GOVERNMENT OF THE DISTRICT OF COLUMBIA

BOARD OF ZONING ADJUSTMENT

B.Z.A. Case No. 17200

Advisory Neighborhood Commission 3-F, party to the proceedings of Board of Zoning Adjustment Case No. 17200, by and through undersigned, respectfully submits this brief memorandum regarding (1) the application of Section 214 of the Zoning Regulations (entitled "Accessory Parking Spaces"), and (2) the right of the BZA to narrow their long settled jurisdiction arbitrarily and capriciously.

This case involves a request for a special exception for an accessory parking lot behind a Burger King outlet at 4422 Connecticut Avenue, NW. After neighborhood meetings and discussions the community had a meeting with the applicant where the community presented a number of community concerns and desired solutions. These solutions for the most part the applicant accepted prior to the ANC meeting, discussing the resolution. See Statement of the Applicant, dated September 21, 2004. Based on the applicant's acceptance the ANC 3F at its meeting on September 20, 2004 passed its Resolution 04-25 stating that the Commission had no objection to the special exception with certain conditions.

At the hearing on October 5, 2004 the Board reviewed the ANC's resolution and stated that the Board had no jurisdiction over some of the proposed conditions because the BZA was considering a special exception for the accessory parking lot only. The BZA stated that any conditions that affected other aspects of the applicant's operation were beyond the scope of

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the present application. In order to allow the ANC to show otherwise the Board decided to keep the record open until October 26, 2004.

Argument 1

11 DCMR 214.7 permits the Board to regulate all Burger King operations. The section states "accessory parking spaces shall be so located, and facilities in relation to the parking lot shall be so designed, that they are not likely to become objectionable to adjoining or nearby property because of noise, traffic, or other objectionable conditions". Section 214 in 214.2 incorporates by reference the provisions of the parking lot section found at 11 DCMR 2303. Section 2303.1 enumerates exactly what is covered in the parking lot regulation. This narrowness is particularly apparent by the use of the term "premises" to describe a parking lot in 2303.1 (c). However, in 214.7 the term is "facilities in relation to". If 214 were referring to the enumerated items in 2303.1 only, why doe 214.7 use such broad phrase as "facilities in relation to"? The zoning regulations do not have a definition for "premises". On the other hand, DC law does define the word . It has a very precise or narrow meaning. In Killingham v. Wilshire Investments, 739 Alt. 2nd 804, 809 (1999) the court limited it to the "tenant's apartment or common areas which she uses". Another case which defines the term is the famous case Jervins v. First National Realty Corp, 428 F. 2d 1071, 1082. Though court defined the term as the whole building, it still was a relatively narrow area. Whereas, the term "facilities" in 214.7 has no judicially defined definition in DC law. The zoning

regulations themselves do not define it either. Therefore, under the Board's stated policy in 11 DC MR 199.2 (g) of "words not defined in this section shall have the meanings given in Webster's Unabridged Dictionary". In Webster's Third New International Dictionary Unabridged, p 812-3 the word is defined as "something (as a hospital, machinery, plumbing) that is built, constructed, installed or established in perform some particular function or to serve or facilitate some particular end". As both sections (214 & 2303) were finalized at the same time on May 12, 1958, and neither had amendments which affected the sections in question. Under the maxim of statutory law when a legislative body chooses a term of art in one provision and not in another in the same enactment, that was intentional. See King v. St. Vincent's Hospital, 502 U S. 215, 220-21 (1991) where the Court wrote "Without such an assumption there are simply differences of treatment, to be respected by limiting protection where the text contains a limit and leaving textually unlimited protection just where the Congress apparently chose to leave it. Because the text of 2024(d) places no limit on the length of a tour after which King may enforce his reemployment rights against St. Vincent's, we hold it plain that no limit was implied". Applying that principle here, the fact that the drafters selected such precise language in 2303 and such broad language in 214.7 indicates that they intended to regulate beyond the mere parking lot to all aspects of the applicant's operations through Section 214.

Furthermore 214.7 uses the word "relation". As it, also, is not defined in the zoning regulations, the BZA must, as its regulations require, turn to the definition from Webster's Third New International Dictionary. In that work on p.916 the word

"relation" means "an aspect or quality (as resemblance, direction, difference) that can be predicated only of two or more things taken together". Under the principle of statutory construction that every word should be "give[n] effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." Montclair v. Ramsdell, 107 U.S. 147, 152 (1883). The fact that the drafters used the word "relation" instead of a narrow, more precise word like 'on" or "thereon" indicates that they were intentionally expanding the BZA jurisdiction beyond the mere accessory parking lot when measuring the potential impacts of an applicant's operation.

Thus, when you put the full phrase together it is clear that the drafters intended that 214.7 cover Burger King's complete operation not just the accessory parking lot when an applicant files a request for such a special exception under this provision.

Argument 2

If BZA does not follow its previous precedents, the Board may be considered acting arbitrarily and capriciously. BZA stated during the hearing that it does not have the jurisdiction to set conditions not directly affecting the parking lot. As it was pointed out to them, in its previous orders # 16000 and #16541 for this very same parking lot the Board included conditions concerning the sound level of the loudspeaker system and Burger King's grease containment practices, both conditions relating to the non-parking lot

activities of the applicant . The Court of Appeals ruled in Office of the People's Counsel v. Public Service of the District of Columbia, 404 Atl. 2nd 404, 414 "When an agency departs a settled practice or rule, it has a special duty to explain the reasons for that departure". It is clear merely stating that no longer have jurisdiction is enough. If the Board decides to change its policy, it must "a reasoned analysis indicating that prior policies are being deliberately changed, not casually ignored" as the court stated in above cited decision.

Conclusion

It is clear from the above analysis that the Board has the authority to order that the applicant adhere to all the conditions that the ANC proposed in its resolution. However, if it does decide not to follow their previous practices, then it must provide the community with a "reasoned analysis" for the change.

Respectfully submitted,

Carl Kessler
Commissioner, ANC3F01
October 26, 2004