Testimony before the
District of Columbia
Board of Zoning Adjustment

Case Number 17675
Appeal of the Reed-Cooke Neighborhood Association,
Holland & Knight December 11, 2007
Request for Postponement,
And Other Related Matters

By
Wilson Reynolds
Intervener on behalf of
Advisory Neighborhood Commission 1C

January 29, 2008

Exhibits:
E-1) ANC 1C correspondence of December 6, 2007.
E-2) Sevilla V. Sweat.
E-3) Minor Flexibility by Zoning Administrator's Ruling (Section 2522, Title 11, DCMR).
E-4) Mr. Bill Crews March 21, 2007 letter to Mr. Chip Glasgow.
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Madam Chair, and Members of the Board: Thank you, again, for the opportunity to come before the Board on a case involving the ~~correspondence~~ March 21, 2007 correspondence by then Zoning Administrator Bill Crews, and off premises alcoholic beverage sales within the Reed Cooke Overlay District, as appealed by the Reed Cooke Neighborhood Association.

My name is Wilson Reynolds, and I am here today representing Advisory Neighborhood Commission 1C of Adams Morgan in Ward One. In addition I have the privilege of being Chair of ANC 1C Planning, Zoning, and Transportation (PZT) Committee ~~of~~, and I serve the voters of Single Member District 07, which is the district where the applicant, Harris Teeter will conduct food sales, and seek permission to sell off premises alcoholic beverages.

ANC 1C Correspondence of December 6, 2007
As you will recall, at the proceedings before the Board on December 18 past, and upon instruction of the Board, I did present correspondence to the Board of action taken by ANC 1C to act as Intervener in this case. A copy is attached to this testimony. The correspondence authorizes my presentation before you today, and shares with the Board the text of a Motion passed at the general session of ANC 1C held on December 5, 2007.

I will not repeat the entire motion, but will reference a germane section. As voted on, and passed, the Motion clearly states the position of ANC 1C on this case:

"ANC 1C does endorse the validity of the Reed Cooke Overlay District, Chapter 14, Title 11, DC Municipal Regulations, and specifically Section 1400.4 of Chapter 14 as clear and irrefutable justification by the Board of Zoning Adjustment to instruct the applicant, Harris Teeter, Inc. to seek permission to sell alcoholic beverages by seeking a Special Exception, as stated in Section 1403 of Chapter 14 of Said DCMRA (sic.) Title 11."

Events have overtaken this correspondence to now include action by the applicant, Harris Teeter, Inc. to amend the Reed Cooke Overlay District before the full Zoning Commission. This attempt to re-write the R-C Overlay, through the good offices of the Office of Planning, is again, an attempt to seek permission to sell alcohol, but not seek a Special Exception before this body.

It is wrong.

On December 11, 2007 the legal firm of Holland & Knight presented to the Board correspondence to postpone the proceedings of December 18 pending the decision by the Zoning Commission of Case 07-33, the proposed text amendment to the Reed Cooke Overlay. This Board denied the postponement.

The Board was right.

Again, from the position of ANC 1C, the Board's decision was correct, and reflects the language of the Motion of December 5 by stating:
"...ANC 1C does endorse the validity.....of Chapter 14 as clear and irrefutable justification by the Board of Zoning Adjustment to instruct ..... Harris Teeter, Inc. to seek.....a Special Exception, as stated in Section 1403 of Chapter 14...."

ANC 1C does urge the Board to continue in these efforts to educate the applicant.

Sevilla V. Sweat
During the BZA proceedings in November of 2007 Mr. Chip Glasgow, of Holland and Knight proffered case law referencing Arizona Court of Appeals 1969 case of Sevilla V. Sweat as relevant to these proceedings since the decision was to allow a grocer to sell off premises beer and wine.

A copy of the case is attached to this testimony.

I submit for your consideration that Sevilla V. Sweat is, in fact, not relevant case law for the case under consideration today. I submit this on two grounds:

First, the Phoenix, Arizona case dealt with a grocery store that due to zoning changes in 1955 and 1962 was operating as a 'non-conforming use'; and if permission was allowed, or not allowed for beer and wine sales for a non-conforming grocery store.

