GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING

Office of the Director

MEMORANDUM

TO: Board of Zoning Adjustment

FROM: Andrew Altman, Director
Office of Planning

DATE: February 24, 2004

SUBJECT: BZA Case No. **17075**

APPLICATION
The application by Ming Jin Zhang pursuant to 11 DCMR 3104.1, for a special exception to allow the continuation of a Chinese Food Carry-Out not meeting the convenience stores in apartment houses requirements (Section 354) in the DCOD/R-5-E Zone District, located at 1417 17th Street, N.W., Square 181, Lot 149.

RECOMMENDATION IN BRIEF
The Office of Planning can't make a recommendation, pending information from the property owner.

SITE AND AREA DESCRIPTION
The subject premise is in the Dupont Circle Neighborhood in Square 181. The Square is bound by P Street to the north, O Street to the south, 16th Street to the east and 17th Street to the west. The subject site is on Lot 149, and contains a three-story row dwelling with basement. The subject carryout is located in the basement, with street level access to 17th Street. The subject structure is the northern end unit of a three-townhouse set. There is a 48-unit mid-rise apartment building at the northeast intersection of the square (17th & P Streets), which abuts the subject structure on the south side. The nine-story Richmond Apartments is at the south end of the square, located at the southeastern intersection of 17th & O Streets. There is a north south alley that extends from P Street, and ends at the rear of the subject property.

PROPOSAL
The applicant proposes to continue using the basement level of the subject premise to operate a Chinese Delicatessen/Carryout with no seating provided. The carryout is

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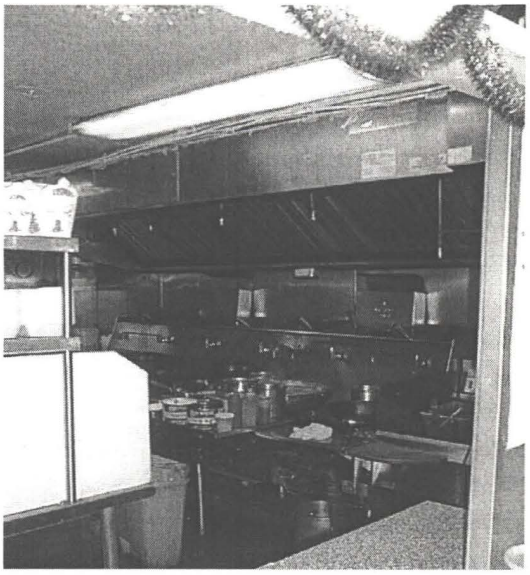
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approximately 700 square feet, located in the basement level of the premise, with a four-step walk-down at the entrance.

ZONING ANALYSIS

Referral From Zoning Administrator

After reviewing the application to establish the carryout under Section 354.1 of the Zoning Regulations, the Office of Planning disagrees with the Zoning Administrator's referral to Section 354 because the provisions are for a convenience store in an apartment house, in the R-5-E District as an adjunct use to an apartment building.



Kitchen area.

Section 354 Convenience Stores in Apartment Houses (R-5)

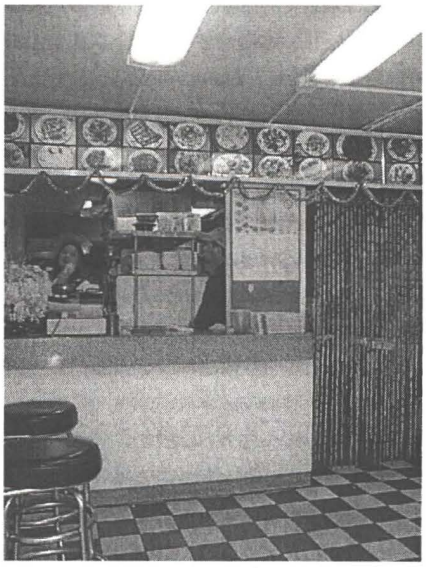
354.1 Sale of convenience commodities and services, as accessory uses and appropriate adjuncts to an apartment house that are designed to serve the tenants' daily living needs shall be permitted as a special exception in an R-5 District if approved by the Board of Zoning Adjustment under § 3104, subject to the provisions of this section:

(a) Food, drugs, and sundries; and
(b) Personal services.

The delicatessen/carryout is on the basement level of a three-story apartment house. The basement, which is partially above grade, has direct access to 17th Street, but no direct connection to the upper floors of the apartment house. The deli/carry-out principally caters to walk-in customers as opposed to the tenants' in the building.

History of Use

The subject building was constructed in 1890 for commercial, residential, and miscellaneous purposes. The basement has operated predominantly as a delicatessen for over forty-five years under a number of different owners. This history is documented by a chronology of Certificate of Occupancies, dating back to 1958. The Office of Planning cannot establish that the present use of the property is different from previous operations. Prior to the current applicant, each of the previous operators was permitted to operate (without Board action) as a non-conforming use.



Customer area.

