GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 17021 of Estelle Goldman, pursuant to 11 DCMR § 3104.1 for a special exception to continue the use of a nonconforming retail grocery/deli in the FBOD/R-3 District at premises 912 New Hampshire Avenue, N.W. (Square 28, Lot 122).

HEARING DATES: June 17, 2003 and September 23, 2003
DECISION DATE: October 7, 2003

DECISION AND ORDER

This application was submitted on April 11, 2003 by the owner of the property that is the subject of the application, Estelle Goldman (the applicant). Following a hearing on September 23, 2003[1] and a public meeting on October 7, 2003, the Board of Zoning Adjustment (the Board) voted to approve the special exception for a period of three years.

PRELIMINARY MATTERS

Self-certification The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The application The application was for a special exception to continue the use of a non-conforming retail grocery/deli that was last authorized by BZA Order No. 16261, dated November 12, 1997. The initial application also requested that the hours of operation be expanded to 24 hours a day under § 2003 of the Zoning Regulations. However, the applicant later withdrew her request to expand the hours of operation. As a result, the only issues remaining for the Board's consideration were the special exception approval and the terms and conditions of such approval.

Notice of Public Hearing Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the applicant, all owners of property within 200 feet of the subject site, the Advisory Neighborhood Commission (ANC) 2A, and the District of Columbia Office of Planning (OP). The applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect.

ANC 2A The subject site is located within the jurisdiction of ANC 2A, which is automatically a party to this application. Although not required to do so under applicable law, the applicant met with ANC representatives, resulting in the development of a

[1] The hearing set for June 17, 2003 was continued at the request of the applicant until September 23, 2003.

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proposed "Management Agreement Covering the Operations of the 7-11 Store at 912 New Hampshire Avenue" (the "Management Agreement").[2] The negotiated Management Agreement encompasses various issues and concerns of the ANC and provides that the ANC will not object to the continuation of the special exception with conditions. However, the applicant and ANC were unable to agree on the duration of the special exception and the Management Agreement makes clear that the ANC did not support a term exceeding 3 years. Thus, while the applicant requested Board approval for a 10 year period (or a minimum of 5 years), the ANC's final submission urged the Board to grant approval for only a 3 year period (Exhibit 51).

Requests for Party Status The Board granted party status to 2 neighboring property owners: Harold Talisman (Exhibit 26) and Benjamin Klotz (Exhibit 25).[3] Mr. Talisman and Mr. Klotz both urged the Board to limit the special exception approval to 3 years, citing examples of the applicant's alleged non-compliance with prior Board orders.

Persons in Opposition Several neighboring property owners appeared in opposition to the applicant's initial request for expanded hours of operation. However, they took no position once the applicant withdrew this request and the issues were narrowed.

OP Report OP's report (Exhibit 43) indicated that the application meets the tests for special exception approval, and recommended that the application be approved for a 3 year term with conditions. An OP representative testified that he recommended a 3 year term because it corresponded to what was negotiated by the ANC in the Management Agreement.

FINDINGS OF FACT

The Special Exception History

1. This application was filed on behalf of 7-Eleven, Inc. ("7-Eleven") and its franchisee for a special exception to continue the use of a non-conforming retail grocery/deli. The special exception was last approved by the Board in BZA Order No. 16261 on October 1, 1997. However, that approval was for a 3 year period that expired on or about October 1, 2000. Consequently, the applicant was operating without Board approval at the time this application was filed and heard.

2. Beginning in 1982, previous Board orders granted approval to operate a grocery and/or delicatessen at the site for terms ranging from 3 years to 6 years. In Order No. 13596 the Board granted approval in 1982 to operate for 3 years. In Order No. 14196

[2] The proposed Management Agreement (appended to Exhibit 52) had not been finalized at the time of the decision meeting on October 7, 2003.

[3] Neighboring property owner, Suzette Klein, also filed a request for party status (Exhibit 40). However, she withdrew her application when the applicant withdrew her request for expanded hours of operation.

the approval was for 6 years beginning in 1984; and in Order No. 15526 the approval was for 5 years beginning in 1991.

