GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 17100-A of Jesus Is The Way Church, pursuant to 11 DCMR § 3104.1 for a special exception for a change of nonconforming use under subsection 2003.1, or in the alternative, pursuant to 11 DCMR § 3103.2, a variance from the use provisions to allow a coffee/sandwich shop under subsection 330.5, in the R-4 District at premises 129-131 15th Street, N.E. (first floor only) (Square 1069, Lot 801).

HEARING DATE:	January 13, 2004
DECISION DATE:	February 3, 2004
MOTION TO RECONSIDER DATE:	February 18, 2004
DATE OF DECISION AFTER RECONSIDERATION:	June 22, 2004

ORDER ON RECONSIDERATION

On or about February 18, 2004, the Advisory Neighborhood Commission (ANC) 6A moved for reconsideration of the Board of Zoning Adjustment's (Board) February 3, 2004 Summary Order granting Jesus Is The Way Church (the applicant) a special exception under 11 DCMR 2003.1 to change an existing nonconforming use within the structure at the site. In its motion, the ANC alleges specific errors in the Board's Order pursuant to 11 DCMR § 3126.4. On April 6, 2004, the Board granted the ANC's request to reconsider the application and directed the applicant to submit any opposition to the request. On or about April 13, 2004, the applicant filed its opposition to the request for reconsideration. *See*, 11 DCMR § 3126.5. At a decision meeting on June 22, 2004, the Board reconsidered the application and voted to uphold its previous decision.

As a threshold issue, the ANC alleges that the Summary Order incorrectly states that "ANC 6A did not participate in the application" and none of ANC 6A issues were addressed. Upon a review of the record the Board confirms that the ANC did not appear at the public hearing on the application for the special exception, that the Board did not receive an ANC report prior to its deliberations on the application, and that the concerns of the ANC were identified in the Office of Planning Report and considered in the Board's initial deliberations in this case. While the ANC claims that it submitted a timely report, dated December 29, 2003, there is no evidence in the record that the ANC letter was transmitted to the Office of Zoning prior to February 17, 2004. Despite these findings, the Board will address the ANC's issues and concerns fully in this order.

The ANC alleges that the Board erred by finding that: (1) that the nonconforming retail use at the residentially zoned property had not been discontinued more than three years ago; (2) that, as a result, the previous retail use could be "changed to a use that is permitted as of right" or approved by the Board as a special exception under section 2003 of the Regulations; and, (3) that the proposed coffee/sandwich shop would not tend to adversely affect the neighborhood.

Board of Zoning Adjustment
District of Columbia
CASE NO. 17100
EXHIBIT NO. 40

For reasons that will be explained below, the Board disagrees with the ANC and affirms its decision to grant the special exception following reconsideration.

1 The Board had ample basis to find that there had been an existing legal nonconforming use at the property.

In its Supplemental Report, dated January 20, 2004, the Office of Planning (OP) concluded that the property had a long history of non-residential use (Exhibit 31). There are certificates of occupancy (C of Os), which date back to the mid-1960s identifying the previous retail establishment uses; *See* C of Os dated 1965, 1970, and 2003 (Exhibits 9, and 10) authorizing a "variety, grocery and patent medicine store". Also, during the mid-1980s the Board approved a change from the "variety, grocery and patent medicine store" use to a beauty parlor use, concluding that the beauty parlor use was a "neighborhood facility" (BZA Application No. 14264, March 20, 1985). While, the Zoning Regulations do not define the term "neighborhood facility", the Board agrees with OP's analysis that "due to the very small size of the building (500 square feet) and dimensions (12.5 feet by 40 feet), the lack of a second floor and no parking, the proposed [coffee/sandwich] shop could be deemed a neighborhood facility".

The ANC claims that any nonconforming use that may have existed in the past was discontinued more that three years prior to this application being filed.[1] However, the Board is not persuaded that this is so. First, the Board credits the testimony of Bishop William S. Musgrove and the joint written statement of the Bishop and Sandra Douglas (the "Proprietor"), that the space has been in continuous retail use (Exhibit 39). Bishop Musgrove specifically stated that the space was currently used as a retail variety store and had previously been used as a beauty parlor/barber shop and a tee-shirt shop. Second, Applicant corroborated the testimony of Bishop Musgrove and Sandra Douglas with rent receipts dating back to 2001. (Exhibit 34).

2. The Board correctly concluded that the applicant may change the nonconforming retail use to a coffee/sandwich shop that qualifies as a neighborhood facility.

Under § 2003.1 of the Regulations, the Board may approve the conversion of a nonconforming use to a use that is permitted as a matter of right in the most restrictive zone in which the existing nonconforming use is permitted as a matter of right, subject to the remaining conditions in § 2003. The existing use is a "variety store", which is first permitted as a matter of right in a C-1 (Commercial) zone district. 11 DCMR § 701.4 (z). The question, therefore, is whether the proposed use is also permitted as a matter of right in that same zone district The Board agrees with OP that the proposed coffee/sandwich shop use would constitute a restaurant use. (A "restaurant" is defined generally as a "place of business where food, drinks, or refreshments are prepared and sold to customers primarily for consumption on the premises...") *See*, 11 DCMR 199. A "restaurant" use is

[1] Section 2005.1 of the Regulations provides, in most circumstances, for the discontinuance of a nonconforming use after a three year period of non-use.

first permitted in the C-1 zone as a matter of right. *See*, 11 DCMR 701.4 (q). Therefore, under § 2003.1, the nonconforming use at the property within the existing structure may be changed to a "restaurant" use at the property so long as the other conditions within § 2003 are satisfied.