No provision of the Reed Cooke Overlay District prohibits a grocery store as a use provision under Section 1401.1, and may actually be encouraged under the purposes of the R-C Overlay District under:
Section 1400.2 (a) (3) Encourage small-scale business development that will not adversely effect the residential community.

Although an argument can be made that a 37,450 square foot business is not exactly "small-scale", or that it will "not adversely effect the residential community.", or perhaps come into conflict with 1400.2 (b), and (c).

Never the less, a grocery store is a conforming use inside the Reed Cooke Overlay District.

Second, Sevilla V. Sweat does not bear relevance to the case before us because the grocery store in the Phoenix, Arizona case was well established, and operating since

1951. This is not the condition with Harris Teeter, as the grocer in this scenario has yet to open, and could have filed for a Special Exception as early as February 18, 2005.

The Basic Miss-Conception in This Case
Members of the Board I must confess to you that I am not a trained attorney. In preparing to represent the ANC I did, however, attempt to work and familiarize myself with the complexities of this case.

I reviewed the transcripts of the BZA November 2005 case where certain zoning variances were debated, but no application was made for a Special Exception to sell beer and wine. I reviewed the above reference Sevilla V. Sweat case. I enlightened myself reading briefs from Holland and Knight. Yet in the attempts at cerebral improvement I was not able to get to the center of the most important issue.

Until I re-read the Summary posted for this case:
"....from a decision of the Zoning Administrator, to allow off-premises alcoholic beverage sales as an accessory use to a grocery store."

This took me to Page 25-20 and 25-21 of Title 11 of DC Municipal Regulations, Section 2522 Minor Flexibility by Zoning Administrator's Ruling. I am certain the Board is familiar with this section. I was not. However, it is clear that the 'flexibility' allowed to the Zoning Administrator is limited, dealing with deviations of lot area, lot occupancy, roof structure setback, and other dimensional definitions.

Viewed through the prism of Section 2522, Mr. Bill Crews' March 21, 2007 correspondence is revealed for what it really and truly is.

It is merely opinion, on official stationary. It is not a 'decision' or a 'ruling' allowed under Section 2522. A copy is attached for your review.

In his own words, Mr. Crews states:
"This is to confirm the substance of our discussion on Thursday, January 18. 2007 concerning the above referenced project." (Harris Teeter)

In short, Mr. Crews, and Mr. Glasgow (the recipient of the letter) had a conversation. Mr. Crews put down on paper what they talked about.

Again, at the end of the correspondence, Mr. Crews writes:
"Accordingly, I concur that the subordinate sale of beer and wine for off-premises consumption is an allowable accessory use for a retail grocery store and that the restrictions in (Section) 1401.1(b) applies to principal uses only and not to accessory sales within a grocery store."

Again, in short, Mr. Crews and Mr. Glasgow had a conversation. Mr. Crews agrees with Mr. Glasgow ("I concur) on the accessory alcohol sales issue. That's where it ends.

No where in the correspondence does Mr. Crews declare that this letter is a 'ruling', or a 'decision'. No where does Mr. Crews use language such as: 'Under the authority granted to me under Section..... etc., I am authorized to grant..... etc. Mr. Crews does not take formal action in writing because he does not have the authority, and knows he does not have the authority. He does do what he is completely entitled to do, render an opinion, which his position and office allow.

The authority for a ruling, and the reason ANC 1C does recommend that the Board rule on this case to enjoin Harris Teeter, Inc. to follow the rules, does lies clearly, and squarely in Section 1403.1 of the R-C Overlay; the legal, and appropriate procedure to seek a Special Exception in the Reed Cooke Overlay District when granted by the true and legal authoritative body for this procedure.

You: The Board of Zoning Adjustment of the District of Columbia.

In conclusion, ANC 1C respectfully requests that the Board of Zoning Adjustment support the Appeal of the Reed Cooke Neighborhood Association in this case.

This concludes my presentation. Thank your patience as I shared these comments with you. I will be happy to answer any questions.

Advisory Neighborhood Commission 1C
PO Box 21009, NW, Washington, DC 20009
202-332-2630 • www.anc1c.org

December 6, 2007

D.C. Board of Zoning Adjustment
One Judiciary Square, Suite 210-South
441 4th Street, NW
Washington, DC 20001

Re: BZA Appeal 17675

Honorable Members of the Board:

At the general session of Advisory Neighborhood Commission 1C held December 5, 2007 a motion to participate in the BZA proceedings on the above referenced case was moved, and passed.

