("Park Concepts/Surroundings") hereby responds to the Opposition filed on behalf of Marie E. Birnbaum in which she opposes Park Concepts' Motion to Dismiss ("Opposition"). As demonstrated herein, the appeal is based on an inadvertent error which has been corrected; makes allegations that are outside of the scope allowed for Board of Zoning Adjustment ("BZA" or "Board") appeals; and makes allegations regarding Park Concepts/Surroundings' Certificate of Occupancy that are not supported by BZA case law and findings made by the Zoning Administrator. Accordingly, the motion to dismiss should be granted expeditiously.

I. The Appeal Makes Other Allegations That Cannot Be Considered in this Proceeding

A. Matters Not Permitted by 11 DCMR §3112.2

According to 11 DCMR §3112.2, an appeal must be filed within 60 days "from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier" (emphasis supplied). In her appeal, Ms. Birnbaum asserts that her appeal is timely because she is within the 60 day allotted time period after she learned of the

“improper issuance of CO1500286.” This basis for the appeal is then qualified in the Notice of Hearing (“NOH”) issued by the Board of Zoning Adjustment (“BZA”) which states that the reason for the hearing is to consider “an October 29, 2014 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. CO1500286 to allow a first-floor retail establishment in the R-4 District” *See, e.g.*, NOH sent to Park Concepts/Surroundings dated December 22, 2014 (postmarked January 13, 2015) & NOH sent to Advisory Neighborhood Commission 6B stamp-dated January 7, 2015 (emphasis supplied).

Accordingly, references made by Ms. Birnbaum or her attorney to matters prior to the 60-day window that Ms. Birnbaum had knowledge of or reasonably should have had knowledge of, are not part of this proceeding and should not be considered in this proceeding, including any grievances that she may have with the owner or with District of Columbia agencies. For example, the photographs contained in Exhibit B to the Opposition taken on February 6, 2014 are not part of the “October 29, 2014 decision” by the Zoning Administrator. Consideration of any of such items in the context of this appeal are extraneous and outside the scope of this proceeding.

This also applies to allegations made in the Opposition that Park Concepts/Surroundings is a “flower/furniture” shop. These allegations are based a brochure which is attached as Exhibit A to the Opposition that was published when Park Concepts/Surroundings operated a market/flower shop in another location in a commercial district. Accordingly, these allegations should not be considered in this proceeding. Ms. Birnbaum “reasonably should have had knowledge” of this brochure prior to October 2014 as it has been posted on Park Concepts/Surroundings website since 2007. As shown in the brochure, the predominant

emphasis always has been flowers, floral arrangements and retail items so, whether then or now, it would not be accurate, and actually quite bizarre, to characterize the shop as a “flower/furniture” shop. Additionally, Ms. Birnbaum “reasonably should have had knowledge” about the plans to relocate the market/flower shop to its current location in 2008. For example:

- In March 2008, an article was published in the widely circulated local Capitol Hill monthly magazine, “The Hill Rag,” describing the plans for the relocation of the market/flower shop to 1023 East Capitol St. SE.
- In April 2008, Kenan Jarboe, our ANC6B Single Member District Representative at the time and a friend of Ms. Birnbaum, posted an announcement on the neighborhood Lincoln Park Listserv describing Hudman/Kuykendall’s initial plans concerning the relocation.
 - The announcement informed Capitol Hill residents that Park Concepts/Surroundings had received permission to relocate its market/flower shop from its then current commercial district location on Massachusetts Ave. NE to the rear of the basement level of 1023 East Capitol St SE and would be operating “as an adjunct to the grocery store” which at that time was operated by the grocery store known as “Lincoln Park Market” which occupied the entire 850 sq. feet of the basement level.
 - Mr. Jarboe was then updated in August 2008 after Park Concepts/Surroundings purchased the assets and lease of Lincoln Park Market and operated a “Market and Flowers” in the basement level.

B. Matters Outside of the Board’s Jurisdiction Are Not Permitted

As acknowledged by Ms. Birnbaum in her Opposition, Park Concepts/Surroundings is obtaining the necessary public space permits to the extent such permits are required. *See* Opposition at p.3 *citing* Exhibit C. However, that fact as well as any other matters related to the use of public space are not to be considered in this proceeding.

In *Appeal No. 17746 (Reed Cooke Neighborhood Association*, order issued June 10, 2008) (the “*RCNA Order*”), the BZA considered an appeal of the Office of Public Works, Public Space Committee of the D.C. Department of Transportation (“PSC”) to allow a curb cut along Champlain Street, N.W. in an area which was designated as “public space.” In dismissing the appeal, the BZA found that the appeal “did not arise out of the administration or enforcement of

the Zoning Regulations, and that, therefore, the Board lacks subject matter jurisdiction over the appeal and must dismiss it.” *Id.* (citing *Board Order No. 17585 of Darshan Shah*, 55 DCR 1201 ((2008) and cases cited therein). In making this finding, the Board stated that it could not find any “real nexus between the cited Zoning Regulations and the PSC’s decision” and concluded “[i]t is clear from the testimony presented at the hearing that the PSC did not make any determination with respect to any Zoning Regulation.”

In this instant proceeding, there is no “decision” related to the use of public space by the PSC or any administrative officer or body nor are there violations in Zoning Regulations at issue with respect to the October 29, 2014 decision by the Zoning Administrator. The Board should firmly reject the absurd attempts by counsel in the Opposition to seek to include use of public space in this proceeding. As stated in the *RCNA Order*,

The Board is authorized to hear appeals of any decision of any administrative officer or body ‘in the carrying out or enforcement’ of any Zoning Regulation. D.C. Official Code § 6-641.07(g)(1) (2001). *See*, 11 DCMR § 3100.2. (The Board may hear appeals of decisions made ‘in the administration or enforcement of the Zoning Regulations.’) Therefore, if an appeal is brought before the Board which does not arise from the carrying out/administration or enforcement of the Zoning Regulations, it is not within the Board’s jurisdiction, and the Board is without authority to hear it.

Id.

II. No Objections Raised to Resolution of Inadvertent Error on the C of O

As noted above, the sole reason stated on the NOH for the hearing pertained to allowing a “first-floor” retail establishment in an R-4 District. In the motion to dismiss, Park Concepts/Surroundings provided evidence showing that the notation of “first-floor” on the C of O was an inadvertent typographical error which has since been corrected. In the Opposition, counsel makes no objection to that evidence and instead focuses her arguments entirely on the

basement level. Accordingly, the sole issue stated in the NOH has been resolved and the motion to dismiss should be granted expeditiously.

III. No Improper Expansion of a Non-Conforming Use

A. Park Concepts/Surroundings Operates Within the Area Allowable for Use as a Retail Grocery Store under 11 DCMR §2000.4

In her appeal, Ms. Birnbaum questions whether the use of “first floor” on the C of O issued on October 29, 2014 “means ‘ground level’ with entry down a few steps (the location of the allowable grocery) or whether it means ‘first floor’ as in first floor. Exhibit I attached hereto contains a presentation made at the ANC6B Planning and Zoning Committee which addresses this issue. As shown in that document and attachments, the basement level of the property is 850 continuous square feet and has two entrances, one for a “below grade level” area which is 725 sq. feet and the other for a “grade level” area which is 125 square feet. The two areas are connected by a passageway with stairs.

From July – November 2008, after Park Concepts/Surroundings purchased the assets and lease of Lincoln Park Market, the market/flower shop occupied the entire 850 sq. feet of the basement level including the “grade level” area where Surroundings is currently located and sold food items as well as flowers and plants. In October – November, Park Concepts/Surroundings entered into an arrangement to lease the 725 sq. feet “below grade level” part of the space to P&C Market while retaining the 125 sq. feet “grade level” portion and continued to use that space as a market which sells flowers and plants. Since December 2008, the two entities have operated together as a “joint venture” within the 850 sq. feet selling flowers, plants and other items sold by grocery stores throughout the entire basement level previously occupied by Lincoln Park Market.

As explained in Exhibit I, until recently both C of O's for the two entities have indicated 850 sq. feet; however, pursuant to a letter sent by the Zoning Administrator, both C of Os have been revised to reflect the square footage used by each entity. Attachment D to that exhibit contains the revised C of O for Park Concepts/Surroundings showing 125 sq. feet on the basement level. The letter received by Park Concepts/Surroundings is also attached in Exhibit I. A copy of the revised C of O for P&C Market showing 725 sq. feet is attached as Exhibit II.

B. No Improper Expansion of Non-Conforming Use

Because 1023 East Capitol St. SE has housed a retail grocery store in the basement level dating back before the adoption of the Zoning Regulations in 1958, its retail use is a "non-conforming" use permitted to continue under 11 DCMR §2000.4 provided the use is not "extended." Park Concepts/Surroundings has not "extended" the non-conforming use by selling flowers and plants in the 125 sq. feet of the basement level of the property.

