

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17439 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs (DCRA), to issue Certificate of Occupancy (C of O) Permit No. 102037, dated July 27, 2005, authorizing a 49-seat restaurant use ("Cluck-U-Chicken"); Appellant alleges that DCRA erred by issuing the C of O for a fast-food restaurant without Board of Zoning Adjustment special exception review under § 733. The subject property is located in the HS (H Street Northeast Commercial Overlay)/C-2-A zone district at premises 1123 H Street, N.E. (Square 982, Lot 823).

HEARING DATES: April 4 and April 25, 2006
DECISION DATE: June 6, 2006

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17439
EXHIBIT NO. 40

DECISION AND ORDER

This appeal was filed September 23, 2005 by Advisory Neighborhood Commission ("ANC") 6A, which appealed from the administrative decision of the Acting Zoning Administrator to grant a certificate of occupancy for a "restaurant" operating in the C-2-A zone at 1123 H Street, N.E. (Square 982, Lot 823). According to the ANC, the establishment was operating as a "fast food restaurant" and therefore required special exception approval.

Following a public hearing, the Board voted at its public meeting on June 6, 2006 to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated September 30, 2005, the Office of Zoning provided notice of the appeal to the Office of Planning, the Department of Consumer and Regulatory Affairs ("DCRA"), the Councilmember for Ward 6, ANC 6A, and Single Member District/ANC 6A02. Pursuant to 11 DCMR § 3112.14, on January 12, 2006 the Office of Zoning mailed letters or memoranda providing notice of the hearing to Mildred K. Sternberg, c/o Delbe Realty, on behalf of the owner of the subject property; the Zoning Administrator; and ANC 6A. Notice was also published in the D.C. Register on January 20, 2006 (53 DCR 434).

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Party Status. In addition to the Appellant and DCRA, the owner and operator of the subject establishment was a party in this proceeding. There were no additional requests for party status.

Appellant's Case. The Appellant argued that the Department of Consumer and Regulatory Affairs erred in its decision to grant Certificate of Occupancy Permit No. CO-102037 to Gibson Investments, Inc., trading as Cluck-U-Chicken, because: (i) the certificate of occupancy allowed use of the premises as a "restaurant" but Cluck-U-Chicken was in fact a "fast food restaurant" as defined by the Zoning Regulations; (ii) the certificate of occupancy was issued for a fast-food restaurant in the C-2-A zone district without a special exception as required by 11 DCMR § 733; and (iii) DCRA granted a certificate of occupancy to Cluck-U-Chicken for a lot that does not correspond to the lot where Cluck-U-Chicken was actually located.

ANC 6A asserted that approximately 80 percent of the floor space of the establishment was allocated for use for customer queuing, for self-service, for carry-out, or on-premises consumption. The ANC also claimed that Cluck-U-Chicken had a "brisk carryout business" such that its "off-premises consumption exceeds on-premises consumption," and that even customers dining on the premises used disposable containers and flatware. According to the ANC, the manner of operation at the establishment appeared to fall within the definition of fast-food restaurant, in part because the establishment had "the intent, capacity, and appliances to hold a large quantity of food items prepared in advance to serve customers on disposable containers that customers would throw away in the dining room trash can." *See* 11 DCMR 199.1, definition of Restaurant, fast-food.

Zoning Administrator. The Zoning Administrator testified that the certificate of occupancy had been issued based on information provided by the applicant, which included building permit plans showing the subject premises and an affidavit indicating how the establishment would be operated, and on the basis of an inspection conducted by the staff of the Office of the Zoning Administrator before the establishment began operation. According to the Zoning Administrator, the certificate of occupancy authorizing restaurant use had been properly issued because the proposed use of the subject property would be "restaurant" and not "fast food restaurant" since the establishment lacked a drive-through, only 10 percent of the food would be prepared or packaged prior to a customer placing an order, and the establishment would not serve food or beverages in disposable containers or use disposable tableware. The staff's inspection indicated that the establishment had non-disposable plates, glasses, and tableware.

