

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

APPELLEE:

Bernard E. Gibson, Jr. of
Gibson Investments, Inc.

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}
} BZA APPEAL NO. 17439
} Certificate of Occupancy Permit No. CO-102037
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MOTION FOR JUDGMENT AS A MATTER OF LAW

Mr. Bernard E. Gibson, Jr. ("Mr. Gibson") of Gibson Investments, Inc. appreciates the Board's review of the totality of evidence bearing probative value on Appeal No. 17439. Therefore, in the most vigorous defense of his occupancy permit, Mr. Gibson respectfully requests that the Board consider this Motion for Judgment As A Matter of Law.

I. BACKGROUND

Advisory Neighborhood Commission ("ANC") 6A ("Appellant") filed the subject Appeal on September 23, 2005 alleging that the Zoning Administrator of the Department of Consumer and Regulatory Affairs ("DCRA") erred in issuing Certificate of Occupancy Permit No. CO-102037. The Certificate of Occupancy was issued to Gibson Investments, Inc. as a restaurant within a C-2-A district and the H Street Overlay Zoning District. A hearing was held on April 4, 2006, at which time Appellant presented its case-in-chief and closing arguments, and Mr. Gibson presented its case and closing arguments. As DCRA's key and only witness, the Zoning Administrator, was unavailable to testify, the hearing was continued to April 25, 2006 to allow DCRA to present its case and submit testimony on the issue of whether the Occupancy Permit was properly issued, and more specifically on the issue of whether Mr. Gibson's restaurant queuing and on-site consumption space is less than ten percent (10%) of the publicly accessible floor space. Mr. Gibson contends that the Certificate of Occupancy was thoroughly vetted, properly issued and sustained pursuant 11 D.C.M.R. § 199.1 (2003).

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II. LEGAL ARGUMENT

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue. Fed.R.Civ. P. 50(a). This rule authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. Fed.R.Civ. P. 50(a) (Notes). In all appeals and applications, the burden of proof shall rest with the appellant or applicant. 11 D.C.M.R. § 3119.2 (2003).

Pursuant to 11 D.C.M.R. §199.1, a restaurant will be considered a fast food restaurant if it has a drive through. A restaurant will also be considered a restaurant if the floor space allocated and used for customer queuing self service for carry out and on-premises consumption is greater than 10 percent (10%) of the total floor space of any one floor which is accessible to the public, *and* [emphasis added] it exhibits one of the two following characteristics:

a) At least sixty percent (60%) of the food items are already prepared or packaged before the customer places an order; and/or,

b) The establishment primarily serves its food and beverages in disposable containers and provides disposable tableware.

11 D.C.M.R. §199.1 (2003).

It was stipulated for the record that Mr. Gibson's restaurant does not have a drive-through. Furthermore, Mr. Gibson's restaurant exhibits *neither* of the two characteristics of a fast food restaurant identified in the code as follows:

1) Only eleven percent (11%) of the food items are preprepared or packaged before the customer places an order – significantly less than the sixty percent (60%) threshold required. As demonstrated through the menu (Exhibit D) and the testimony of Mr. Gibson and Mr. Haddad, only 8 of 72 items are preprepared, representing a mere eleven percent (11%) of preprepared or packaged foods. Only the desserts and a few of the side dishes are preprepared and packaged. All else are made fresh to order. As witness Mr. Haddad testified, Mr. Gibson's restaurant is indeed "an *alternative* to fast food." Furthermore, this is consistent with what Mr. Gibson certified in the DCRA Affidavit required prior to the issuance of the occupancy permit, dated December 15, 2004 and later dated June 14, 2005.