1. Support from BZA Case Law

In *Application No. 17906* (Se Y. Jeong, order issued August 11, 2009), the Board determined that special exception relief was not required for an application that had sought special exception relief to add the sale of five types of prepared foods to a nonconforming grocery store located on the ground floor of a building in an R-4 zone district. The Board found that neither "grocer" nor "grocery store" is defined in the Zoning Regulations. The Board then stated,

[g]rocery stores today also sell a multiplicity of items that might not be traditionally categorized as 'groceries,' such as periodicals, flowers, and DVDs. They also often provide services which would be considered outside the traditional ambit of a grocery store, such as banking services via ATM machines, preparing hot coffee or tea or even hot dogs or other simple food items"

Id. (emphasis supplied). The BZA concluded “[b]ecause the sale of prepared food is part of the principal use, no new C of O or amendment to the existing C of O is required” and “[t]he fact that the grocery is a non-conforming use does not change this analysis.”

As demonstrated above and in Exhibit I, the 850 square feet of the basement level of the property has been and continues to be “principally devoted” to items traditionally categorized as groceries. Similar to the way that Giant, Safeway and Harris Teeter have floral departments in their grocery stores on Capitol Hill, the rear portion of the basement level of the property has a small area (125 sq. feet) which is for the sale of flowers and plants with the remaining 725 sq. feet for sale of items traditionally categorized as groceries. These and other grocery stores have separate floral departments that not only sell flowers and plants but also design floral arrangements and provide services such as weddings, events and make deliveries. See, *e.g.*, www.giantflorist.com/, www.safewayflowers.com, www.harristeeterflowers.com. Other departments in those grocery stores also sell non-traditional grocery items such as charcoal, firewood, pet supplies and “furniture” such as lawn chairs. See, *e.g.*, *Safeway, Inc. v. Sanders*, 372 P.2d 1021, 1023 (Okla. 1962) (case involving damages for personal injuries in a Safeway grocery store caused when the plaintiff caught her foot against one of the “chairs for sale, which were described as lawn chairs”).

Further, even though the entities are not affiliated, Park Concepts/Surroundings and P&C Market operate as a joint venture utilizing the entire basement level to principally sell traditional grocery store items. The owners of P&C Market are friends of Hudman/Kuykendall and share the same vision of creating an upscale market selling gourmet grocery items as well as exquisite floral arrangements and exotic plants. Patrons to both shops also perceive the two entities as one as evidenced by the numerous emails submitted in this proceeding in support of Park

Concepts/Surroundings. See, e.g., Joint Letter of Opposition filed January 24, 2015 in this proceeding (email from Ely Ratner stating, "we . . . consider P&C Market and Surroundings to be an integral part of the neighborhood;" email from Jane Angarola stating, "Surroundings and P&C Market are thriving and have transformed the neighborhood, as a business and as involved and caring neighbors;" e-mail from Margaret Simmons Vining "It has been a joy to watch Charles, John, Surroundings, and P&C Market bring refinement and extraordinary products that are unavailable in one location elsewhere - and within a short walk! They have become a valued part of the Lincoln Park neighborhood not only for the high quality services and products they provide but also for their beautifying, professional and friendly presence"). As noted in the case cited above which also pertained to a nonconforming grocery store in an R-4 zone district, grocery stores provide services through unaffiliated entities such as banking services via ATM machines. Other examples of such joint ventures include Starbucks operating independently inside grocery stores.

2. Confirmation from the Zoning Administrator

As cited above, Park Concepts/Surroundings recently received a letter from the Zoning Administrator (copy attached as part of Exhibit I). The letter confirms that as of the issuance of the C of O in July 2008, "the inclusion of flower sales as part of the permitted non-conforming basement retail use was in conformity with the zoning regulations, since this did not 'extend' the non-conforming use in violation of 11 DCMR §2002.3." The letter further states,

When Park Concepts, LLC leased the front portion of the basement retail grocery store to P&C Market on November 26, 2008, and continued to sell flowers as Surroundings Flowers in the rear portion of the retail grocery store space, this did not 'extend' the non-conforming use since the same total 850 square feet were used for retail use. The Zoning Administrator also determined that the current operation and location of the flower shop are not in violation of 11 DCMR §2002.3 of the zoning regulations. Park Concepts, LLC/Surroundings Flowers is

not extending the nonconforming use to any additional area or floors of the property nor is the use intensified.

