GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No 16880 of Endale Terefa, pursuant to 11 DCMR § 3104.1, for a special exception to allow a change of nonconforming use from retail grocery to retail grocery and deli (no seats) under section 2003, in an R-4 District at premise 434 Shepherd Street, N.W. (Square 3237, Lot 79)

HEARING DATES: June 11, 2002, October 1, 2002
DECISION DATES: November 5, 2002, January 7, 2003

DECISION AND ORDER

The applicant in this case is Mr. Endale Terefa ("Applicant"), who is seeking to add a delicatessen component to his existing non-conforming grocery store, thereby expanding his non-conforming use. The Applicant's corner grocery store in an R-4 zone district at the corner of Shepherd and 5th Streets, N.W., in the Petworth Neighborhood of Ward Four. He is seeking a special exception to be permitted to add a delicatessen use to the grocery store in order to provide customers with items such as coffee, doughnuts and pre-packaged sandwiches

In 2001, the Applicant applied to the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") for a Certificate of Occupancy to use his store as a "Retail Grocery/Deli." On October 31, 2001, the Applicant was notified by the Office of the Zoning Administrator in the Building and Land Use Regulation Administration of DCRA, that his application was disapproved because his store is a nonconforming use, a change or expansion of which requires zoning relief from the Board of Zoning Adjustment ("Board").

On March 20, 2002, the Applicant filed an application with the Board requesting a special exception under § 2003.1 of Title 11 of the District of Columbia Code of Municipal Regulations ("DCMR"), pursuant to § 3104.1. A public hearing on the application was scheduled for June 11, 2002, but was continued, without any action being taken, until October 1, 2002, at the request of the Applicant.

On September 30, 2002, the Applicant's attorney, who was retained on September 26, 2002, in anticipation of the October 1, 2002 hearing, requested another continuance, which was denied. Therefore, the public hearing proceeded on October 1, 2002. After the hearing, the Board determined that additional information was needed from the parties and the Office of Planning ("OP") prior to making its decision. After receipt of

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such information, the Board held a public decision meeting on November 5, 2002. At this meeting, the Board deferred making a decision on the application in order to afford the applicant more time to work with the community, Advisory Neighborhood Commission (ANC) 4C and the appropriate Councilmember's office. The Board also sought a management and landscape plan from the applicant, outlining mitigating conditions to be imposed on the operation of his store, and input from the District of Columbia Department of Public Works. Final decision on the application was set for January 7, 2003. As of that date, however, the Board had not received any plan or list of conditions from the Applicant. For that reason and the reasons stated below, the Board, on January 7, 2003, voted 0-4-1 to deny the special exception application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated April 1, 2002, the Office of Zoning (OZ) notified OP, ANC 4C, the ANC Commissioner for the affected Single-Member District and the Ward 4 Councilmember of the filing of the application. Pursuant to 11 DCMR § 3113.13, the OZ published notice of the hearing on the application in the District of Columbia Register and on April 16, 2002, mailed notices to the Applicant, ANC 4C and all owners of property within 200 feet of the subject property, advising them of the date of the hearing. Further, the Applicant's affidavit of posting indicates that on June 1, 2002, he placed a zoning poster on the premise at 434 Shepherd Street, N.W., in plain view of the public.

Requests for Party Status. There were no requests for party status in this case. ANC 4C is automatically a party.

Applicant's Case. The Applicant testified in support of his application. He described his grocery store operation and his attempts to mitigate negative impacts on the surrounding neighborhood, including litter and loitering individuals. The Applicant did not call any witnesses to testify on his behalf.

Government Reports. The Office of Planning submitted a report dated June 11, 2002 to the Board recommending approval of the application. OP opined that the addition of a deli component to the grocery store would not require any significant change to the external or internal configuration of the store, nor would it create any deleterious external effects. OP testified at the October 1, 2002 hearing that, at the time it drafted its report, it was unaware that the Applicant planned to sell hot dogs cooked on the premise as part of his deli operation, but further testified that this would not change its recommendation. OP did not include any conditions in its June 11th report. Subsequent to the hearing, however, it provided the Board with a requested Supplemental Report dated October 30, 2002, in which it suggested several conditions to be imposed on the operation of the grocery/deli in order to mitigate potential negative impacts on the neighborhood.