2) The restaurant serves all of its dine-in patrons on restaurant quality plates, cups and silverware, as demonstrated through: 1) the testimony of Mr. Gibson, Mr. Haddad, Mr. Meyers, Ms. Ayele, and Mr. Borbely; 2) a constant inventory of plates, cups, silverware double the amount of seating in the restaurant; 3) a dedicated dishwasher staff person; and, 4) the purchase of a dishwasher to accommodate increased demand for dining in. Simply put, the testimony of Mr. Luna, admittedly based on observations from *outside* of the restaurant *passing by on his way home*, and the undocumented and alleged 10 visits over the course of more than 200 days of operation lacks probative value and fails to meet their burden of proof over the overwhelming testimony that not only does Mr. Gibson's place of business serve the community as one of the very few eat-in restaurants on the corridor, with dishes, silverware and cups, but it also waits and busses tables as well. Furthermore, this is consistent with what Mr. Gibson certified in the D.C.R.A. Affidavit required prior to the issuance of the occupancy permit, dated December 15, 2004 and later dated June 14, 2005.

3) It can be stipulated that Mr. Gibson's restaurant is not a retail grocery store, convenience store, ice cream parlor, delicatessen or other business selling food or beverages as an accessory use or for off-premises preparation and consumption.

Therefore, despite whether or not the element of more than 10% queuing space is met, he cannot be deemed a fast-food restaurant in any case as the following elements of: 1) more than 60% preprepared food has clearly not been established by Appellant in the face of exhibits and testimony from witnesses, either at the time of issuance of the occupancy permit, or post-issuance; 2) the use of disposable containers and tableware has clearly not been established by Appellant in the face of exhibits and testimony from witnesses either at the time of issuance of the occupancy permit or post-issuance; and 3) Mr. Gibson is clearly not selling food or beverages as an accessory use. Thus, according to 11 D.C.M.R. §199.1, Mr. Gibson's occupancy permit as a C2A restaurant must be upheld.

Furthermore, as stated in Mr. Gibson's presentation, a Special Exception is not a viable option in this matter. Contrary to Appellant's repeated misrepresentations, a Special Exception is prohibited in this case, pursuant to Section 1320.4, of the H Street Zoning Overlay, which explicitly prohibits special exceptions for fast food restaurants within 25 feet of a residential district and not separated from that district by an alley. Z.C. Order No. 04-27 § 1320.4 (c) (1) (2006) (H Street Zoning Overlay). Mr. Gibson's restaurant does not abut to an alley, and, may be argued, is within 25 feet of a residential district. Therefore, revocation of Mr. Gibson's occupancy permit will effectively mean the closure of his business. Appellant may suggest that a variance of this rule be considered as a remedy of the prohibition of special exception in this matter. However, Mr. Gibson strongly encourages this Board to duly consider the overwhelming evidence supporting the proper issuance of his occupancy permit as a restaurant over the limited and dubious exhibits and testimony submitted by Appellant, who clearly has not met their burden of proof, over the proposition of considering a remedy, not even proposed in Appellant's Complaint, that would clearly contradict existing law and "substantially impair the intent, purpose, and integrity of the [H Street Zoning Overlay]." 11 D.C.M.R. 3103.2 (2003).

In addition, attempts to clarify the existing code by Appellant, and/or narrow its scope, is best a matter of legislation, subject to a public process. Misrepresenting Mr. Gibson's welcoming and pleasant eat-in restaurant and more than diligent business practices and commitment to stay a part of the H Street community, amidst a sea of plexi-glass carryouts, as an attempt to clarify the existing code and chastise D.C.R.A. is simply wrong, lacks conscience and appreciation of the facts of this matter, as well as the unjust financial and emotional toll upon Mr. Gibson, his employees, and his patrons.

As an additional matter, Mr. Gibson respectfully requests this Board to duly consider and appreciate the relevancy of the April 4, 2006 letter signed by 50% of ANC6A commissioners requesting the Board deny ANC6A's own appeal to ANC6A's conviction of the merits of their appeal and the testimony asserted during the April 4, 2006 hearing by Mr. Luna and Mr. Rice. Pursuant to 11 D.C.M.R. § 3115.1, a written report of the ANC shall have been submitted for the Board's review containing the following information:

e) The issues and concerns of the ANC about the appeal or application as related to the standards of the Zoning Regulations against which the appeal or application must be judged; and,

f) The recommendation, if any, of the ANC as to the disposition of the appeal or application.

