

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

Appeal of Cosi, Inc.

BZA Appeal No. ____
ANC 3C

STATEMENT OF APPEAL

I. Appeal from the Decision of the Zoning Administrator

The Appellant, Cosi, Inc. ("Cosi"), by and through undersigned counsel, respectfully submits this Board of Zoning Adjustment ("Board") Appeal of the decision of the Department of Consumer and Regulatory Affairs and the Zoning Administrator of January 29, 2007, that no certificate of occupancy may be issued for an eating establishment at the proposed location, 3519 Connecticut Avenue, NW, Washington D.C. The Zoning Administrator's denial is based upon the opinion of the administrator that the establishment occupies the linear street frontage of Connecticut Avenue within the Cleveland Park neighborhood commercial overlay district and that the parking lot in front of the establishment "is accessory to the frontages." *See Email* dated January 29, 2007, and attached hereto as Exhibit 1. The Zoning Administrator's decision is based upon his "preliminary figures" which indicate that "Cleveland Park NCOD is over the limit for eating establishments and we can not allow any new ones." *See, Exhibit 1.*

II. Standard and Background

Section 11 DCMR 1302.5. states that restaurants, fast food restaurants, delicatessens, carry-outs, and similar eating or drinking establishments shall occupy no more than twenty-five percent (25%) of the linear street frontage within a particular NC Overlay District, as measured along the lots that face designated roadways in the particular district. The regulations further state that Connecticut Avenue is the designated roadway for the Cleveland Park overlay District. The term "street frontage" is specifically defined in the Regulations as "the property line where a

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17649
EXHIBIT NO. 4

lot abuts upon a street.” 11 DCMR 199.1.

The proposed location does not abut Connecticut Avenue, as there is a large parking lot, used by multiple establishments, for multiple uses, between Connecticut Avenue and the establishment. Although the regulations state that “street frontage” is defined by a lot which “abuts” the street, the Zoning Administrator ignored the clear language of the regulations and determined that Cusi falls under the regulations of Section 1302.5.

III. Argument - Grounds for the Appeal

A. The proposed use does not occupy street frontage

The Zoning Administrator incorrectly determined that the proposed use of the establishment occupies the linear street frontage of Connecticut Avenue, and therefore incorrectly refused to permit the appellant to obtain an occupancy permit. Again, 11 DCMR 199.1, defines “street frontage” as “*the property line where a lot abuts upon a street.*” In the premises at issue, a parking lot, not controlled by the appellant, and used by other tenants of the shopping center, is located *between* the proposed establishment and the street. Due to the presence of this parking lot, the proposed establishment does not occupy any linear street frontage on Connecticut Avenue, as that term is defined in the D.C. Municipal Regulations, and the denial of a Certificate of occupancy was improper.

B. Any determination of “accessory use” is not relevant

As noted above, the denial of a Certificate of Occupancy due to the number of eating establishments in the Cleveland Park neighborhood commercial overlay district, must be based on a finding, under 11 DCMR 1302.5, that the premises occupies the linear street frontage of Connecticut Avenue. The Zoning Administrator ignored the plain language defining the linear street frontage, and instead noted that, “I am not going to find that the parking lot hides the store

frontages. The parking lot is accessory to the frontages.” See, Exhibit 1. The District of Columbia Municipal Regulations give the Zoning Administrator no authority to find that the premises is part of the linear frontage based upon a finding of an “accessory use.” Regardless of whether the separate parking lot, used by multiple establishments and for multiple uses, is an accessory to the proposed location of Cusi, the proposed location is not a part of the linear street frontage. By making this determination, the Administrator ignored the plain language of the statute, and instead imposed his own requirements and own test to determine “linear street frontage.”

C. Eating establishments do not occupy 25% of the street frontage.

Even if the proposed establishment is found to occupy the linear street frontage of Connecticut Avenue, and the parking lot is merely an accessory use, propositions that the Appellant strongly rejects, the decision of the Zoning Administrator remains incorrect. Although eating establishments may only occupy 25% of the street frontage under 11 DCMR 1302.5, no accurate measurement of the percentage of street frontage was conducted prior to the Administrator’s decision, and the percentage of such establishments does not currently exceed 25%.