The letter concludes, “At this time, the Zoning Administrator does not find Park Concepts, LLC to be in violation of the zoning regulations and will not take any enforcement action” (emphasis supplied).

3. Strong Support from the ANC and the Capitol Hill Community

On March 3, 2015, the Planning & Zoning Committee of ANC6B heard presentations from both parties and from some of the over 40 Capitol Hill neighbors that attended the meeting solely to participate in this matter. After hearing all of the facts and arguments presented by both sides, the committee voted eleven in favor with one abstention to recommend that ANC6B dismiss or deny the appeal at its monthly meeting on March 10. None of the neighbors that attended raised their hands as being in support of the appeal and none of the committee members voted against the motion to dismiss or deny.

IV. Conclusion

As demonstrated herein, dismissal or denial of the appeal is warranted because it: is based on an inadvertent error which has been corrected; makes allegations that are outside of the scope allowed for BZA appeals; and makes allegations regarding Park Concepts/Surroundings 'C of O that is unsupported by BZA case law and is contrary to findings made by the Zoning Administrator. Further, the public interest would be served by immediate dismissal or denial of the appeal as evidenced by the fact that the Planning & Zoning Committee of ANC6B as well as numerous Capitol Hill residents have voiced their strong support to have the appeal dismissed.

March 7, 2015

Respectfully Submitted,



John M. Kuykendall III
Managing Member & Counsel to
Park Concepts, LLC dba Surroundings Flowers
1023 East Capitol St SE
Washington, D.C. 20003
DC Bar #450987

EXHIBIT I



ANC6B Planning & Zoning Committee Meeting
BZA Appeal No. 18948 – Appeal of Marie E. Birnbaum
March 3, 2015

Background

- In January 2008, Charles Hudman and John Kuykendall, owners of Park Concepts LLC dba Surroundings Flowers, purchased 1023 East Capitol St. SE.
 - The property is “mixed use” which means it has a basement level that is allowed to operate as a grocery store/market and first and second floors where Hudman/Kuykendall now reside that are zoned residential.
 - The basement is 850 sq. feet and is split level with 725 sq. feet “below grade level” and 125 sq. feet “grade level.”
 - **See Attachment A (showing the exterior of the property with “grade level” portion of basement under canopy).**
- In June 2008, Park Concepts purchased the assets and lease of what was known as “Lincoln Park Market” which occupied the entire 850 sq. feet of the basement level including the “grade level” area where Surroundings is currently located.
 - **See Attachment B (showing the inside of the 125 sq. foot “grade level” area where Surroundings is currently located)**
- In July 2008, the DCRA issued Park Concepts/Surroundings a Certificate of Occupancy (C of O) for a “Retail Grocery Store.”
- From July – November 2008, Park Concepts/Surroundings operated a “Market and Flowers” in the basement level selling food items as well as flowers and plants.
 - **See Attachment C (showing that the entire basement level was used by Surroundings).**
- In October-November 2008, Park Concepts entered into an arrangement to lease the 725 sq. feet the “below grade level” part of the space to P&C Market while retaining the 125 sq. feet “grade level” portion and continued to use that space as a market which sells flowers and plants.
- Since December 2008, the two entities have operated together as a “joint venture” within the 850 sq. feet selling flowers, plants and other items sold by grocery stores throughout the entire lower level previously occupied by Lincoln Park Market.
 - As explained below, both C of O’s for the two entities have indicated 850 sq. feet; however, pursuant to the directive of the Zoning Administrator of the DCRA, the C of Os are being revised to reflect the square footage used by each entity.
 - **See Attachment D (showing the revised C of O for Park Concepts/Surroundings indicating 125 sq feet)**

Appeal

- On October 27, 2014, Park Concepts requested that its C of O be updated to state “Grocery Store/Flower Shop” as part of ensuring that all licenses were current.
 - Due to an inadvertent error, the updated C of O incorrectly listed “first floor” rather than “basement” as being the floor to which the C of O pertained.
 - This error has been corrected.
- On December 20, 2014, before the C of O was corrected, Ms. Marie E. Birnbaum filed an appeal before the Board of Zoning and Adjustment (BZA) alleging that the updated C of O was an “impermissible, new, non-conforming use.” The BZA has scheduled a hearing for March 17th.
 - Appeal alleges that the C of O pertains to the “first floor” and that the use as a “grocery store/flower shop” is “an improper expansion of non-conforming use.”
- On January 24, 2015, Park Concepts filed a Motion to Dismiss and on February 5, 2015, Ms. Birnbaum’s attorney filed an Opposition to the Motion to Dismiss.