ANC Report. In two separate letters dated May 22, 2002, ANC 4C indicated that it voted at a regularly scheduled public meeting on May 14, 2002 to oppose the application. The ANC stated that a deli in an area zoned R-4 is undesirable and will further challenge an already challenged neighborhood. Further reasons cited for opposition were: fostering of criminal activity, litter, loitering, excessive vehicular and pedestrian traffic and noise to abutting properties.

Parties and Persons in Support. No persons testified in support of the application. During the hearing, two letters and a petition in support were entered into the record. After the hearing, the Applicant proffered 4 more letters of support, which the Board accepted into the record.

Parties and Persons in Opposition. ANC 4C Chairman Timothy Allen Jones testified as a party in opposition to the application. Mr. Ron Austin, representing Councilmember Fenty's office, testified as to the Councilmember's opposition. Metropolitan Police Officer Marcus Jones, of the 4th District, testified in opposition and two local residents, Ms. Shirley Washington, and Ms. Kiesha Miller, testified as persons in opposition. The record also contains several letters in opposition, including letters signed by Councilmembers Fenty and Mendelson, and two petitions against the operation and expansion of the grocery store, signed by neighborhood residents.

Hearing. The public hearing on the application was postponed from June 11, 2002 until October 1, 2002, when it was concluded.

Decision Meetings. The Board held a public decision meeting on November 5, 2002, but deferred a final decision on the application until January 7, 2003, on which date the Board voted 0-4-1 to deny the application.

FINDINGS OF FACT

1. The Applicant's grocery store is on the ground floor of the building located at the corner of Shepherd and 5th Streets, N.W., in the Petworth Neighborhood of Ward Four. It is located in an R-4 zone district.

2. The building housing the grocery store was built in 1915 and has a long history of having a "miscellaneous grocery store" on the first floor. There is a residential unit above the grocery store.

3. The grocery store use, though not permitted as a matter-of-right use today in an R-4 zone, pre-dates the zoning regulations, and so, is a non-conforming use within the zone, which is permitted to continue, subject to certain specific provisions of the zoning regulations.

4. The grocery store is named "Bless 7 to 9 Store" and sells pre-packaged grocery items, including beer and wine, which are not intended for "take-out" use or to be eaten on the premise.

5. The hours of the store are from 8:30 a.m. to 9:00 p.m. The Applicant works in the store part-time, and when he is not present, his wife or his other employee is present. The store receives two commercial deliveries per week.

6. Applicant would like to expand his grocery store non-conforming use to include a deli component, and to sell therein hot dogs cooked on the premise, hot coffee, doughnuts and pre-packaged sandwiches.

7. There is often debris from the store, such as food wrappers, littering the area immediately exterior to the Applicant's store, although he cleans this area twice a day.

8. The Applicant's building has been cited at least once by the District of Columbia Department of Public Works for a litter violation for "[o]vergrowth of bushes, weeds, branches, etc. extending into public space!!" and "[i]mproper storage of bottle holders." (Notice of Violation No. 332496-1) The violation incurred a $75.00 fine and required abatement within 14 days.

9. A commercial trash collector removes trash from the Applicant's premise twice a week.

10. Applicant provided trash cans outside his store for the use of his customers, but they were repeatedly stolen during the night, when the store was closed. The Applicant did not take the trash receptacles into the store at night, not did he attempt to install a fixed receptacle. Instead, he began using a milk crate or a cardboard box for trash collection.

11. There was, for a long period of time, in front of Applicant's store, a large, unsightly empty ice machine, covered with graffiti, in which the Applicant stored newspapers between the time of their early morning delivery and his opening of the store, in order to prevent them from being stolen.

12. There was a pay phone in front of the Applicant's store. He removed the phone itself, leaving the empty metal housing.

13. The Applicant has placed two small lights on the exterior of his store, on either side of the door, and there is a city street light approximately 10 meters away from the entrance to the store, on the street corner.

