

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)	)	
_____	)	

Appellant's Withdrawal of Appeal

Appellant Marie E. Birnbaum timely filed the above-referenced appeal on December 19, 2014, challenging the Certificate of Occupancy (“C of O”) issued by the D.C. Department of Consumer and Regulatory Affairs (“DCRA”) to Park Concepts, LLC, dba Surroundings Flowers, on the grounds that the C of O for a “grocery store/flower shop” improperly authorized the expansion of a nonconforming use. As the photographs attached to Appellant’s prehearing statement and other filings¹ demonstrate, the Owners’ retail operations included the outdoor sale/display of garden benches, fountains, and other large scale garden structures not ordinarily sold in either a “flower shop” or a “grocery store.” *See, e.g.*, Appeal No. 17092 of Stephanie: Mencimer, *et. al.*, Oct. 14, 20144) (finding that a dog board facility was not similar to a pet shop or veterinary hospital)

However, subsequent to the filing of this Appeal, the large garden structures have been removed from the public space where they were previously located. Moreover, at the public hearing held by ANC 6B’s Planning and Zoning Committee to address this Appeal, the Owner’s counsel John Kuykendall stated that Surroundings is not selling these structures at 1023 East Capitol St SE. Accordingly, it appears that, subsequent to the filing of this appeal, the Owner

¹ See Exhibit B to Appellant’s Opposition to Motion to Dismiss

has voluntarily brought the property closer to compliance with applicable zoning regulations, and it is no longer necessary for this Board to address the legal issues raised in this appeal, and the Appellant hereby withdraws this appeal.

Nonetheless, Appellant strongly disagrees with the arguments advanced in the Owners' "Response, including the suggestion that that this appeal was not timely filed."² Moreover, the Owners' repeated allusions to the popularity of their store are misplaced and outside the purview of this appeal. The legally relevant issue in the context of this appeal is whether the use is authorized by the Zoning Regulations; statements concerning the popularity of or neighborhood support for the particular use are inadmissible.

Finally, Appellant notes that the latest filing by Owners' counsel Mr. Kuykendall contains a number of ad hominem references that disparage the legitimate concerns advanced in this lawful appeal. This intemperate language is incompatible with the D.C. Bar's voluntary standards of civility, which require counsel to "treat all participants in the legal process, including counsel and their staff, parties, witnesses, judges, and court personnel, in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written." <http://www.dcbbar.org/bar-resources/legal-ethics/voluntary-standards-for-civility/general.cfm>

² Appellant notes as well that this timeliness argument was not raised in the Owners' initial motion to dismiss, and is therefore beyond the scope of issues that may properly be raised in a reply to Appellant's opposition.

Respectfully submitted,



Andrea C. Ferster
Attorney at Law
2121 Ward Court, N.W. 5th Fl.
Washington, D.C. 20037
Phone (202) 974-5142
Fax (202) 223-9257
afferster@railstotrails.org

CERTIFICATE OF SERVICE

I hereby certify that the foregoing withdrawal of appeal were served electronically this 13th day of March 2015 upon:

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

Kristen Oldenburg, Chair, ANC6B
423 12th Street, S.E.
Washington, D.C. 20003
Kirsten6B04@anc6b.org

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



Andrea Ferster