The Appeal Makes Other Allegations That Are Not To Be Considered in this Proceeding

- According to 11 DCMR §3112.2, an appeal must be filed within 60 days “from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier” (emphasis supplied).
- Accordingly, references made by Ms. Birnbaum or her attorney to matters prior to the 60-day window that Ms. Birnbaum had knowledge of or reasonably should have had knowledge of, are not part of this proceeding and should not be considered. This includes allegations regarding use of public space as well as any grievances that she may have with the owner or with District of Columbia agencies.
 - As acknowledged by the Opposition, Park Concepts/Surroundings is obtaining the necessary public space permits to the extent such permits are required.
- Allegations made in the Opposition that Surroundings is a “flower/furniture” shop are based a brochure that was published when Surroundings operated a market/flower shop in another location in a commercial district. Accordingly, these allegations should not be considered in this proceeding.
 - The brochure has been posted on Surroundings website since 2007. As shown in the brochure, the predominant emphasis always has been flowers, floral arrangements and retail items so, whether then or now, it would not be accurate to characterize the shop as a “flower/furniture” shop.
 - Ms. Birnbaum “reasonably should have had knowledge” about the plans to relocate the market/flower shop to its current location in 2008. For example:
 - In March 2008, an article was published in the Hill Rag describing the plans for relocation.
 - In April 2008, Kenan Jarboe, our ANC6B Single Member District Representative at the time, posted an announcement on the Lincoln Park Listserv describing Hudman/Kuykendall’s initial plans concerning the relocation. He was then updated in August after the plans changed.

The Issue Related to the “First Floor” Has Been Resolved

- According to the Notice of Hearing (NOH) sent from the BZA to ANC6B as well as to Hudman/Kuykendall, the reason for the hearing is to consider “an October 29, 2014 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. CO1500286 to allow a first-floor retail establishment in the R-4 District” (emphasis supplied).
- In the motion to dismiss, Park Concepts/Surroundings provided evidence showing that the notation of “first-floor” on the C of O was an inadvertent typographical error which has since been corrected.
- The Opposition makes no objection to that evidence and instead focuses entirely on the basement level. Accordingly, the issue stated in the NOH has been resolved.

No Improper Expansion of Non-Conforming Use

- Because 1023 East Capitol St. SE has housed a retail grocery store in the basement level dating back before the adoption of the Zoning Regulations in 1958, its retail use is a “non-conforming” use permitted to continue under 11 DCMR §2000.4 provided the use is not “extended.” Park Concepts/Surroundings has not “extended” the non-conforming use by selling flowers and plants in the 125 sq. feet of the basement level of the property.
- Support from BZA Case Law
 - o In *Application No. 17906* (Se Y. Jeong, order issued August 11, 2009), the BZA determined that special exception relief was not required for an application that had sought special exception relief to add the sale of five types of prepared foods to a nonconforming grocery store located on the ground floor of a building in an R-4 zone district.
 - o The BZA found that neither “grocer” nor “grocery store” is defined in the Zoning Regulations.
 - The BZA then stated, “[g]rocery stores today also sell a multiplicity of items that might not be traditionally categorized as ‘groceries,’ such as periodicals, flowers, and DVDs. They also often provide services which would be considered outside the traditional ambit of a grocery store, such as banking services via ATM machines, preparing hot coffee or tea or even hot dogs or other simple food items” (emphasis supplied).
 - o The BZA concluded “[b]ecause the sale of prepared food is part of the principal use, no new C of O or amendment to the existing C of O is required” and “[t]he fact that the grocery is a non-conforming use does not change this analysis.”
- The 850 sq. feet of the basement level of the property continues to be “principally devoted” to items traditionally categorized as groceries.
 - o Similar to the way that Safeway and Harris Teater have floral departments in their grocery stores on Capitol Hill, the rear portion of the basement level of the property has a small area which is for the sale of flowers and plants with the majority of the 850 sq. feet for sale of items traditionally categorized as groceries.

