

April 4, 2006

Geoffrey Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, NW
Suite 210 South
Washington, DC 20001

Dear Chairman Griffis and Distinguished Members of the BZA -

We are writing to you as individual Commissioners serving on Advisory Neighborhood Commission 6A; this letter does not represent the ANC's official position (the ANC voted 5-3 to file the instant appeal.)

We believe that, as a matter of policy, the Board should DENY the ANC's appeal, as a ruling against Cluck U Chicken would be detrimental to the neighborhood.

We urge the Board to continue to differentiate fast food and other restaurants on the basis of whether they are geared primarily toward on-site or carryout consumption. H Street has too few dine-in establishments that allow people to sit and talk together, and that keep most of their trash on-site. Cluck-U Chicken is geared toward on-site consumption, with more than 90% of the floor space in the main room devoted to seating, and with servers bringing customers' food to their tables on non-disposable tableware. There are about 16 quick service / carryouts on H Street that are not geared toward on-site consumption, compared with only about 9 establishments with seats. The consensus of our constituents is that H Street needs more establishments that offer customers a place to sit and eat a meal. There is a lack of fine dining on H Street, but we expect fine dining will come as the neighborhood changes, without adding regulatory burdens to other establishments. Already, the number of higher-priced establishments (coffee shops, restaurants and taverns) is growing, especially around the Atlas Theater and H Street Playhouse, on the 1200 - 1500 blocks of H Street.

Cluck-U Chicken is clean and inviting. The chicken is delicious. The establishment employs local residents, including our young people, who are friendly to customers. The business and operational model allows for low-cost food and on-site consumption.

There are still scores of vacant buildings and storefronts on H Street. We want to make it easier for good businesses - including food establishments geared toward on-site consumption - to come to H Street as a matter of right.

Our ANC has been sending a clear message to businesses that large numbers of bars and restaurants are welcome to come to H Street, to bring investment and energy to the corridor, even though it's likely they will have at least some negative spillover effects on residents. It's important to many of our constituents that, moving forward, businesses catering to an economically diverse customer base will be just as welcome. It's important to us that this area remain economically and racially diverse. Market forces alone are already significantly gentrifying our neighborhoods. We hope government policies will encourage and support businesses that serve all sectors of our communities.

Much of the impetus for this appeal came out of frustration with DCRA for not providing the ANC with requested information in a timely manner. We do not believe that an appeal of a certificate of occupancy, at great costs to all parties, is the correct response to frustrations, many of them valid, with DCRA. To the best of our knowledge, this business owner has followed done everything correctly and in accordance with the rules, and this action by the ANC is not motivated by concerns about this business owner's specific operation. He and about dozens of neighbors attended the March ANC

BOARD OF ZONING ADJUSTMENT

District of Columbia

CASE NO. 17439

EXHIBIT NO. 23

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meeting and requested a formal meeting to try to resolve concerns. An initial motion for a subgroup of commissioners (Commissioners Fengler, Rice and Marshall) to meet with Cluck U and attempt to negotiate a solution failed on a 4-4 vote. A subsequent vote on having a meeting, but with no subgroup authorized to negotiate, failed on a 4-3 vote.

We believe that, as a matter of law, the Board should DENY the ANC's appeal, as DCRA did not err in granting a restaurant certificate of occupancy to Cluck U Chicken: the establishment's carryout facilities are clearly subordinate to on-premises consumption uses; specifically, less than 10% of Cluck U Chicken's publicly accessible floor space is used for queuing. The amount of seating in the establishment, combined with the fact that servers bring food to tables on non-disposable tableware and clear the tables after customers are finished, allows Cluck U Chicken to qualify as a restaurant.

Under the DC Municipal Regulations, an establishment is either a "restaurant" or a "fast food restaurant." The regulations make clear that the term "restaurant" encompasses more than the traditional "fine-dining" establishment. The term "shall include but not be limited to an establishment known as a cafe, lunch counter, cafeteria, or other similar business, but shall not include a fast food restaurant." The key distinction between restaurant and fast-food restaurant is that in a restaurant, carryout facilities "must be clearly subordinate to the principal use providing prepared foods for consumption on the premises." A restaurant will be considered a fast food restaurant "if the floor space allocated and used for customer queuing for self-service for carry out and on-premises consumption is greater than ten percent of the total floor space on any one floor that is accessible to the public" and it exhibits one of two other characteristics. (11 DCMR 199.1).

This 10-percent rule can either be read as limiting, in a "restaurant," the amount of floor space that can be used for queuing, or as limiting the amount of floor space used for either queuing or on-site consumption. Only the first interpretation is in accord with the principle, stated in the regulations, that the distinction between a restaurant and a fast-food restaurant is on-site consumption versus carryout uses. The second interpretation, adopted as dicta in the Blimpies order of June 2005, would mean that establishments that otherwise would be fast food restaurants could automatically become "restaurants" by REMOVING their seating or, conversely, that a "restaurant" would become a fast food establishment by having too much seating. Clearly, considering the common understanding of "fast food," the intent of the 10% rule must have been to limit the queuing area in a restaurant, not also to limit the seating area.

It is very difficult if not impossible to conceive of ANY restaurant where less than 10% of the publicly accessible floor space is used for seating and queuing, combined. Thus, including on-site consumption within the 10% calculation essentially negates the whole 10% provision (all food establishments will use more than 10% of space for "queuing ... and on-site consumption"). A basic principle of statutory interpretation is that statutes should be construed so as to avoid rendering superfluous any statutory language. Incorporating seating area into the 10% rule would render the rule superfluous. Under the Blimpie's interpretation of the 10% rule, all establishments that use disposable tableware would be fast food restaurants; clearly, the regulation was meant to be more complex than that. Further, all cafes and many lunch counters and cafeterias would be fast food restaurants, contradicting the plain language stating that the term "restaurant" includes such establishments.

Glady Ann Marshall
(6A07)

Sincerely
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