11 D.C.M.R. § 3115 1 (2003).

The Board will recall that the testimony of Mr. Borbely, an ANC6A Commissioner and the four signatories of the letter – half of ANC6A, directly contradicts the testimony of the Appellant, as to the material issue of the ANC's recommendation as to the disposition of the appeal, and to the issues and concerns of the ANC about the appeal or application as related to the standards of the Zoning Regulations against which the appeal is being judged, either by Motion or, currently, by explicit written opposition and testimony submitted at the April 4th hearing. Appellant did not submit such a report. Furthermore, Appellant's testimony at the April 4th hearing about these issues was not forthcoming about the grave concern and doubt of the merits and implications of this

appeal from its own ANC board and repeated pleas from the community. Appellant did not share these “issues and concerns of the ANC about the appeal” either through the written report required by 11 D.C.M.R. § 3115.1 or testimony. The fact that Appellant’s own body formally submits testimony *supporting* Mr. Gibson’s C2A permit against its own appeal *opposing* Mr. Gibson’s C2A permit further reinforces that Appellant has simply not met its burden of proof.

Finally, much greater harm than benefit will result in the revocation of Mr. Gibson’s C2A occupancy permit. Firstly, the community actually likes the restaurant, repeatedly commends Mr. Gibson’s restaurant as a “clean” “sit-down restaurant that serves you” with “good food.” Secondly, the actions of this ANC against this particular business are counterproductive to the intent of reducing the number of fast foods on the corridor, by effectively attempting to force a recognized and appreciated restaurant to become a fast food. Perhaps if this was a carry-out selling “singles,” with plexi-glass, no seating, and produced litter on the streets this appeal would have made sense. But the testimony and evidence overwhelming demonstrates that Mr. Gibson’s restaurant is indeed a welcomed addition to the H Street corridor and not the type of operation that has been a burden upon our community. Thirdly, the revocation of Mr. Gibson’s permit based on loose representations lacking sufficient probative value by a few individuals to overturn a decision that was thoroughly vetted by DCRA officials and staff in this matter, as opposed to *Blimplies*, *BZA Appeal 17214*, and overwhelming evidence that Mr. Gibson’s place of business does operate as a restaurant, will send a chilling effect to businesses currently on the corridor and prospective new businesses. To risk life investments and numerous jobs for residents, admittedly not even based on community consensus, is a tenuous proposition for all concerned including businesses that depend upon reliable and objective governments, residents that depend upon good businesses to provide desired goods and services, and the district government that depends upon good business practices and thriving communities.

III. CONCLUSION

In conclusion, based on the evidence submitted at the April 4, 2006 hearing, the Appellant has failed to meet their burden of proof in establishing that Mr. Gibson's restaurant serves more than 60% of prepared or prepackaged foods, *or* that Mr. Gibson does not serve its dine-in customers on restaurant plates, cups and silverware.

Consideration of whether Mr. Gibson's queuing and on-site consumption exceeds ten percent (10%) of the publicly accessible space at this point is moot as a restaurant *cannot* be considered a fast food restaurant without establishing either of two prong test above. Therefore, Mr. Gibson respectfully requests that the Board grant this Motion for Judgment As A Matter of Law, as Mr. Gibson's restaurant has already demonstrated at the April 4th hearing through exhibits and testimony that the *neither* of the two prongs for establishing a fast-food restaurant have been met by Appellant, and therefore, respectfully requests this Board affirm the C2A occupancy permit that was thoroughly vetted and properly issued.

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2006 the foregoing Response to BZA APPEAL No. 17439 was hand-delivered to:

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RESPECTFULLY SUBMITTED,



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