- Park Concepts/Surroundings together with P&C Market, both operating within the 850 sq. feet on the basement level of the property, can together sell products and services sold by retail grocery stores even though they are not affiliated.
 - As noted in the case cited above, grocery stores provide services such as banking services via ATM machines that are operated by unaffiliated entities.
 - Another example is that Starbucks sells its drink products independently inside the Safeway grocery store.
- Confirmation from the Zoning Administrator, DCRA
 - In a letter dated February 25, 2015 sent to Hudman/Kuykendall from Matthew LeGrant, Zoning Administrator, DCRA, the Zoning Administrator finds:
 - that as of the issuance of the C of O in July 2008, “the inclusion of flower sales as part of the permitted non-conforming basement retail use was in conformity with the zoning regulations, since this did not ‘extend’ the non-conforming use in violation of 11 DCMR §2002.3.”
 - The Zoning Administrator further states,
 - “When Park Concepts, LLC leased the front portion of the basement retail grocery store to P&C Market on November 26, 2008, and continued to sell flowers as Surroundings Flowers in the rear portion of the retail grocery store space, this did not ‘extend’ the non-conforming use since the same total 850 square feet were used for retail use.
 - The Zoning Administrator also determined that the current operation and location of the flower shop are not in violation of 11 DCMR §2002.3 of the zoning regulations.
 - Park Concepts, LLC/Surroundings Flowers is not extending the nonconforming use to any additional area or floors of the property nor is the use intensified.”
 - In this letter, Hudman/Kuykendall were informed that both C of O’s for Park Concepts/Surroundings and P&C Market need to be updated to reflect the correct square footage used by each entity.
 - The letter concludes, “At this time, the Zoning Administrator does not find Park Concepts, LLC to be in violation of the zoning regulations and will not take any enforcement action” (emphasis supplied).

Conclusion

- As demonstrated herein, dismissal of the appeal is warranted because it:
 - is based on an inadvertent error which has been corrected;
 - makes allegations that are outside of the scope allowed for BZA appeals; and
 - makes allegations regarding Park Concepts/Surroundings ‘C of O that is incongruent with BZA case law and findings made by the Zoning Administrator.
- The BZA gives ANC6s “great weight” in matters of appeal. Accordingly, it is incumbent upon ANC6B’s Planning and Zoning Committee:
 - to carefully examine the strong record evidence presented against the unsupported allegations made in the appeal.
 - consider the public interest of the hundreds of Capitol Hill residents that have voiced their support in dismissal of the appeal; and
 - recommend to the full ANC6B that it vote to promptly dismiss the appeal.