14. The Applicant's store has a surveillance camera, but it does not have a recording capability.

15. The Applicant often has to call the police because of people congregating and loitering in front of his store.

16. The Board credits the testimony of Police Officer Jones. He testified that the individuals loitering in front of the store are engaging in criminal activity, such as selling drugs, and that the store provides them with a "cover," in that, if they see a police squad car approaching, they immediately duck into the store under the pretense of being customers and "stash" the drugs out of sight.

17. The Board credits Officer Jones' testimony that the lighting in front of Applicant's store is inadequate, and that, in combination with a large, untrimmed tree in front of the store, it creates shadows, which the criminal loiterers use to their advantage in hiding from, and running from, the police. These loiterers also cause undue noise when yelling about the approach of the police.

18. The Board credits the testimony of Officer Jones and Mr. Austin and finds that an expansion of the store to include a deli component would worsen an already poor situation and would increasingly attract criminals by providing them with further comforts, such as hot food and coffee.

CONCLUSIONS OF LAW

The Board is authorized to grant a special exception where, in its judgment, the special exception will be "in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property." 11 DCMR § 3104.1; D.C. Official Code § 6-641.07(g)(2) (2001). Each special exception permitted, however, must also meet all the conditions enumerated in the particular section pertaining to it. In this case, the Applicant has to fulfill not only the requirements of § 3104.1, but also the conditions listed in § 2003 of the zoning regulations. Section 2003 pertains to changes made to a non-conforming use, such as the applicant's grocery store. Although the Board concludes that the Applicant's grocery store is a "neighborhood facility," as required by § 2003.5, the Board further concludes that the application falls short of fulfilling the requirements necessary for the granting of the special exception.

The application fulfills neither of § 3104.1's requirements. Granting of the requested special exception is not in harmony with the Zoning Regulations and Zoning Maps. Although Applicant's nonconforming use is permitted, expansion of such uses is not encouraged, as demonstrated by the stringent restrictions placed upon them by Chapter

20 of the zoning regulations. Further, granting the special exception would tend to affect adversely the uses of neighboring property, contrary to § 3104.1. Moreover, coupled with § 3104.1's requirement of no adverse affects on neighboring property, are the requirements of §§ 2003.2 and 2003.3, *to wit*:

> The proposed use shall not adversely affect the present character or future development of the surrounding area in accordance with this title. The surrounding area shall be deemed to encompass the existing uses and structures within at least three hundred feet (300 ft.) in all directions from the non-conforming use.
>
> The proposed use shall not create any deleterious external effects, including but not limited to noise, traffic, parking and loading considerations, illumination, vibration, odor, and design and siting effects.

11 DCMR §§ 2003.2 and 2003.3, respectively. There is ample evidence in the record showing that the Applicant's proposed expansion of his grocery store to include a deli component would adversely affect the present character and future development of the surrounding area. In fact, the record is replete with allusions to the adverse impacts on the neighborhood created by, and exacerbated by, the Applicant's store as it currently exists. There was much testimony concerning the congregating and loitering of unsavory characters in front of Applicant's store. The Board concludes that this problem, which includes criminal activity, would be further exacerbated by an expansion of services offered by the store.

Although it appears that the Applicant has attempted to address some of the other deleterious external effects created by his store, such as litter and trash, his efforts have been insufficient. If such efforts are insufficient to contain the deleterious effects of the store as it is presently constituted, the Board is constrained to find that an expansion of the store's offerings would only make the attempts at containment more inadequate, thereby worsening the deleterious effects.
The Applicant has not provided the Board with any evidence that he would have, in the future, any greater ability to contain such deleterious effects than he does now. The Board therefore concludes that an expansion of the Applicant's store to include a deli component would lead to an increase in those deleterious external effects already caused by, and exacerbated by, the store, in direct contravention of § 2003.3.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to the application for a special exception, pursuant to § 3104, to allow a change of

nonconforming use from a retail grocery to a retail grocery and deli, under § 2003. It is therefore **ORDERED** that the application be **DENIED.**

VOTE: **0-4-1** (Geoffrey H. Griffis, Anne M. Renshaw, Curtis L. Etherly and David Zaidain, to deny. Zoning Commission member not present, not voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT.
Each voting Board member has approved the issuance of this Order denying the application.

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAY 12 2003

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL. LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
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As Director of the Office of Zoning, I hereby certify and attest that on MAY 12 2003 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

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