The Site and Surrounding Area

3. The subject property is located near the intersection of 24th Street and New Hampshire Avenue Avenue, N.W., almost immediately adjacent to the new George Washington University Hospital and within walking distance of the Foggy Bottom Metro Station and the George Washington University campus.

4. The property is zoned FBOD/R-3. To the north are three-story residential buildings and a 9-story condominium apartment building. To the south is a two-story row house and a 7-story apartment building and row houses.

5. The total gross floor area of the building is approximately 2,700 square feet, with approximately 913 square feet on each of the 3 levels (basement, first and second floors). The second (top) floor of the building is used for residential purposes by 7-Eleven for its employees. The franchisee also maintains an off-site parking space on 24th Street.

The Special Exception Operations

6. The store currently operates from 7:00 am to 11:00 pm daily. Three employees work the day shift from 7:00 am to 3:00 pm, and three employees work the evening shift from 3:00 pm to 11:00 pm. No beer, wine, liquor, or drug paraphernalia of any kind are sold at the store.

7. There is no vehicular or other access to the rear of the property. Therefore, all loading is accomplished at the front of the store on the public street. Deliveries occur from 9:30 am to 3:00 pm at a commercial loading zone on New Hampshire Avenue, N.W., except deliveries from the 7-Eleven distribution center occur only twice per week during the evening from 8:00 pm to 10:00 pm.

8. Interior and exterior trash containers are provided and regularly emptied by the franchisee, who is also responsible for ensuring that the front of the store is kept free from litter, debris and "spillage" on the public space.

9. Tinted doors and windows are used to prevent interior light from intruding beyond the store. Exterior lighting is provided to ensure public safety, but shielded to minimize disturbance to the neighborhood.

CONCLUSIONS OF LAW

The Special Exception

Generally, 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). The Board concludes that the continued use of the property as a retail grocery/deli will be compatible with the surrounding area and will not adversely affect neighboring properties, so long as the conditions within this Order are complied with.

Each special exception permitted, however, must also meet all the conditions enumerated in the particular section pertaining to it. In this case, therefore, the applicant also has to meet the conditions listed in § 2003 of the Zoning Regulations. Section 2003 sets forth specific criteria under which the Board may permit a change to a nonconforming use, and will be discussed in the paragraphs that follow.

2003.1 If approved by the Board of Zoning Adjustment, as authorized in § § 3103 and 3104 for variances and special exceptions respectively, 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, subject to the conditions set forth in this section.

The longstanding and requested continuing use of the subject property as a grocery store and delicatessen for 7-Eleven operations is permitted as a matter-of-right in the C-1 district, the most restrictive commercial district. See, 11 DCMR § 701.4

2003.2 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 nonconforming use.

Provided there is no expansion of its hours of operation, and provided the applicant complies with the Conditions in this Order, the 7- Eleven retail grocery/deli will not adversely affect the present character or future development of the surrounding area.

2003.3 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.

Provided there is no expansion of its hours of operation, and provided the applicant complies with the Conditions in this Order, the 7-Eleven retail grocery/deli will not create any deleterious external effects such as those enumerated above.

2003.4 When an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming use of less restrictive use.

For 21 years, 7- Eleven has maintained the same use as a grocery store and delicatessen and has not converted to a conforming or more restrictive use.

2003.5 *In Residence Districts, the proposed use shall be either a dwelling, flat, apartment house, or a neighborhood facility.*

In each previous Board order, it was determined that 7-Eleven and its franchisee use the subject property as a "neighborhood facility", and this Board adopts this determination.

2003.6 For the purpose of this section, the districts established by this title are listed in the following order of decreased use restriction:

(a) R-1-A, R-1-B, R-2, R-3, R-5-A, R-4, R-5-B, R-5-C, R-5-D, and R-5-E;
(b) SP-1 and SP-2;
(c) C-1, C-2-A, C-2-B, C-2-C, C-3-A, C-3-B, C-3-C, C-4, and C-5 (PAD);
(d) W-1, W-2, and W-3
(e) CR; and
(f) C-M-1, C-M-2, C-M-3, and M.