One such condition is contained in subsection 2003.5. This provision limits the proposed use where, as in this case, the subject property is located in a residence zone. Section 2003.5 states that "[i]n Residence Districts, the proposed use shall be either a dwelling, flat, apartment house, or a neighborhood facility." The proposed coffee/sandwich shop is obviously not a "dwelling", "flat", or "apartment house". However, the Board agrees with OP that the proposed coffee/sandwich shop could be deemed a "neighborhood facility" due to its small size within the existing structure (Exhibit 31). The Board notes too that it previously approved a change of nonconforming retail use to a "neighborhood facility" at the site when it approved the beauty parlor use. As a result, the Board finds that the condition within subsection 2003.5 has been met.

The other pertinent conditions under § 2003 relate to impact on the neighborhood. These conditions are contained within subsections 2003.2 and 2003.3. As the issue of neighborhood impact was also raised by the ANC, it will be addressed separately below.

3. The Board did not err in concluding that the proposed coffee/sandwich shop would not adversely affect the present character or future development of the surrounding area or create any deleterious external effects in accordance with subsections 2003.2 and 2003.3.

The ANC asserts in its motion for reconsideration that the proposed coffee/sandwich shop will have a "negative effect" on neighboring properties. The ANC cites the "saturation" of commercial establishments on the block and the lack of "need" of additional "commercial amenities". It also claims that "another commercial establishment" would detract from the "residential character" of the block, and that the proposed use "would provide no substantial benefit to the community". However, the Board addressed each of these issues and concerns during the hearing process. Although the ANC was not present at the public hearing (and the Board did not have the ANC's report at that time), these issues and concerns were raised by the OP, the Capitol Hill Restoration Society, and the applicant.

OP reported that neighbors had concerns relating to the proposed use, in particular, the potential for its attracting more crime to the neighborhood and increasing loitering in the area of the coffee/[sandwich] shop. However, the Board addressed these concerns by placing conditions on the special exception grant. The approval was limited to three years, as suggested by the Capitol Hill Restoration Society (Exhibit 24), and the applicant was required to install trash receptacles, remove litter and debris, and install specified lighting. Given the conditions upon which this special exception was granted, and its three-year term, the Board did not err in concluding as it did that the coffee/sandwich shop would not adversely impact on the neighborhood.

4. The Board complied with the "great weight" provisions applicable to both the OP and the ANC

Under D.C. Official Code § 6-623.04 the Board is required to give "great weight" to OP recommendations. The Board did so. OP recommended consideration of the application as a special exception rather than a variance. It also recommended approval of the special exception provided the Board found there was a continuous nonconforming retail use at the property. The Board's analysis and approval is consistent with each of these recommendations.

Under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, D.C. Official Code § 1-3-9.10(d)(3)(A)), the Board is also required to give "great weight" to the issues and concerns raised in the affected ANC's written 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. Because the ANC did not file a timely report with the Board, there were no recommendations to which to afford great weight in the Board's decision on the application

Further, the ANC did not participate in the Board's public hearing. However, despite the ANC's absence from the hearing, the ANC's position was made known to the Board by OP, the Capitol Hill Restoration Society, and the applicant. For instance, the Board received information from all three that the continuous retail use was in question and that the ANC had concerns regarding potential crime and loitering at the property. In response, the applicant addressed these concerns through testimony and post hearing submissions. Specifically, the applicant provided testimony and evidence regarding the continuous retail use at the property and testified that there would be a police presence at the coffee/sandwich shop. Thus, even though the ANC did not participate at the public hearing, the Board did consider the ANC's issues and concerns.

Finally, the Board has reviewed the ANC report in consideration of the ANC's Motion for Reconsideration , and has responded in this order to each of the legally relevant issues and concerns[2] raised therein. Accordingly, the requirement of great weight has been fully satisfied.

In conclusion, the Board finds that the ANC's motion largely repeats evidence and argument that the Board heard, assessed, and factored into its decision. Accordingly, the

[2] The ANC's concern that the property is not "unique" is not legally relevant. As stated, this application was decided as a special exception, not a variance. Therefore, this case was not decided upon variance criteria. *See Concerned Citizens of Brentwood v. BZA*, 634 A.2d 1234, 1241 (1993) (The "great weight requirement extends only to 'issues and concerns that are legally relevant.' *Bakers Local 118, supra, 437 A.2d at 179* (citation omitted)" (internal quotation marks omitted).

Board affirms its decision to grant the special exception for a change of nonconforming use.

For all of these reasons, it is hereby **ORDERED** that the Motion of ANC 6A for Reconsideration of the Board's February 3, 2004 decision, granting applicant a special exception under DCMR 2003.1, is **DENIED.**

VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, and David A. Zaidain, by absentee ballot; the Zoning Commission member not present, not voting).

Vote taken on June 22, 2004

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

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

FINAL DATE OF ORDER: NOV - 5 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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO. 17100-A

As Director of the Office of Zoning, I hereby certify and attest that on NOV - 5 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:

Sandra Douglas
55 Longfellow Street, N.W.
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rsn

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning