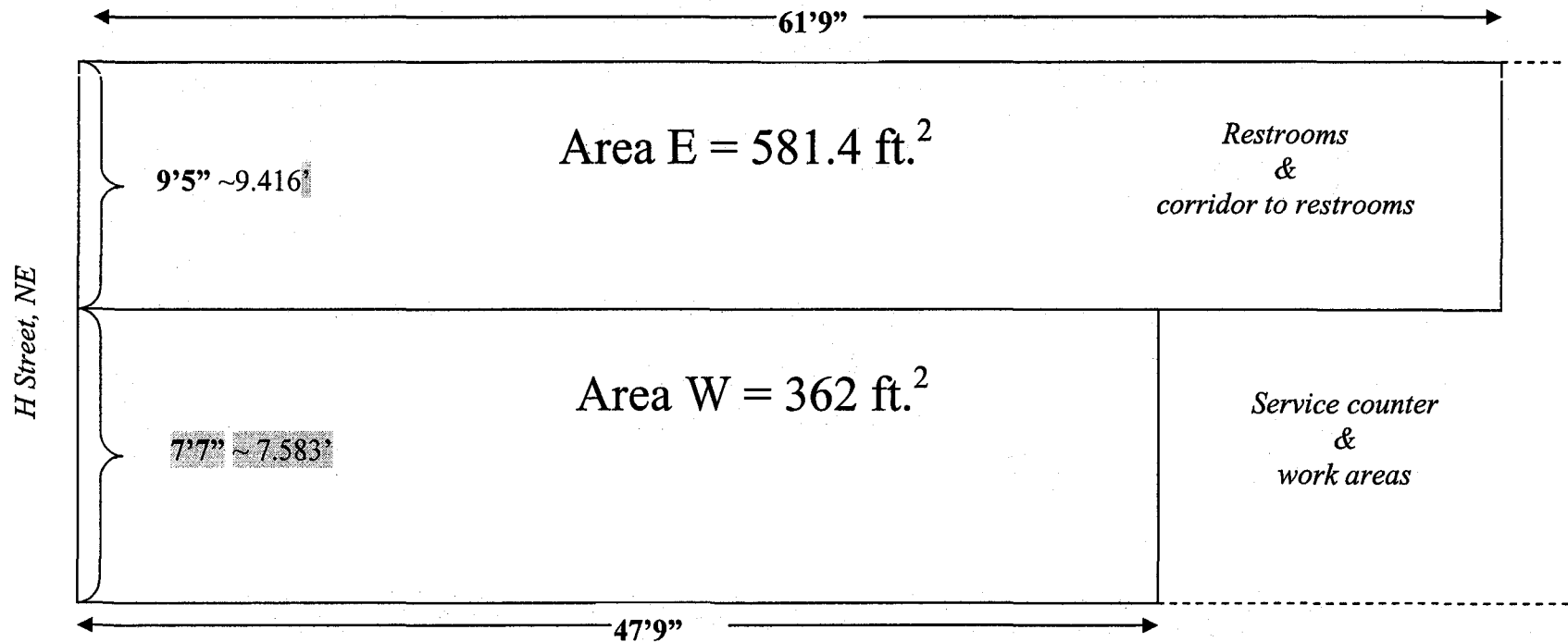


Appellant's Exhibit B (amended)
Total Floor Space Accessible to the Public
Cluck-U-Chicken (1123 H St., NE)



TOTAL FLOOR AREA ACCESSIBLE TO PUBLIC = 943.4 ft.²

<plain text> indicates dimensions measured from the scale on the building plans
<bold> are dimensions taken directly from the building plans

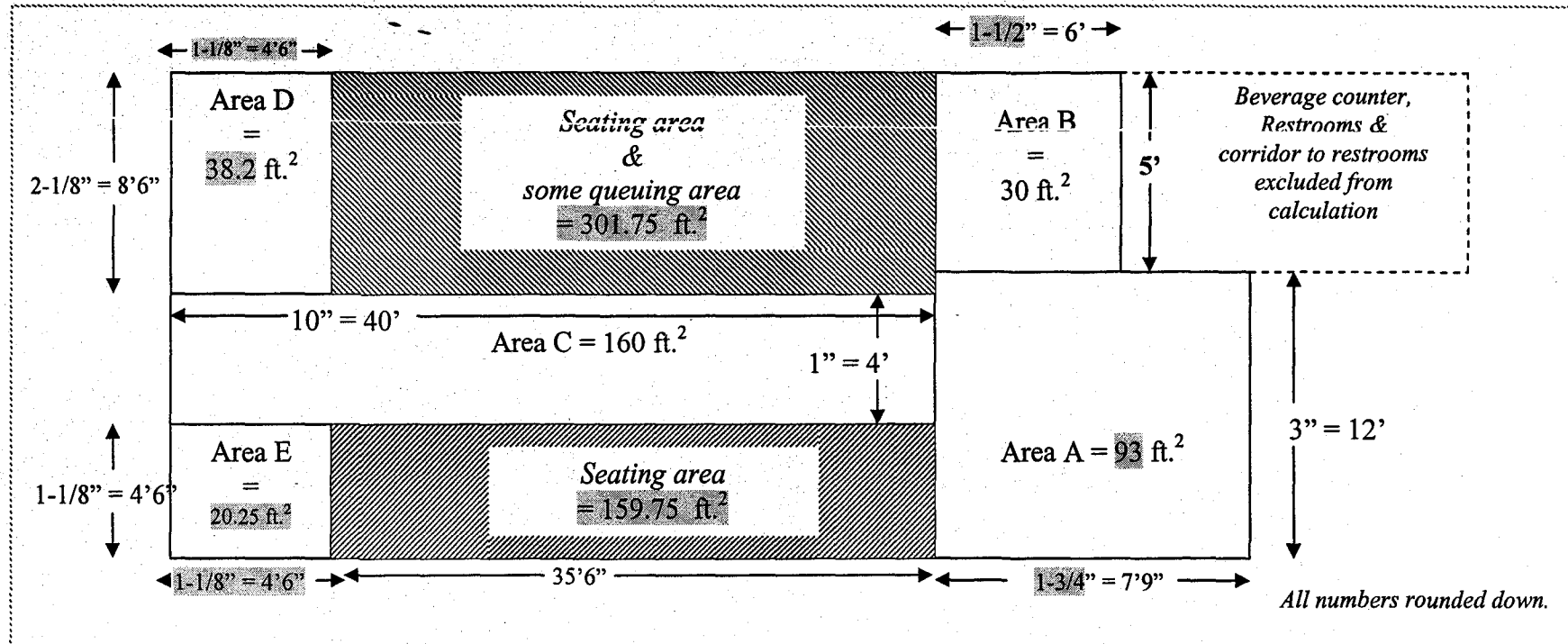
BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17439
EXHIBIT NO. 33

Board of Zoning Adjustment
District of Columbia
CASE NO. 17439
EXHIBIT NO. 33

Appellant's Exhibit B (amended), continued

Queuing Area

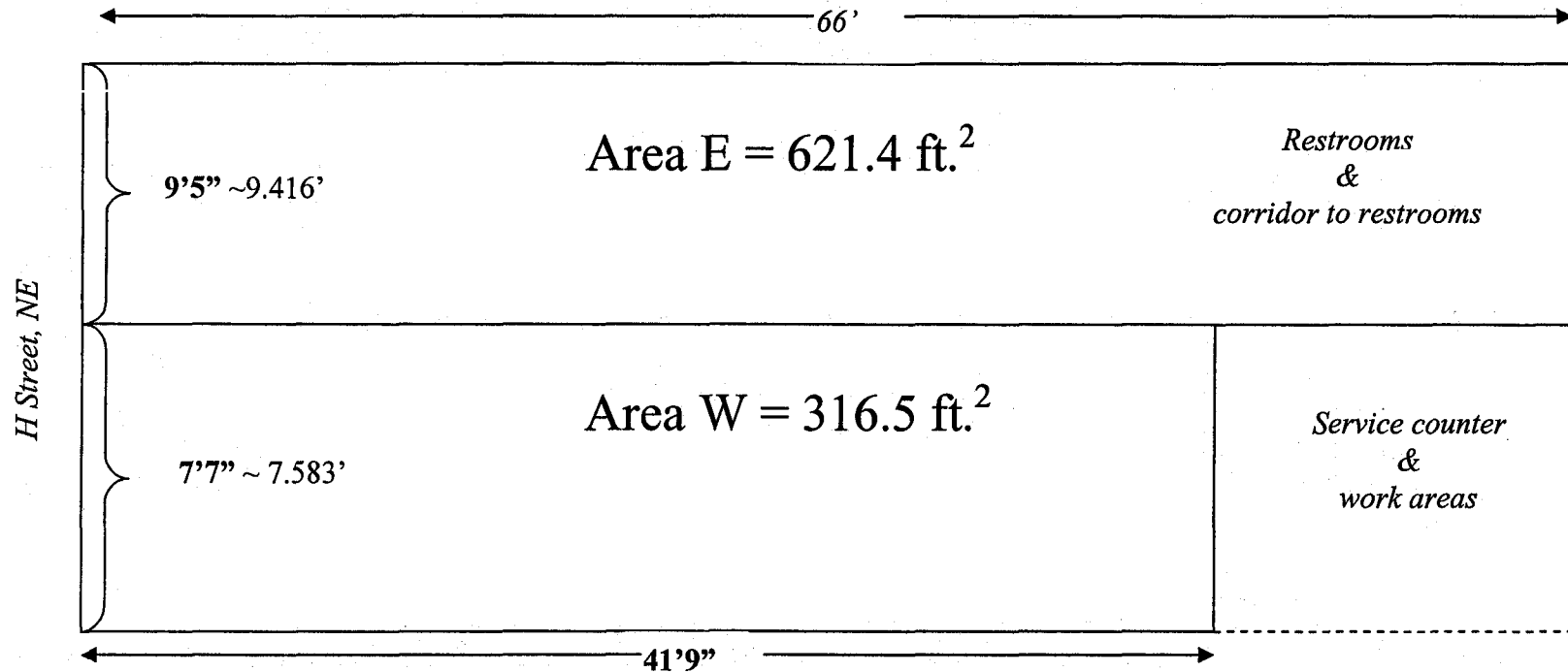
Cluck-U-Chicken (1123 H St., NE)



Part:	Width x Depth (inches)		Width x Depth (feet)		Area of each part:	Total queuing area:	Total queuing area as a % of public space (943.4 ft. ²):	Total queuing + seating area (461.5 ft. ²):	total queuing + seating area as a % of total floor area (2125 ft. ²):
A:	3"	1-3/4"	12'	7'9"	93 ft. ²	93 ft. ²	9.8%	554.5 ft. ²	26.0%
B:	-	1-1/2"	5'	6'	30 ft. ²	123 ft. ²	13.0%	584.5 ft. ²	27.5%
C:	1"	10"	4'	40'	160 ft. ²	283 ft. ²	29.9%	744.5 ft. ²	35.0%
D:	2-1/8"	1-1/8"	8'6"	4'6"	38.25 ft. ²	321.25 ft. ²	34.0%	782.75 ft. ²	36.8%
E:	1-1/8"	1-1/8"	4'6"	4'6"	20.25 ft. ²	341.5 ft. ²	36.1%	803 ft. ²	37.7%

* NOTE: (A + B + C) is 13.3% of the total floor area (2125 ft.²)

Appellant's Exhibit C
Total Floor Space Accessible to the Public
Cluck-U-Chicken (1123 H St., NE)



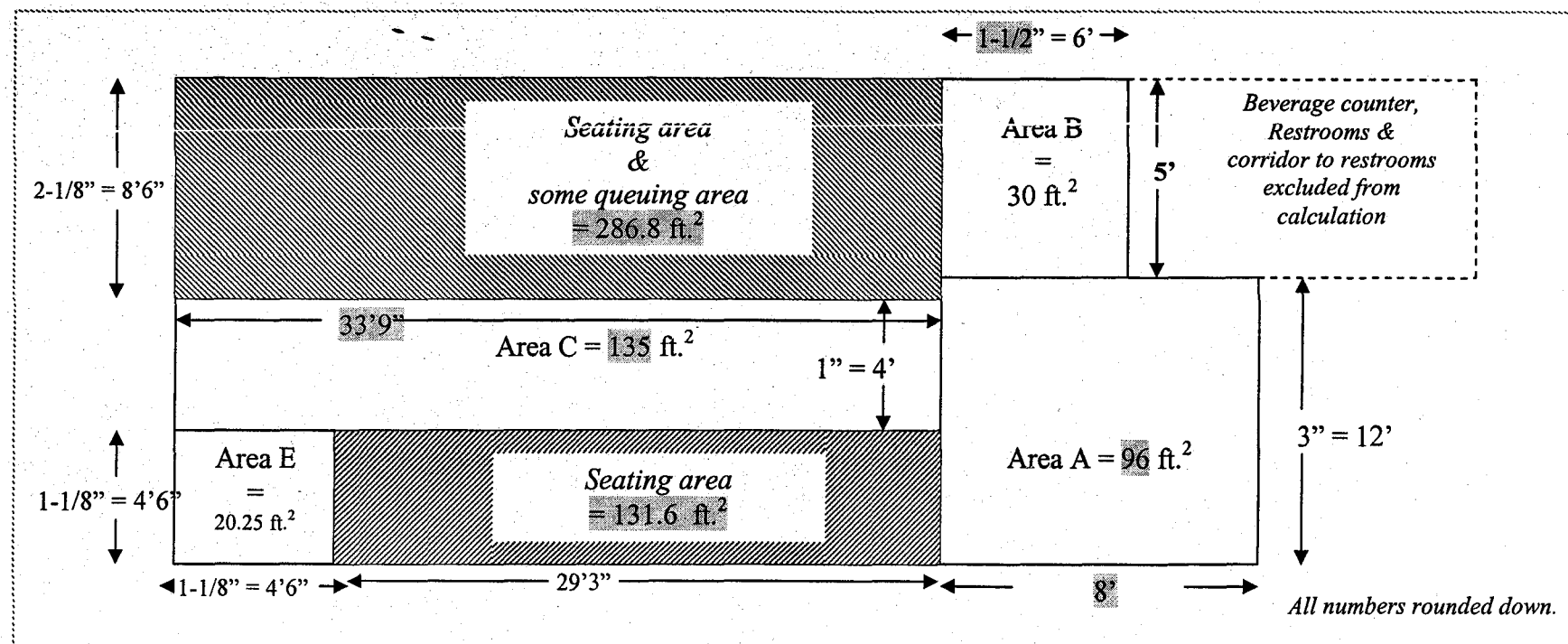
TOTAL FLOOR AREA ACCESSIBLE TO PUBLIC = 937.9 ft.²

<plain text> indicates dimensions measured from the scale on the building plans

<bold> are dimensions taken directly from the building plans

Appellant's Exhibit C, continued

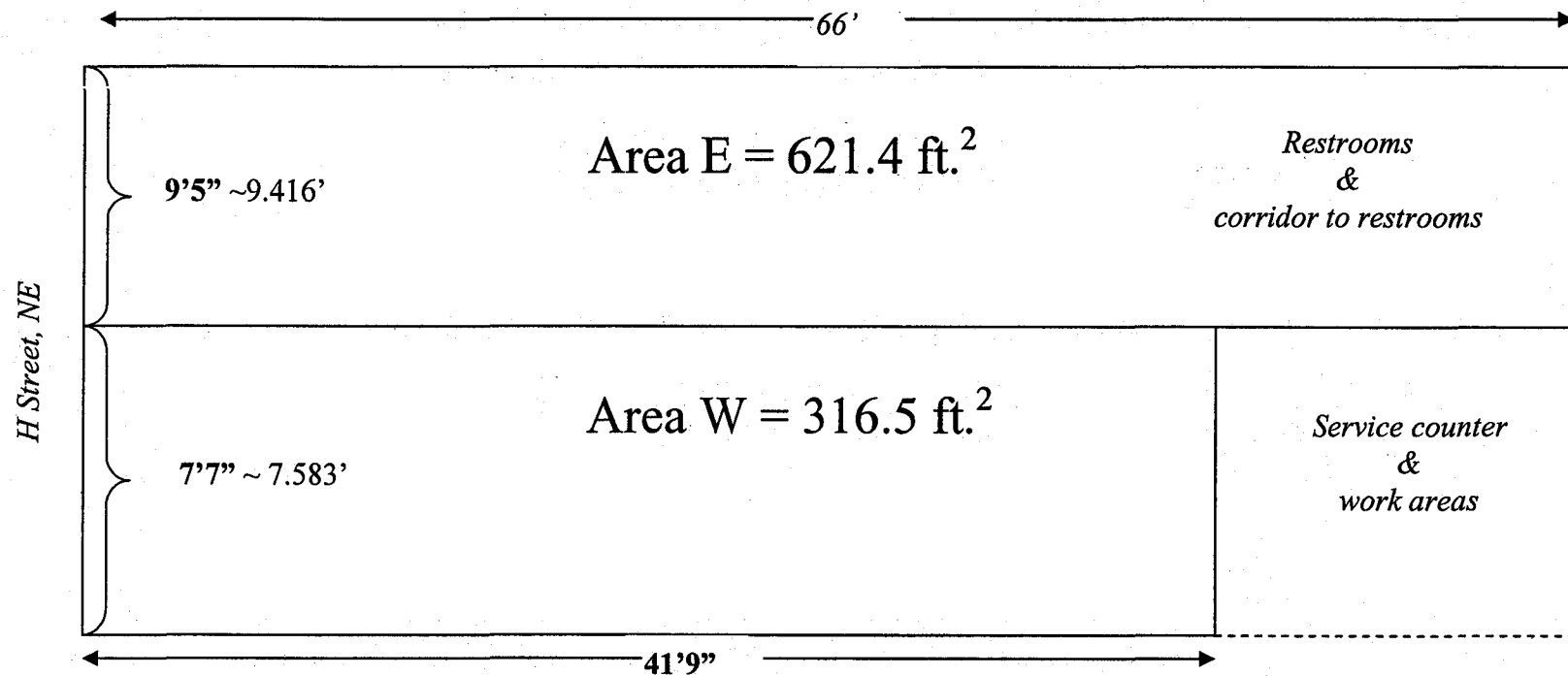
Queuing Area
Chuck-U-Chicken (1123 H St., NE)



Part:	Width x Depth (inches)		Width x Depth (feet)		Area of each part:	Total queuing area:	Total queuing area as a % of public space (937.9 ft. ²):	Total queuing + seating area (418.4 ft. ²):	total queuing + seating area as a % of total floor area (2125 ft. ²):
A:	-	-	12'	8'	96 ft. ²	96 ft. ²	10.2%	514.4 ft. ²	24.2%
B:		1-1/2"	5'	6'	30 ft. ²	126 ft. ²	13.4%	544.4 ft. ²	25.6%
C:	1"	-	4'	33'9"	135 ft. ²	261 ft. ²	27.8%	679.4 ft. ²	31.9%
D:					- ft. ²	- ft. ²	27.8%	679.4 ft. ²	31.9%
E:	1-1/8"	1-1/8"	4'6"	4'6"	20.25 ft. ²	281.25 ft. ²	29.9%	699.65 ft. ²	32.9%

* NOTE: (A + B + C) is 12.2% of the total floor area (2125 ft.²)

Appellant's Exhibit D
Total Floor Space Accessible to the Public
Cluck-U-Chicken (1123 H St., NE)



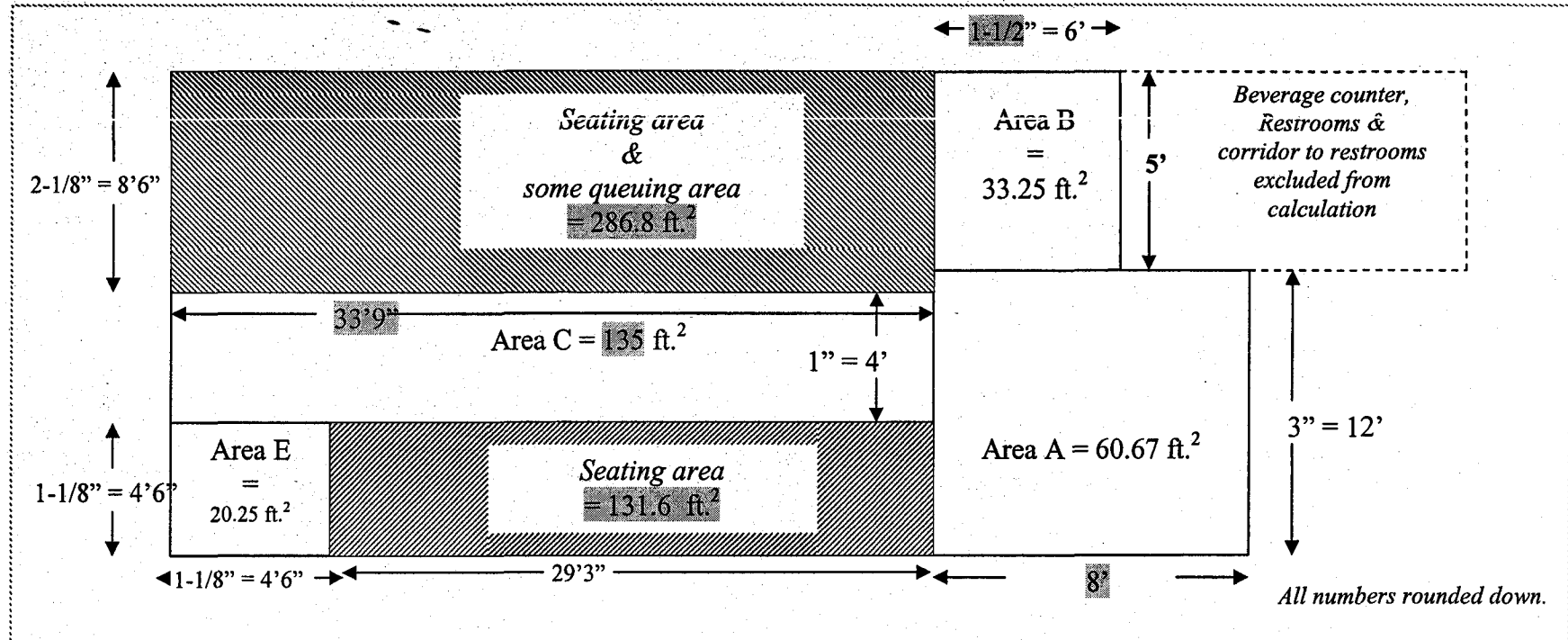
TOTAL FLOOR AREA ACCESSIBLE TO PUBLIC = 937.9 ft.²

<plain text> indicates dimensions measured from the scale on the building plans
<bold> are dimensions taken directly from the building plans

Appellant's Exhibit D, continued

Queuing Area

Cluck-U-Chicken (1123 H St., NE)



Part:	Width x Depth (inches)		Width x Depth (feet)		Area of each part:	Total queuing area:	Total queuing area as a % of public space (937.9 ft. ²):	Total queuing + seating area (418.4 ft. ²):	total queuing + seating area as a % of total floor area (2125 ft. ²):
A:	-	-	12'	8'	60.67 ft. ²	60.67 ft. ²	6.4%	479.0 ft. ²	22.5%
B:		1-1/2''	5'	6'	33.25 ft. ²	93.92 ft. ²	10.01%	512.3 ft. ²	24.1%
C:	1''	-	4'	33'9''	135 ft. ²	228.92 ft. ²	24.4%	647.3 ft. ²	30.4%
D:					- ft. ²	- ft. ²	24.4%	647.3 ft. ²	30.4%
E:	1-1/8''	1-1/8''	4'6''	4'6''	20.25 ft. ²	249.17 ft. ²	26.5%	667.5 ft. ²	31.4%

* NOTE: (A + B + C) is 10.7% of the total floor area (2125 ft.²)

Before the
DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:	)	
	)	
Advisory Neighborhood Commission 6A from the	)	
Administrative Decision of DCRA on	)	BZA Appeal No. 17439
Certificate of Occupancy Permit No. CO-102037	)	

Appellant's Opposition to Appellee's Motion for Judgment

Appellant ANC 6A hereby requests that the Board of Zoning Adjustment ("BZA") DENY appellee Gibson Investment, Inc.'s Motion for Judgment. In opposition to the motion, ANC 6A states as follows:

Appellee's motion actually requests two separate actions from BZA. First, it asks BZA to decide this case on the basis of evidence presented in the appellee's case, or, in other words, summary judgment. Second, it asks BZA to dismiss the case because it asserts ANC 6A does not fully support this appeal, or, in other words, dismissal for lack of jurisdiction. ANC 6A addresses each request separately.

I. A motion for judgment does not apply to this non-court, non-jury administrative proceeding.

BZA should deny Appellant's motion as a matter of law. By its own account, a motion for judgment applies only to jury trials. *See* Appellee's Mo. at 2. *Cf.* D.C. Superior Ct. Rules of Civil Procedure Rule 50. This appeal is before BZA, an administrative body, which, although adjudicative, is neither a court nor a jury. Therefore, a motion for judgment does not apply, and BZA should deny the motion.

II. To the extent it substantively requests summary judgment, appellee's motion admits there are material questions of fact.

Appellee's motion is essentially a motion for summary judgment because it requests judgment on the grounds that there is no genuine dispute of any material facts and the movant is entitled to judgment as a matter of law. *Cf. Osbourne v. Capital City Mtg. Corp.*, 667 A.2d 1321 (1995); Tr. for Application of the Most Worshipful Prince Hall Grand Lodge 22, BZA Appeal No. 16938 at 171-172 (March 25, 2003). Specifically, Appellee argues in the alternative that Cluck-U-Chicken "cannot be deemed a fast food restaurant in any case," and that an order from BZA granting ANC 6A's appeal would cause hardship to Gibson Investments, Inc. Appellee's Mo. at 4.

As a preliminary matter, BZA disfavors motions for summary judgment, particularly when information or testimony BZA has requested is outstanding. *See, e.g.*, Tr. for BZA Appeal No. 16938 at 171-172. In this case, BZA continued the hearing to April 25, 2006 for the specific purpose of hearing DCRA's case, which would include all of DCRA's testimony, all of DCRA's documentary evidence and Appellant's rebuttal and closing statement. The subject matter of the continuance is highly relevant because DCRA's decision to grant a certificate of occupancy is the subject of this appeal. In short, a bench decision from BZA at this stage would be premature and contrary to BZA's past practice. Therefore, on these grounds alone, BZA should deny Appellee's motion.

In addition, summary judgment is an extreme remedy that entitles the moving party to judgment as a matter of law **only when no genuine issue of material fact is present at the time the motion is made.** *Sturdivant v. Seaboard Serv. Sys.*, 459 A.2d 1058 (1983). In this case, the

facts that are material to showing that Cluck-U-Chicken is a fast food restaurant are whether, under 11 D.C.M.R. § 199.1 (“restaurant, fast food”):

1. Cluck-U-Chicken satisfies the 10% floor area requirement, and
2. Cluck-U-Chicken satisfies either the disposable container requirement or the prepared food requirement.

The 10% floor area requirement is material but no longer at issue because Appellee, through its witness at the hearing on April 4, 2006, admitted that Cluck-U-Chicken satisfies the 10% floor area requirement. Therefore, on the question of whether Cluck-U-Chicken is a fast food restaurant, the only material fact at issue is whether Cluck-U-Chicken satisfies either the disposable container requirement or the prepared food requirement.

The disposable container requirement is at least one material fact at issue in this case. At the very least, both Appellant ANC 6A and Appellee have presented testimony and exhibits on the factual question of whether Cluck-U-Chicken intended to use, or uses, primarily disposable containers. The extent to which BZA should credit each party’s testimony or exhibits is for BZA to decide, not Appellee.¹ Cf. T. for BZA Appeal No. 16938 at ¶¶ 12-14. On that basis alone, BZA should deny Appellee’s motion.

III. Granting appellee’s motion would deny DCRA its right as a party to be heard in this case, and would deny ANC 6A its due process and legal right to present a rebuttal and closing statement.

¹ Appellant disputes Appellee’s claim that a number of facts are not in dispute. Specifically, ANC 6A contradicted the fact that Cluck-U-Chicken serves “all of its dine-in patrons on restaurant quality plates, cups and silverware” (Mo. at 2) with photographs and an e-mail from DCRA (Appellant’s Exhibits); Bernard Gibson himself qualified his statement about Appellee’s “dedicated dishwasher person” (Mo. at 2) by testifying that the employee’s duties were “dishwasher and food prep” (T. of April 4, 2005); Bernard Gibson’s testimony contradicts the statement that “Mr. Gibson purchased the Dishwasher to accommodate increased demand” (Mo. at 2) when he testified that he purchased the dishwasher because someone told him he should; and ANC 6A has not stipulated, and in fact directly contradicted, the intent of Appellee’s proposed stipulation (Mo. at 3) in its Supplemental Statement of the Appellant (March 14, 2006).

Appellee cites no authority by which BZA can deny a party the opportunity to be heard. However, granting Appellee's motion would deny DCRA the opportunity to present evidence in violation of 11 D.C.M.R. § 3117.11(a)(2). Certain facts, such as the information that DCRA might claim to have relied on in granting the application, are uniquely within its control. Also, it would deny ANC 6A the opportunity to present rebuttal and closing statements, which would deny ANC 6A due process, deny ANC 6A the opportunity for a "a reasonable balance in time allocation between proponents and opponents," 11 D.C.M.R. §§ 3117.3(e), 3117.5, and deny ANC 6A the right to present its rebuttal and closing statement under 11 D.C.M.R. § 3117.11(a)(6). Therefore, on this basis alone, BZA should deny Appellee's motion.

IV. Hardship to the appellee is not an issue properly before BZA in this case, is not a legal basis for granting summary judgment and is not unique to Gibson Investments, Inc.

Hardship to the Appellee is irrelevant for three reasons. First, specific to this case, upon the decision to file the instant appeal, ANC 6A Commissioners Joe Fengler and Cody Rice, and since the filing of this appeal, ANC 6A's authorized agent Richard Luna, invited Gibson Investments, Inc., to either modify its establishment to bring it into clear compliance with applicable zoning regulations, or else apply for alternate permits that would be effective by the time BZA issued its order in this appeal. Gibson Investments, Inc. declined the invitations.

Second, also specific to this case, this appeal focuses on the narrow question of whether DCRA erred in granting a certificate of occupancy to an establishment that is not a restaurant. Under any relevant definition, hardship to the applicant (here, Appellee) is not a permissible criterion. *Cf.* 11 D.C.M.R. § 199.1 (defining "restaurant" and "restaurant, fast food"). Hardship to the Appellee is relevant only to the extent that DCRA considered hardship to Gibson Investments, Inc., when it granted it the certificate of occupancy that is the subject of this appeal.

To that end, if Gibson Investments, Inc., now asserts that DCRA properly considered hardship when it granted Cluck-U-Chicken's certificate of occupancy, then ANC 6A responds that DCRA erred by considering criteria not contained in the definition of a restaurant.

Third, generally, hardship results from any decision that is adverse to any appellee in any case that comes before BZA. ANC 6A stated in its opening statement that it is sympathetic to any hardship that this appeal might cause to Gibson Investments, Inc. Furthermore, ANC 6A trusts that each Boardmember might likewise be sympathetic to possible hardship to the appellee in any of its cases, including this one.

Nonetheless, the hardship to the appellee in this case is similar to the hardship of any other appellee in any other appeal to BZA. Gibson Investments, Inc. should not receive special treatment merely because it has made an emotional plea. Doing so would open the door for DCRA to grant certificates of occupancy on the basis of emotional appeal instead of zoning regulations. Also, doing so would nullify the zoning appeal process, because every appeal involves hardship to an appellee. **Lastly, any hardship to an appellee, great or small, is counterbalanced by the vindication of the specific legal rights that BZA adjudicates and the public good that results from fair and uniform enforcement of the zoning regulations.**

V. Appellee lacks evidence to support dismissal for lack of jurisdiction.

ANC 6A submitted its report in compliance with 11 D.C.M.R. § 3115.1 on September 16, 2005. ANC 6A voted to authorize the appeal after due consideration and at a time that was very close—within less than two (2) months—to the date of the events leading up to and including DCRA's issuance of the certificate of occupancy for Cluck-U-Chicken. Therefore, ANC 6A and its authorized agents are properly before BZA in this appeal.

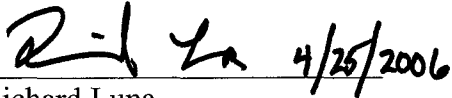
In its motion, Appellee does not attack the validity of the ANC 6A's § 3115.1 report. Rather, Appellee suggests that the independent action of four (4) ANC commissioners should color BZA's view of this appeal and of ANC's properly submitted § 3115.1 report, even though the four independent commissioners did not hold a public meeting, did not give proper notice of any meeting, did not have a quorum present and did not represent a majority of the commissioners. Strangely, Appellee does not specify on what specific legal question, to what extent or on what authority BZA should interpret the actions of the independent commissioners.

Significantly, Appellee omits the fact that on two separate occasions, at two separate properly noticed public meetings with a quorum present, ANC 6A voted against withdrawal of this appeal. See Exhibit A (attached).

BZA would run afoul of 11 D.C.M.R. § 3115.1 if it were to credit the independent commissioners' testimony as anything more than testimony of individual witnesses of the appellant. ANC 6A respectfully urges BZA to decline Appellee's invitation to BZA to run afoul of § 3115.1 or otherwise inject BZA into the political process.

WHEREFORE ANC 6A respectfully requests that BZA DENY Appellee's Motion for Judgment.

Respectfully submitted,


Richard Luna
1230 Linden Place, NE
Washington, DC 20002-4455

as authorized agent for
Advisory Neighborhood Commission 6A
P.O. Box 75115
Washington, DC 20013



District of Columbia Government
Advisory Neighborhood Commission 6A
Box 75115
Washington, DC 20013



April 24, 2006

Board of Zoning Adjustment
441 4th St, NW, Suite 210
Washington, DC 20001

Re: ANC 6A Status of Cluck-U-Chicken Appeal, BZA Case Number: 17439

Dear Board Members,

ANC 6A has not changed its decision to appeal the administrative decision of the Department of Consumer and Regulatory Affairs' Zoning Administrator to issue a Certificate of Occupancy for a "restaurant" for Cluck-U-Chicken at 1123 H Street NE.

I am certifying in writing that the position our Commission took on September 8, 2005, to appeal the Cluck-U-Chicken certificate of occupancy issued by the Zoning Administrator has not been changed at any of the seven subsequent public Commission meetings held from September 8, 2005, to the last public Commission meeting held on April 13, 2006.

To be clear, while four Commissioners may not agree with the decision made on September 8, 2005, it takes five Commissioners to vote to rescind any previous action taken by a Commission. To date, our Commission had not rescinded the decision to appeal the certificate of occupancy of Cluck-U-Chicken made on September 8, 2005.

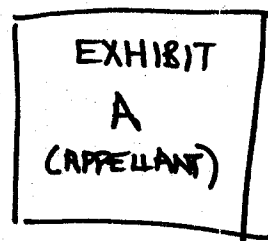
In close, any letter signed by four Commissioners does not negate the decision or great weight of an ANC made at a duly noticed, public meeting.

Respectfully Submitted,

Joseph Fengler
Chair, Advisory Neighborhood Commission 6A

Cc: ANC 6A Commissioners
Gottlieb Simon, Executive Direct, Office of ANC

For more information about our Commission, please visit www.anc6a.org





TRASH CAN IN PUBLIC SEATING AREA

9/17/2005

19



NO TABLE CLOTHS, NO BARRIER / STANCHIONS FOR QUEUING AREA
1 / 11 / 2006



TRASH CAN

DISPOSABLE CONTAINERS

9/14/2005



DISPOSABLE CONTAINERS

9/16/2005



DISPOSABLE CONTAINERS SERVED ON TRAY
11 / 4 / 2005

USA Locations All 31 Stores Go!

International Locations All 1 Stores Go!

*It's an addiction*
CLUCK-U CHICKEN

Cluck-U Chicken Franchisee Form

About Cluck-U
Contact Us
Who's Who
Customer Feedback
Menu
USA Locations
International
Locations
Promotions and Events
In the News
Franchising
Merchandise
Art/Design
Games
Career Opportunities
Store Login

Cluck-U, Corp. is looking for suitable candidates for franchise ownership. We seek highly motivated individuals with the resources, experience and ability to operate and personally manage a high volume restaurant. While it is no guarantee of success, we believe that individuals with proven management experience, who are committed to hard work and have sufficient financial resources are most likely to excel in this demanding environment.

A minimum net worth of \$190,000 is required for each Franchise to be opened. 40 % of the minimum net worth must be cash or liquid assets.

The following questionnaire is not an offer to sell or a solicitation of an offer to buy a franchise. No sale will occur until the execution of the Franchise Agreement and payment of all required fees. Your submission of this questionnaire is for information purposes only.

Neither our acceptance of the is questionnaire nor any discussions resulting therefrom constitute any commitment on our part to enter any agreement to sell a territory or a franchise.

These Franchise requirements do not constitute an offer to award a franchise. Such an offer may be made only after the issuance of a written offering circular.

The following information is requested to assist us in evaluating your qualification as a potential franchisee of Cluck-U Chicken. Responses to this questionnaire must be submitted by each person who is expected to own an interest in the franchise, if one is granted. If we believe you may have the qualifications we are looking for in a franchisee, we will send you Cluck-U Chicken materials for your review.

[Next](#)

If you are experiencing difficulty sending your questionnaire then email us at: info@cluckuchicken.com with the problem you are experiencing.

©2006 Cluck-U, Corp.
Cluck-U-Chicken
P. O. Box 99
Beltsville, MD 20704
info@cluckuchicken.com


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[NOVELTIES](#)
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[FUN STUFF](#)
[SEND AN E-CARD](#)
[BECOME A V.I.C.](#)
[FRANCHISE INFO.](#)
[Rooster's Coop](#)

CLUCK U FRANCHISE

Franchise Information

Cluck-U, Corp. is looking for suitable candidates for franchise ownership. We seek highly motivated individuals with the resources, experience and ability to operate and personally manage a high volume fast food restaurant. While it is no guarantee of success, we believe that individuals with proven management experience, who are committed to hard work and have sufficient financial resources are most likely to excel in this demanding environment.

A minimum net worth of \$190,000 is required for each Franchise to be opened. 40 % of the minimum net worth must be cash or liquid assets.

The following questionnaire is not an offer to sell or a solicitation of an offer to buy a franchise. No sale will occur until the execution of the Franchise Agreement and payment of all required fees. Your submission of this questionnaire is for information purposes only.

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The following information is requested to assist us in evaluating your qualification as a potential franchisee of Cluck-U Chicken. Responses to this questionnaire must be submitted by each person who is expected to own an interest in the franchise, if one is granted. If we believe you may have the qualifications we are looking for in a franchisee, we will send you Cluck-U Chicken materials for your review.

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EXHIBIT 33 CONTAINS
OVERSIZED DOCUMENTS
AND CAN BE VIEWED AT THE
OFFICE OF ZONING