Intervenor. The Board received testimony and evidence from Bernard Gibson, the owner and operator of the Cluck-U-Chicken establishment. According to the owner, the establishment was a restaurant, and not a fast-food restaurant because the business prepared and sold food and beverages primarily for consumption on the premises; the floor space allocated and used for customer queuing, self-service for carry-out, and on-premises consumption was less than 10 percent of the total floor space on any one floor accessible to the public; more than 80 percent of the food items were made to order; the staff served food to the eat-in patrons on non-disposable plates, with silverware and glasses, and bused the tables after patrons finished eating; the facilities for carry-out were subordinate to the principal use of providing prepared foods for consumption on the premises; and the establishment did not have a drive-through facility.

FINDINGS OF FACT

1. On July 27, 2005, the Acting Zoning Administrator issued Certificate of Occupancy Permit No. CO-102037 to Gibson Investments, Inc., trading as Cluck-U-Chicken. The permit reflected a use change from a variety store to a 49-seat restaurant on the first floor of 1123 H Street, N.E. (Square 982, Lot 803), in the R-4 zone. A corrected certificate of occupancy was subsequently issued to reflect that the property was zoned C-2-A and was located at Lot 823 in Square 982.
2. The subject property is located at 1123 H Street, N.E. (Square 982, Lot 823) and is now zoned HS-R/C-2-A, within the Retail subdistrict of the H Street Northeast Commercial Overlay district.¹
3. At a public meeting on September 8, 2005, with a quorum present, ANC 6A voted 5-3 to appeal the administrative decision of the Zoning Administrator to issue a certificate of occupancy for a “restaurant” at the subject property.
4. A restaurant, not including a fast-food restaurant, is permitted as a matter of right in the C-2-A zone. 11 DCMR §§ 701.4(q), 721.1. A fast-food restaurant may be permitted in the C-2-A zone, subject to Board approval as a special exception. See 11 DCMR §§ 733, 1304, 1320.4(c), 1325.
5. The Zoning Regulations define a “restaurant” as:

¹ The H Street NE Neighborhood Commercial Overlay zone district was approved by the Zoning Commission on January 9, 2006 and became effective on March 10, 2006. See Z.C. Order No. 04-27.

A place of business where food, drinks, or refreshments are prepared and sold to customers primarily for consumption on the premises. This 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. In a restaurant, any facilities for carryout shall be clearly subordinate to the principal use providing prepared foods for consumption on the premises.

11 DCMR § 199.1.

6. The Zoning Regulations define “fast food restaurant” as:

A place of business devoted to the preparation and retail sale of ready-to-consume food or beverages for consumption on or off the premises. A restaurant will be considered a fast food restaurant if it has a drive-through. 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 (10%) of the total floor space on any one (1) floor that is accessible to the public, and it exhibits one (1) of the two (2) 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. (This definition does not include an establishment known as 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.)

11 DCMR § 199.1.

7. The certificate of occupancy was issued based on information provided by the owner of Cluck-U, which included building permit plans showing the subject premises and an affidavit indicating how the establishment would be operated, and on upon an inspection conducted by the staff of the Office of the Zoning Administrator before the establishment began operation.

8. The affidavit indicated that eight percent of the floor space that is accessible to the public on any one floor would be used for "queuing self-service for carry-out or on-premises consumption."
9. The affidavit stated that 10 percent of the food items would be prepared or packaged prior to a customer placing an order.
10. The affidavit indicated that the proposed establishment would not primarily serve food and beverages in disposable containers or provide disposable tableware.
11. The pre-operation inspection revealed that the area between the entrance and the service counter – a distance of approximately 42 feet was furnished with tables and chairs, with an area approximately eight feet deep left open in front of the service counter. The remainder of the premises appeared devoted to food preparation, product storage, an office, and bathrooms.
12. The staff's inspection indicated that the establishment had non-disposable plates, glasses, and tableware.
13. No drive-through was observed at the time of the inspection, and none existed as of the date of the hearing on this appeal.
14. Patrons dining in the establishment are served on non-disposable plates and use non-disposable cups and silverware. Customers place orders at the counter, and the food is served to them at the tables by Cluck-U staff.
15. Take-out orders are also placed at the counter. The establishment uses disposable plates, cups, and flatware for orders placed by take-out customers.
16. The owner of the establishment provided daily operation reports reflecting three months of operation at the establishment. The reports indicated the number of customers who purchased food for consumption on-premises, for carry-out, for pick-up, or for delivery. The daily operation reports reflected that, for the three-month period, a large majority of sales were for customers dining at the establishment.
17. More than 80 percent of the food items are made to order at the establishment.

CONCLUSIONS OF LAW

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration the Zoning Regulations. 11 DCMR §§ 3100.2, 3200.2. In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. 11 DCMR § 3100.4.

The Appellant contended that the certificate of occupancy authorizing a “restaurant” use at the subject premises was improperly issued because the Cluck-U-Chicken establishment was in fact a “fast food restaurant,” as that term is defined in the Zoning Regulations, and should have been required to seek a special exception.

Almost all of the ANC’s assertions concern how Cluck U is now operating, which is not the focus of an appeal. The issue before this Board is whether the facts known to the Acting Zoning Administrator at the time the Certificate of Occupancy was issued could have reasonably led him to believe that the proposed use was to be a restaurant, and not a fast food restaurant. The Appellant has not offered persuasive evidence that the decision to issue the certificate of occupancy was erroneous based upon the facts known at the time of the application.

Those facts consisted of the content of the application, the representations made by the Cluck-U owner in its affidavit, the depiction of the facility in the building permit plans, and the observations made by Office of the Zoning Administrator staff during a pre-operation inspection. As summarized in findings of fact 8 through 13, those facts describe a business that would meet the definition of a “restaurant”, not a fast food restaurant.

Appellant’s contention that the business is actually being operated as a fast food restaurant does not prove that the issuance of the certificate of occupancy was in error. Although a lawfully issued certificate of occupancy may be revoked by DCRA and enjoined by the Superior Court if “the actual occupancy does not conform with that permitted,” 12A DCMR § 110.5.1, this Board cannot invalidate a valid certificate of occupancy on that ground.

In any event, the evidence in the record of the business’s actual operation does not indicate that a fast food restaurant use is in place. The property lacks a drive-through. More than 80 percent of the food items sold at the establishment are made to order; therefore, less than 60 percent of the food items are already prepared or packaged

before a customer places an order. Finally, the establishment serves its food and beverages in non-disposable containers and provides non-disposable tableware to customers eating on the premises.²

The Board is required to give "great weight" to issues and concerns raised by the affected ANC. D.C. Official Code §6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of the affected ANC and an explanation of why the Board did or did not find their views persuasive. This opinion fully addresses the issues raised by the Appellant ANC and, for the reasons discussed above, the Board does not find its arguments persuasive.

For the reasons stated above, the Board concludes that the Appellant has not satisfied the burden of proof with respect to its claim of error in the administrative decision of the Zoning Administrator to issue Certificate of Occupancy Permit No. 102037, dated July 27, 2005, authorizing a 49-seat restaurant use ("Cluck-U-Chicken") at 1123 H Street, N.E. (Square 982, Lot 823) without requiring special exception approval by the Board as a fast-food restaurant pursuant to § 733 of the Zoning Regulations. Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**.

VOTE: **4-0-1** (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann and Carol J. Mitten (by absentee ballot) voting to deny the appeal; Curtis L. Etherly, Jr. not participating, having recused himself)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member approved the issuance of this order.

ATTESTED BY: _____


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 30 2007

² The Board need not make a finding with respect to that part of the definition regarding: "floor space allocated and used for customer queuing for self-service for carry out and on-premises consumption" because that finding is only relevant if the restaurant exhibits at least one of the two characteristics listed in (a) or (b) of the definition of a fast-food restaurant. As set forth above, the Board has found that it does not.

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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.

SG