Zoning Regulations Lack Definition for Delicatessen or Food Carry-Out

The previous Certificate of Occupancies designated the subject basement use as "Retail Delicatessen" (Non-Conforming). However, no definition exists in the Zoning Regulations for a **delicatessen** or food carryout.

The applicant applied for a Certificate of Occupancy to use the subject premises as a "Chinese Carry-Out." The Zoning Administrator (ZA) office disapproved the application, because in their judgment, the Board of Zoning Adjustment should review the application for approval.

In discussions with the ZA office, as to why the current application was being referred to the Board for zoning purposes, after a succession of previous owners had been permitted to use the space as a deli – a non-conforming use, the ZA did not make a determination on how the use should be classified as a "restaurant" or a "fast food".

OP cannot determine on behalf of the ZA what the appropriate zoning category would be for the carryout food business, but provides the following analysis:

OP has analyzed the application in terms of a special exception subject to Section 2003.

Food delivery service - **a restaurant, delicatessen, or fast food restaurant** in which the principal use is delivery of prepared food by motor vehicle to customers located off the business premises. Seating and tables for customers may or may not be provided for on-premises consumption, but if present are clearly subordinate to the principal use of delivering prepared food to off-site customers. Any establishment that derives more than seventy-five percent (75%) of its sales from delivery orders will be considered a food delivery service in all cases. This definition does not include catering establishments.

Section 199.2 (g) refers undefined words to the meaning given in *Webster's Unabridged Dictionary*. Referring to *Webster's Ninth Collegiate Dictionary* a delicatessen is defined as follows:

Delicatessen - ready to eat food products (as cooked meats and prepared salads).

If the Board accepts the use as a delicatessen, it is still difficult to define the use as a "Food delivery service" because the applicant reports that the food is not principally delivered by motor vehicle, but rather is picked up by customers.

Because no use category has been determined for the business, OP has reviewed the application in terms of both a use variance and the special exception criteria of §2003 **Changing Uses Within Structures,** as changing from a food delivery service (first permitted in the C-2-B zone districts by §721.3) to a "Other service or retail use similar to that permitted" in the C-2 zone district (§721.4).

The delicatessen/carryout is on the basement level of a three-story apartment house. The basement, which is partially above grade, has direct access to 17th Street, but no direct connection to the upper floors of the apartment house. The deli/carry-out principally caters to walk-in customers, as opposed the tenants' in the building.

Food Delivery Service (721.3)
If the Board determines the use is a food delivery service, then the most restrictive zone in which a food delivery service is permitted is C-2-B, subject to certain criteria.

Section 2002 Nonconforming Uses Within Structures.

2002.2 Where the nonconforming use occupies only a portion of the structure, the restrictions of this section and §§ 2003 and 2004 shall apply only to that part of the structure devoted to the nonconforming use.

Section 2003 Changing Uses Within Structures.

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 conditions set forth in this section.

C-2-B is the most restrictive district, in which a food delivery service is permitted. Other permitted similar uses in the C-2-B Districts are catering bakeries and restaurants.

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.

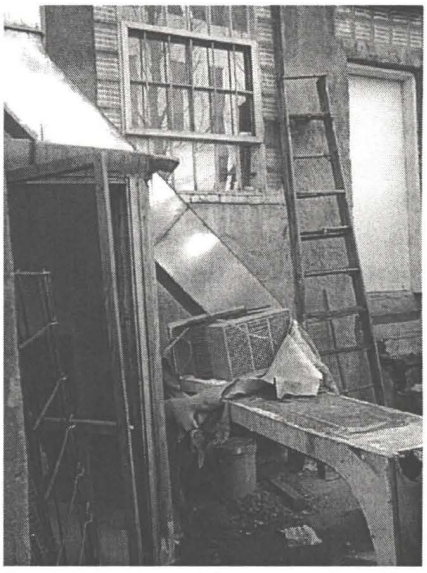
The subject business (under a number of different operators) has been at the same location before the enactment of the current Zoning Regulations in 1958, however the commercial food operation is not consistent with the present character of the area.

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.

OP is unaware of any traffic or parking concerns but the community residents have expressed concerns about noise and rodent problems.

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 or less restrictive use.

The existing 700 square foot space has accommodated various kinds of retail food operations prior to 1958. No changes to the use have been recorded since 1958.



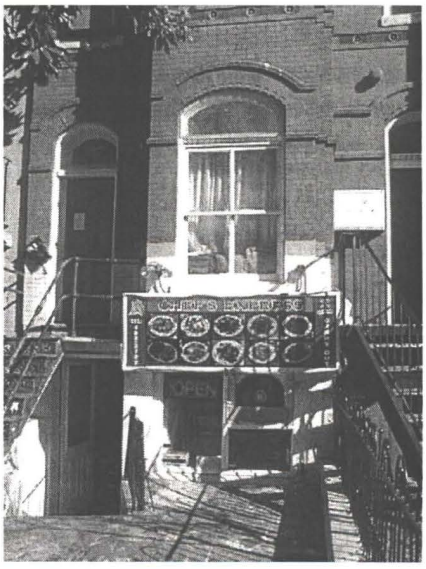
Rear area.