The general session of ANC 1C was convened preceeding due notice to the public, with all eight Commissioners present. The motion is as follows:

ANC 1C Participation Before Board of Zoning Adjustment Proceedings

ANC 1C does support participation in Board of Zoning Adjustment Case 17675 as an Intervener to proceedings of appeal filed by the Reed Cooke Neighborhood Association regarding the Reed Cooke Overlay District being in conflict with proposed off-premsie sales by Harris Teeter.

Furthermore, that ANC 1C does charge the Chairperson of ANC 1C Planning, Zoning, and Transportation Committee to represent ANC 1C in these proceedings.

Finally, that ANC 1C does endorse the validity of the Reed Cooke Overlay District, Chapter 14, Title 11, DC Municipal Regulations, and specifically section 1401.1, and Section 1400.4 of Chapter 14 as clear and irrefutable justification by the Board of Zoning Adjustment to instruct the applicant, Harris Teeter, Inc. to seek permission to sell alcoholic beverages by seeking a Special Exception, as stated in Section 1403 of Chapter 14 of Said DCMRA Title 11.

Thank you for your consideration of this action.

Sincerely,

Bryan Weaver
Chairperson, ANC 1C

E-1

C
Sevilla v. Sweat,
Ariz.App. 1969.

Court of Appeals of Arizona.
Ernest SEVILLA, Intervenor-Appellant,
Board of Adjustment 11 of the City of Phoenix, Arizona, Respondent,
v.
Otto J. SWEAT and Thelma E. Sweat, husband and wife, Petitioners-Appellees.
No. 1 CA-CIV 593.

Feb. 17, 1969.

The board of adjustment overruled building inspector's denial of request to sell package beer and wine in operation of 'non-conforming use' grocery store, and petition for writ of certiorari was granted. The Superior Court of Maricopa County, Cause No. 192921, J. Smith Gibbons, J., rendered judgment setting aside decision of board of adjustment, and appeal was taken. The Court of Appeals, Cameron, J., held that superior court could grant certiorari to review decision of board of adjustment. The Court further held that package beer and wine are 'groceries' so that to add sales of package beer and wine to 'non-conforming use' grocery store would not constitute a new or extended use.

Decision of superior court reversed and decision of board of adjustment reinstated.

West Headnotes

[1] Zoning and Planning 414 ⚖565

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k563 Nature and Form of Remedy
414k565 k. Certiorari. Most Cited Cases

Superior court could grant certiorari to review decision of board of adjustment overruling building inspector's denial of request to sell package beer and wine in operation of "non-conforming use" grocery store. A.R.S. §§ 9-465, subsecs. C, E, 12-2001.

[2] Zoning and Planning 414 ⚖747

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review
414k745 Scope and Extent of Review
414k747 k. Questions of Fact; Findings. Most Cited Cases

Although the superior court, in a writ of certiorari, is limited when reviewing the decision of the board of adjustment to finding error on part of board and may not substitute its opinion of the facts for that of the board of adjustment, the Court of Appeals, on appeal, may substitute its opinion for that of the superior court inasmuch as the Court of Appeals is reviewing the same record. A.R.S. § 9-465, subsec. E.

[3] Zoning and Planning 414 ⚖749

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review
414k749 k. Determination and Disposition. Most Cited Cases

If evidence supports decision of board of adjustment after hearing, decision should be affirmed not only by superior court on writ of certiorari but by court of appeals on appeal from decision of superior court. A.R.S. § 9-465, subsec. E.

[4] Zoning and Planning 414 ⚖329.1

414 Zoning and Planning
414VI Nonconforming Uses
414k329 Enlargement or Extension of Use
414k329.1 k. In General. Most Cited Cases
(Formerly 414k329)

Package beer and wine are "groceries", so that to add sales of package beer and wine to "non-conforming use" grocery store would not constitute a new or extended use.