ATTACHMENT A

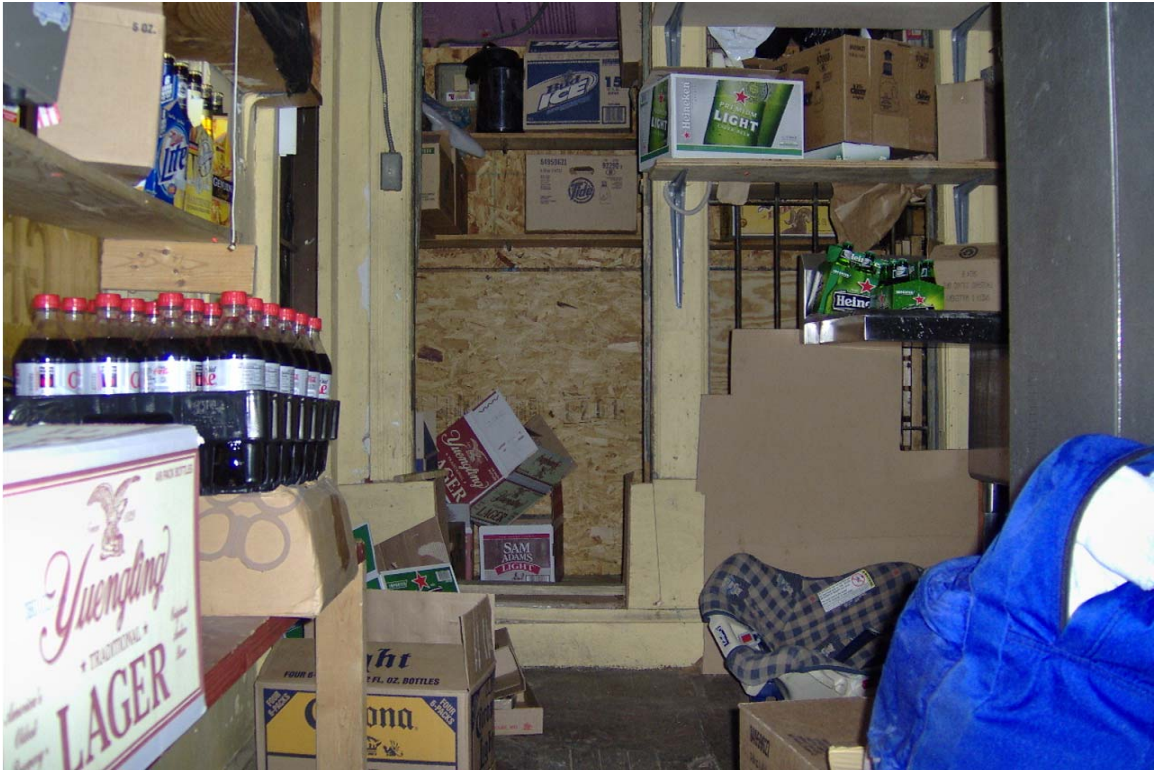


LINCOLN PARK MARKET
BEER, WINE & GOURMET FOOD
GROCERIES

OPEN



ATTACHMENT B





ATTACHMENT C



Market Surroundings Flowers

Surroundings
Market & Flowers

BIKE
LANE
NO PARKING
FIRE
HYDRANT
NO STANDING
NO STOPPING

FLOWERS



Surroundings Flowers

Surroundings
Market & Flowers

ATTACHMENT D

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. CO1501393

Issued Date: 02/27/2015

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: SURROUNDING 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: 125
						PERMIT FEE: \$82.50
Building Permit Number (if applicable)		Type of Application: Revised	Approved Building Code Use : 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 John McFarland		Expiration Date:		
2/27/2015		TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639				



**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



February 25, 2015

VIA REGULAR MAIL

To: Park Concepts, LLC
1023 East Capitol Street, SE
Washington, DC 20003

Re: 1023 East Capitol Street, NE (Surroundings Flowers)

Attn: Charles Hudman and John Kuykendall

The Office of the Zoning Administrator received a complaint in February 2014 regarding Surroundings Flowers, a business located at 1023 East Capitol Street, SE ("the Property"). We were informed that the business was operating without a valid certificate of occupancy and in violation of the zoning regulations. DCRA's Regulatory Investigation Section conducted an investigation of the business in March 2014 and determined that Surroundings Flowers was operating from the Property; however, the certificate of occupancy presented at the time of the investigation required an update to reflect the correct floor of the building from which the business was operating.

Certificate of Occupancy No. CO1500286 was issued to Park Concepts, LLC, trading as Surroundings Flowers, on October 29, 2014. This certificate of occupancy permitted a grocery store/flower shop on the first floor at the Property, based on an accidental error on the application stating that the use was on the first floor, not the basement floor. This error was corrected with a revision to this certificate of occupancy limiting it only to the basement floor that was made on January 20, 2015. Further concerns about the business arose, which prompted our office to conduct a follow up investigation of the business in January 2015. Following the conclusion of this investigation, the Zoning Administrator met with you, Charles Hudman and John Kuykendall, in order to obtain additional information about the history of the business at the Property.

Based on this investigation, the Zoning Administrator believes that the following are true:

- The Property has housed a retail use – a grocery store – in the 850 square feet of the basement floor dating back before the adoption of the Zoning Regulations in 1958. This retail use is therefore a non-conforming use permitted to continue under 11 DCMR §2000.4 provided the use is not extended, which would violate 11 DCMR §2002.3.
- Park Concepts, LLC purchased the Property in January 2008 including the tenant who operated the basement retail grocery store.
- In July 2008, Park Concepts bought out the pre-existing lease for the basement retail grocery store, intending to incorporate their existing retail flower business until then located at another site as part of the basement retail grocery store.
- On July 1, 2008 Park Concepts, LLC received a certificate of occupancy (CO 170278) for the basement retail grocery store, with the use listed as "retail" and the occupied square footage listed as "850".