In the decision, the Administrator noted that: “with our preliminary figures, Cleveland Park NCOD is over the limit for eating establishments and we can not allow any new ones.” See, Exhibit 1. Thus, the administrator acknowledges that the figures are only *preliminary*. He does not, however, provide the basis for these “preliminary” calculations and gives no indication why a conclusive final determination cannot be made by his office.

Subsequent to the decision, and in order to determine the basis for the determination, appellant filed Freedom of Information Act (“FOIA”) requests with both the District of Columbia

Office of Zoning (“DCOZ”) and the Department of Consumer and Regulatory Affairs (“DCRA”) seeking calculations of the total street frontage facing Connecticut Avenue; all documents used in such calculations; all addresses or lot numbers of those establishments comprising the total street frontage; and any and all changes in the total street frontage within the Overlay District in the last five years. *See*, Letter dated February 14, 2007, attached hereto as Exhibit 2.

In response to the FOIA request, DCOZ only provided citation to an Order and case file from 1989, and failed to provide any recent or final calculations regarding the street frontage. *See*, Response of DCOZ, attached hereto as Exhibit 3. In relying on cases and a decision from 1989 to respond to the FOIA request, it is apparent that DCOZ made no determination of the percentage of eating establishments as part of a decision to deny a certificate of occupancy to Cosi.

The Zoning Administrator is part of DCRA, and therefore the FOIA request was also sent to DCRA. DCRA failed to serve *any* response within the fifteen (15) days required by statute. DCRA eventually responded to the request, subsequent to the statutory deadline, only by stating that “[b]ecause of the voluminous nature of your request, additional time is necessary....” *See*, Response of DCRA attached hereto as Exhibit 4. The DCRA response failed to include a single document or explanation regarding the calculation of eating establishments. These FOIA responses, in conjunction with the statement of “preliminary” calculations by the Administrator, reveal that a true and accurate calculation of the number of zoning establishments was never conducted. If the Zoning Administrator had conducted a survey prior to denying the recent application by Cosi, that information would have been readily available upon the FOIA request. Therefore, the denial of Cosi’s Certificate of Occupancy was arbitrary, capricious, and not based

upon accurate calculations. Finally, a calculation of the current uses in the Cleveland Park Overlay District reveals that the percentage of eating establishments does not exceed twenty-five percent (25%).

IV. CONCLUSION

For the foregoing reasons, and such other and further reasons as may be asserted at or before the hearing in this matter, as well documents and information thus far not made available by DCRA and/or DCOZ, the Applicant respectfully requests that it be permitted to obtain a certificate of occupancy for an eating establishment at 3519, Connecticut Avenue, NW, Washington D.C.

Andrew J. Kline

From: Crews, Bill (DCRA) [Bill.Crews@dc.gov]
Sent: Monday, January 29, 2007 8:15 PM
To: Andrew J. Kline
Cc: LeGrant, Matt (DCRA); Steinfink, Jay; Kevin.Sampica@getcosi.com
Subject: RE: Cosi; Cleveland Park

Andrew,

I am not going to find that the parking lot hides the store frontages. The parking lot is accessory to the frontages.

Consequently, with our preliminary figures, Cleveland Park NCOD is over the limit for eating establishments and we can not allow any new ones

Best regards,

Bill Crews

Zoning Administrator for the District of Columbia
Department of Consumer and Regulatory Affairs
941 N. Capitol St. NE Suite 2000
Washington, DC 20002
202.442.4576 Office
202.442.4871 Fax
bill.crews@dc.gov

EXHIBIT 1

Andrew J. Kline (DC & MD)
akline@klinelawdc.com
Scott H. Rome (DC & MD)
srome@klinelawdc.com
LaQuan S. Partee, Legal Assistant
Lpartee@klinelawdc.com

LAW OFFICES
ANDREW J. KLINE
1225 NINETEENTH STREET, N.W.
SUITE 320
WASHINGTON, D.C. 20036

(202) 686-7600
FAX (202) 293-3130

February 14, 2007

BY CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Rick Nero
FOIA Officer
Office of Zoning
One Judiciary Square
441 4th Street NW, Suite 210S
Washington, DC 20001
richard.nero@dc.gov
Phone: (202) 727-6311

Selena Robinson
FOIA Officer
Dept. of Consumer & Regulatory Affairs
941 North Capitol Street NE, Suite 9400
Washington, DC 20002
selena.robinson@dc.gov
Phone: (202) 478-9286

RE: Freedom of Information Act Request

Dear Mr. Nero:

Pursuant to the Freedom of Information Act, D.C. Official Code § 2-531 et seq., this letter shall serve as an information request upon the District of Columbia Office of Zoning ("DCOZ") and the Department of Consumer & Regulatory Affairs ("DCRA").