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

The use is located in a residence district (DCOD/R-5-E). The subject use should qualify as a neighborhood facility, because there are no seats, no parking spaces, and the space is specifically designed for food sales purposes. There are exhaust ducts at the rear of the subject basement space, which runs up the rear of the three-story building, to the roof for emission. Additionally, when the building was built in 1890, commercial use was one of the original anticipated purposes. There is documented proof that the basement space in the building has been in continuous use for delicatessen/carry-out purposes for over forty years.

Potential For Use Variance

If the Board determines that the use is not permitted in the DCOD/R-5-E, then a use variance is warranted.



Front view of subject site.

3103 Variances
Is the property unique by reason of its exceptional narrowness, shallowness, shape, topography or other extraordinary or exceptional situation or condition?

Yes. The property is unique because of its exceptional situation and condition. The property was developed in 1890 for commercial, residential, and miscellaneous purposes. It has operated predominantly as a delicatessen (non-conforming) for over a forty-five year under a number of different owners. The building is one of a set of three semi-detached apartment houses that fronts on 17th Street. The basement level of the building (location of the subject use) is partially below grade.

There are four steps at the restaurant entrance, which provides direct access to 17th Street. The space is specifically designed for commercial use, and contains a 700 square foot food business. There is institutional kitchen equipment, overhead exhaust ducts, food storage areas, and refrigeration equipment. There is also a bay window area at the front of the site with commercially designed windows.

By reason of the aforementioned unique or exceptional condition of the property, will the strict application of the Zoning Regulations result in peculiar and exceptional practical difficulties or exceptional and undue hardship upon the owner of the property?

OP informed the operator of the food business, that only the owner of the property could request variance relief. OP is waiting for information from the owner regarding undue hardship.

Can the requested relief be granted without substantial detriment to the public good and without substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map?

OP cannot determine the impact on the zone plan until the owners has submitted information explaining any undue hardship.

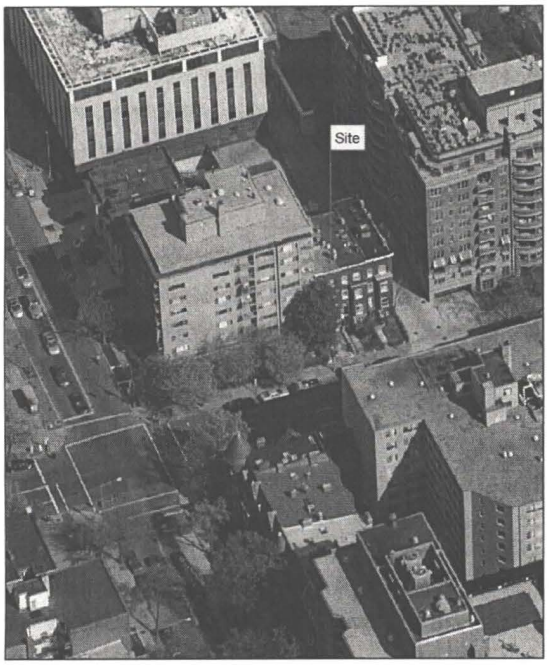
COMMUNITY COMMENTS

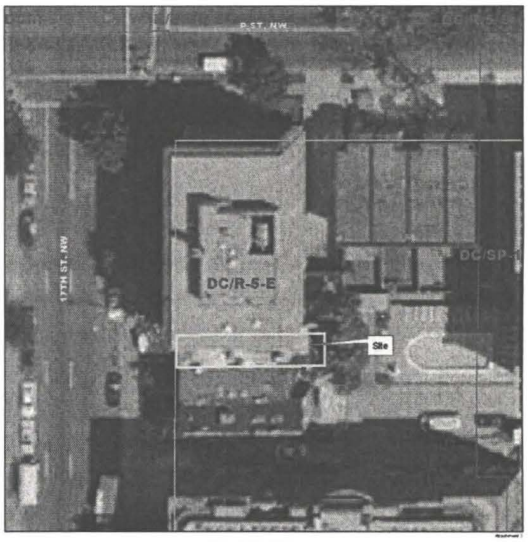
At its January 14,2004 meeting, Advisory Neighborhood Commission (ANC) 2B, the ANC voted to oppose the application. The ANC sited the following issues:

- The current use is unapproved and not in compliance with the Zoning Regulations.
- The use has significant negative impact on the properties on Square 181.
- Residents have consistently complained to the Commission that the establishment has reduced the peace, order, and quiet of the area.
- The applicant did not address the hardship that would be caused should the application not be approved.

RECOMMENDATION

The Office of Planning analyzed two options for the Board to consider in its deliberations regarding the application of Ming Jin Zhang for the continuation of a restaurant in the R-5-E District. OP can't make a recommendation, pending information from the property owner.





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Delicatessen/Carryout (No Seats)
1417 17th Street, NW