A retail grocery/delicatessen is first permitted within the C-1 District. Within the R-5 District, "foods, drugs and sundries" are permitted as an accessory use, but only within apartment houses and with no direct access to the outside.

2003.7 The Board may require the provision of or direct changes, modifications, or amendments to any design, plan, screening, landscaping, type of lighting, nature of any sign, pedestrian or vehicular access, parking and loading, hours of operation, or any other restriction or safeguard it deems necessary to protect the value, utilization, or enjoyment of property in the neighborhood.

This property is within the Foggy Bottom Historic District, whose purpose includes "enhanc[ing] the residential character of the area by maintaining residential uses". Previous Board approvals have been subject to specific conditions and/or terms of a Management Agreement. Because the Board desires to protect the historic and residential character of the neighborhood, and because of the ongoing Management Agreement between the applicant and the affected ANC, the Board's approval will be subject to various conditions that address screening, landscaping, lighting, signage, loading, and hours of operation.

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. To give "great weight" the Board must articulate with

particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns. In this case the ANC supported the applicant's request for continued approval, provided certain conditions of the Management Agreement were incorporated and, provided the approval was limited to a three-year term. However, the Board may impose only those conditions that are necessary to mitigate the potential adverse impact of the zoning relief granted. D.C. Official Code § 1-309.10 (2001). The Board is persuaded that most of the negotiated conditions proffered by the applicant and ANC are necessary in this respect. The Board is also persuaded based upon the evidence of record (including the applicant's more than three year period of operating without Board approval and neighborhood complaints regarding the applicant's non-compliance with prior special exception conditions) to limit the approval to the three-year period requested by the ANC.

In light of the foregoing, the Board **ORDERS** that the application is hereby **GRANTED** to allow the continued use as a special exception of the 7-Eleven as a retail grocery/delicatessen at 912 New Hampshire Avenue, N.W. (Square 28, Lot 122), **SUBJECT** to the following **CONDITIONS:**

1. Approval shall be for a period of **THREE (3) YEARS.**
2. The hours of operation shall be from 7:00 am to 11:00 pm daily.
3. Deliveries from the 7-Eleven distribution center shall be between 8:00 pm and 10:00 pm only.
4. All other deliveries shall be on a scheduled basis between 9:30 am and 3:30 pm so that only one delivery vehicle is at the site at any given time.
5. All deliveries shall be made using the commercial loading zone on New Hampshire Avenue immediately adjacent to the site.
6. Applicant will empty the trash containers belonging to 7-Eleven and the District government in front of the store at least twice daily or more frequently as required.
7. Applicant will clean the sidewalk and gutter in front of the store to ensure they are clean at all times.
8. Applicant will clear trash from the sidewalks in front of the adjacent and nearby buildings to the north and south of the store on a regular basis.
9. Applicant will clear snow and ice from the sidewalk in front of the store to ensure safe passage.
10. Applicant will maintain the exterior appearance of the premises in keeping with the residential character of the Foggy Bottom Historic District and Foggy Bottom Overlay District. Any exterior lighting shall be minimized and directed downward and away from all adjoining residential property. Applicant will take all reasonable measure to minimize the light visible from the inside of the store, and will maintain tinted windows and doors.
11. No signs or poster will be posted in the windows and no public telephones,

teller machines or other similar devices will be added to the exterior of the building. No electronic or mechanical amusement machines will be located on the premises.

12. No storage containers or items, except garbage receptacles, will be stored on the exterior of the store.
13. Applicant will maintain the exterior landscaping at the property as provided in the negotiated Management Agreement.

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, David A. Zaidain, Curtis L. Etherly, Jr., and Peter G. May to approve).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: FEB 2 3 2004

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.

PURSUANT TO 11 DCMR 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. SAG/RSN

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As Director of the Office of Zoning, I hereby certify and attest that on FEB 2 3 2004 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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rsn

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