Please provide our office with (1) a calculation of the total street frontage facing Connecticut Avenue contained within the Cleveland Park Overlay District. Please also include: (2) all documents used or considered in calculating the measurement of total street frontage in the Overlay District; (3) all addresses, lot and square numbers, or other indicators of the units that compose the total street frontage in the Overlay District; and (4) any and all changes in the total street frontage within the Overlay District in the last five years.

Please also provide this office with: (5) a list of all restaurants, fast food restaurants, delicatessens, carry outs and similar eating or drinking establishments (hereinafter referred to collectively as "eating establishments") in the Cleveland Park Overlay District that are

EXHIBIT 2

ANDREW J. KLINE

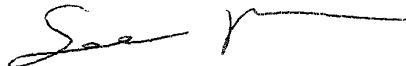
Mr. Rick Nero
February 14, 2007
Page 2

considered a part of the linear street frontage of Connecticut Avenue; (6) the address, square and lot number, square footage, and footage of the linear frontage of each of these eating establishments in the Overlay District; (7) a calculation of the current percentage of the linear street frontage to Connecticut Avenue comprised of eating establishments within the Overlay District; and (8) all documents used or considered in calculating the percentage of eating establishments within the Overlay District.

As you are undoubtedly aware, pursuant to § 2-531(c), DCOZ and DCRA have 10 days from the receipt of this request to either make the requested public records accessible or to notify this office of the determination not to make the requested public record or any part thereof accessible and the reasons therefor.

Thank you very much for your time and consideration. If you have any questions or concerns please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott H. Rome", with a long horizontal flourish extending to the right.

Scott H. Rome

SHR/ys

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



February 20, 2007

Scott H. Rome, Esq.
Law Offices of Andrew J. Kline
1225 19th Street, N.W., Suite 320
Washington, D.C. 20036

Re: Cleveland Park Overlay District – FOIA

Dear Mr. Rome:

The Office of Zoning (OZ) received your letter (attached) dated February 14, 2007, on February 16, 2007, requesting information under the Freedom of Information Act (FOIA) in reference to the above. The OZ has determined that the following Zoning Commission (ZC) order and related files are responsive to the information that you are looking for:

ZC Order No. 616, dated May 8, 1989 (Cleveland Park & Woodley Park
Overlays)

ZC Case File No. 86-26 (Connecticut & Wisconsin Avenues)

ZC Case File No. 87-27 (Connecticut & Wisconsin Avenues)

The above documents will be available for your research and inspection during the OZ business hours of 8:30 A.M. to 5:00 P.M., Monday through Friday. OZ is located at 441 4th Street, N.W., Suite 210-S, Washington, D.C. 20001. Please call the OZ three (3) business days in advance when you are ready to review these files so that the above files can be ordered from our off-site storage facility. There is no fee for the inspection of OZ records. Please be advised however that if after you inspect the records you wish to make photocopies, there is a copying charge of \$0.20 per page (check or money order only). Please also be advised that the above-cited ZC order can be viewed on the web by accessing the ZC and BZA order search function of the OZ web site located at www.dcoz.dc.gov.

EXHIBIT 3

LETTER TO SCOTT H. ROME
PAGE NO. 2

Please call Richard S. Nero, Jr., Deputy Director of Operations and FOIA Officer at (202) 727-6311, if you have any questions relevant to the foregoing.

SINCERELY,



JERRILY R. KRESS, FAIA
Director, Office of Zoning



rsn
Selena Robinson, DCRA
Attachment

Ltr to Rome

LAW OFFICES

ANDREW J. KLINE

1225 NINETEENTH STREET, N.W.
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WASHINGTON, D.C. 20036

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Scott H. Rome (DC & MD)
srome@klinelawdc.com
LaQuan S. Partee, Legal Assistant
Lpartee@klinelawdc.com

February 14, 2007

BY CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Rick Nero
FOIA Officer
Office of Zoning
One Judiciary Square
441 4th Street NW, Suite 210S
Washington, DC 20001
richard.nero@dc.gov
Phone: (202) 727-6311

Selena Robinson
FOIA Officer
Dept. of Consumer & Regulatory Affairs
941 North Capitol Street NE, Suite 9400
Washington, DC 20002
selena.robinson@dc.gov
Phone: (202) 478-9286

RE: Freedom of Information Act Request

Dear Mr. Nero:

Pursuant to the Freedom of Information Act, D.C. Official Code § 2- 531 et seq., this letter shall serve as an information request upon the District of Columbia Office of Zoning ("DCOZ") and the Department of Consumer & Regulatory Affairs ("DCRA").

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Please also provide this office with: (5) a list of all restaurants, fast food restaurants, delicatessens, carry outs and similar eating or drinking establishments (hereinafter referred to collectively as "eating establishments") in the Cleveland Park Overlay District that are

DC OFFICE OF ZONING
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ANDREW J. KLINE

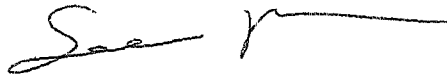
Mr. Rick Nero
February 14, 2007
Page 2

considered a part of the linear street frontage of Connecticut Avenue; (6) the address, square and lot number, square footage, and footage of the linear frontage of each of these eating establishments in the Overlay District; (7) a calculation of the current percentage of the linear street frontage to Connecticut Avenue comprised of eating establishments within the Overlay District; and (8) all documents used or considered in calculating the percentage of eating establishments within the Overlay District.

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Thank you very much for your time and consideration. If you have any questions or concerns please do not hesitate to contact me.

Sincerely,

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Scott H. Rome

SHR/ys

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs

Office of the Director



March 16, 2007

Scott H. Rome, Esq.
Law Offices of
Andrew J. Kline
1225 Nineteenth Street, N.W.
Suite 320
Washington, D.C. 20036

Dear Mr. Rome:

This letter is in response to your Freedom of Information Act ("FOIA") request ("request") dated February 14, 2007 and received in the Department of Consumer and Regulatory Affairs ("Department") on February 20, 2007. Your request seeks:

- 1) a calculation of the total street frontage facing Connecticut Avenue contained within the Cleveland Park Overlay District.
- 2) all documents used...in calculating the measurement of total street frontage in the Overlay District.
- 3) all addresses, lot and square numbers, or other indicators of the units that compose the total street frontage in the Overlay District.
- 4) any and all changes in the total street frontage within the Overlay District in the last five years.
- 5) list of all restaurants, fast food restaurants, delicatessens, carry outs or similar eating or drinking establishments in the Cleveland Park Overlay District that are considered a part of the linear street frontage of Connecticut Avenue.
- 6) the address, square and lot number, square footage, and footage of the linear frontage of each of these eating establishments.
- 7) a calculation of the current percentage of the linear street frontage to Connecticut Avenue comprised of eating establishments within the Overlay District.
- 8) all documents used or considered in calculating the percentage of eating establishments within the Overlay District.

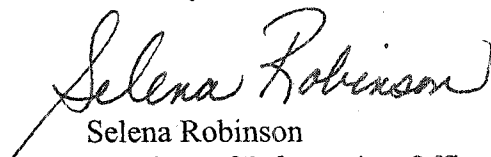
Because of the voluminous nature of your request, additional time is necessary to enable us to determine which records or portions thereof may be released. Accordingly, the Department anticipates a delay in providing you with its final response. Please be assured that your request is being handled diligently and that all documents that can be released will be made available at the earliest date possible.

EXHIBIT 4

If you consider this response to be a denial of your request, you may file an appeal by writing to the Mayor's Correspondence Unit, FOIA Appeal, 1350 Pennsylvania Avenue N.W., Suite 221, Washington, DC 20004. The appeal should include "Freedom of Information Appeal" or "FOIA Appeal" in the subject line of the letter as well as marked on the outside of the envelope. Your appeal should be accompanied by a copy of your original request and this letter.

If you have any questions concerning your request, please call me at (202) 478-9286 or email me at Selena.Robinson@dc.gov and refer to FOIA Request Number 2007-155.

Sincerely,



Selena Robinson
Freedom of Information Officer