- Until November 26, 2008, Park Concepts, LLC operated the basement retail grocery store including the sale of flowers.
- On November 26, 2008, Park Concepts, LLC leased a portion of the 850 square feet of the basement to P&C Market to operate as a grocery, with Park Concepts, LLC intending to continue their flower retail use in the remaining portion of the 850 square feet of the basement.
- On December 1, 2008, P&C Market received a certificate of occupancy (CO 0900296) for the basement retail grocery store, which erroneously listed the occupied square footage as "850" instead of the smaller portion assigned to it by their lease with Park Concepts, LLC.
- Between November 26, 2008 and October 29, 2014 Park Concepts, LLC continued to operate under CO 170278 but failed to revise it to reflect that the square footage occupied was less than the 850 declared.
- On October 29, 2014, Park Concepts, LLC addressed this error by applying for and receiving a new certificate of occupancy (CO 1500286) with the occupancy listed as "grocery store/flower shop" and the occupied square footage as "850". Since the application mistakenly listed the location of the use as the "first floor", CO 1500286 listed the use as on the "first floor."
- This error in CO 1500286 was corrected on January 20, 2015 to reflect the location of the retail use as "basement."
- P&C Market and Park Concepts, LLC together operate in and do not use more than the 850 square foot space of the grandfathered non-conforming retail use permitted under 11 DCMR §2000.4.

As a result, the Zoning Administrator has determined that as of the July 1, 2008 issuance of CO170278, the inclusion of flower sales as part of the permitted non-conforming basement retail use was in conformity with the zoning regulations, since this did not "extend" the non-conforming use in violation of 11 DCMR §2002.3. When Park Concepts, LLC leased the front portion of the basement retail grocery store space to P&C Market on November 26, 2008, and continued to sell flowers as Surroundings Flowers in the rear portion of the retail grocery store space, this also did not "extend" the non-conforming use, since the same total 850 square feet were used for retail use. The Zoning Administrator has also determined that the current operation and location of the flower shop are not in violation of 11 DCMR § 2002.3 of the zoning regulations. Park Concepts, LLC/Surroundings Flowers is not extending the nonconforming use to any additional area or floors of the property nor is the use intensified.

However, the Zoning Administrator finds that the square footage shown on the certificates of occupancy for both Surroundings Flowers and P&C Market, as 850 square feet, is incorrect. The 850 square feet encompass both the front portion of the pre-existing basement retail grocery store and the rear portion now occupied by Park Concepts, LLC. Therefore, Park Concepts, LLC must update its certificate of occupancy to reflect the correct (rear) portion of the 850 square feet of space that they currently occupy. Additionally, P&C Market must also update their certificate of occupancy to reflect the remaining square footage.

At this time, the Zoning Administrator does not find Park Concepts, LLC to be in violation of the zoning regulations and will not take any enforcement action. Please inform my office of when Park Concepts, LLC will apply for the revised certificate of occupancy to reflect the correct square footage for Surroundings Flowers. Any questions about this letter may be directed to the Office of the Zoning Administrator at (202) 442-4576 or via email at matt.legrant@dc.gov.

Date: _____

Feb. 25, 2015



Matthew Le Grant
Zoning Administrator

EXHIBIT II

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

1120 4th Street NW
Washington DC 20004
(202) 462-4679
dcma.dc.gov



C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO. CO1501394

Issued Date: 03/06/2015

Address 1023 EAST CAPITOL ST SE		Zone R-4	Ward 8	Square 0967	Buffer	Lot 0004
Description of Consistency RETAIL GROCERY STORE, DELI						
Permission is Hereby Granted To P & C MARKET, LLC		Trading As P & C MARKET		Flooring Occupied BASEMENT		Occupant Load No. of Seats
Property Owner P & C MARKET, LLC		Address 1023 E CAPITOL ST SE WASHINGTON, DC 20003-2809		BZAPUD Number		Occupied Sq. Footage 728
Building Permit Number (if applicable)		Type of Application Revised	Approved Building Code Use Approved Zoning Code Use: Retail establishment			

Conditional Restrictions:

THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE, EXCEPT PLACES OF RELIGIOUS ASSEMBLY. Use complies with DCMA Title 11 (Zoning) and Title 32 (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 assure compliance with all the applicable regulations of the District of Columbia.

Permit Director Melinda Bolling	Permit Clerk John McFarland <i>John J. McFarland</i>	Expiration Date:
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DISHONESTY, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-424-6842

AMENDED CERTIFICATE OF SERVICE BY E-MAIL

CERTIFICATE OF SERVICE I, John Kuykendall, do hereby certify that on March 7, 2015, a true and exact copy of the foregoing Response to Opposition of Appellant to Motion to Dismiss was served by electronic mail, addressed as follows:

Andrea C. Ferster **
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aferster@railstotrails.org

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