***184 **425** William H. Chester, Phoenix, for inter-

venor-appellant.
Stephen Rayburn and Pearson & Shoob, by Ben C. Pearson, Phoenix, for petitioners-appellees.
CAMERON, Judge.
This is an appeal from a judgment of the Maricopa County Superior Court which set aside a decision of the Board of Adjustment II of the City of Phoenix allowing the appellant permission to sell package beer and wine in the operation of a grocery store. By 'package beer and wine' we mean beer and wine sold in containers not for consumption on the premises. The grocery was operated as a nonconforming use under the zoning ordinance of the City of Phoenix.

We are called upon to determine:
1. Whether the writ of certiorari to the Superior Court from a ruling of the Board of Adjustment was proper.
2. Whether package beer and wine are included within the definition of the word 'groceries'.

The facts necessary for a determination of this matter on appeal are as follows. Appellant, Sevilla, purchased the property at 534 North 8th Street in Phoenix, Arizona, in 1951. He applied for commercial zoning in that year which was approved and he has operated a small, neighborhood grocery store at that location since 1951. The changes in the zoning ordinance of the City of Phoenix in 1955 and 1962 zoned this area (R-4) and the operation of the grocery store became a 'non-conforming use'. On 28 July 1966 Sevilla applied for a liquor license to sell package beer and wine at the said grocery store. The Building Inspector disapproved of the application and the appellant appealed to the Board of Adjustment II of the City of Phoenix. The statement on the appeal read as follows:
'This request is appealing the Building Inspector's decision that adding beer sales to an existing nonconforming grocery store constitutes adding a new use to the grocery store use.
'The applicant filed for commercial zoning in 1951 and was approved. The ordinance changes of 1955 and 1962 zoned this area R-4 and created a new nonconforming grocery store.
'The staff recommends the building inspector's decision be upheld and further, that to permit the addition of beer sales to this nonconforming use is an expansion of the nonconforming use which should not be permitted. Such expansion would tend to defeat the purpose of nonconforming uses, that purpose being to bring the use to conformance eventually. To allow such expansion encourages the nonconformance and lengthens rather than lessens the time of nonconformance.'

A hearing was held before the Board of Adjustment II and a petition requesting that Sevilla be allowed to sell package beer and wine in his grocery store was presented containing over 200 signatures. Petitions containing over 125 signatures were filed in opposition to the approval of the application.

The Board of Adjustment overruled the denial of the request by the Building Inspector and the Appellees, Otto J. Sweat and Thelma Sweat, filed a petition for writ of certiorari in the Superior Court which was granted. After hearing the Superior Court ordered:
'That said Board of Adjustment abused its discretion and acted arbitrarily and in excess of its jurisdiction.
'IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order of the Board of Adjustment II, overruling the decision of the building inspector, be and the same is hereby overruled and vacated.
'IT IS FURTHER ORDERED AND DECREED that the act of adding package***185 **426** beer and wine sales to its existing nonconforming grocery store business constitutes a new use.'

From said order Ernest Sevilla brings this appeal.

WAS CERTIORARI PROPER?

[1] Arizona Revised Statutes reads in part as follows:
'* * *
'C. The board shall:
'1. Hear and decide appeals when there is error in an order, requirement or decision made by an administrative official in the enforcement of an ordinance adopted pursuant to this article.

'4. Reverse or affirm, wholly or partly, or modify the order or decision appealed from and make such order or decision as ought to be made, and to that end shall have the powers of the officer from whom the appeal is taken.
'E. A person aggrieved by a decision of the board, or a taxpayer, or a municipal officer may, at any time within thirty days after the filing of the decision in the office of the board, petition a writ of certiorari for review of the board's decision. Allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and for good cause shown, grant a restraining order, and on final hearing may reverse or affirm, wholly or partly, or may modify the decision reviewed.' s 9-465, subsecs. C & E, A.R.S.

It is the contention of Sevilla that the Board acted within its discretion and that therefore the writ of certiorari to the Superior Court was improper. We would not agree that the Board of Adjustment acted in abuse or in excess of its discretion in the instant case. The Board of Adjustment was doing exactly what it was authorized and directed to do, namely, hear appeals from the Building Inspector regarding zoning of the property in question. Under these circumstances normally a writ of certiorari would not lie.s 12-2001 A.R.S., State ex rel. Morrison v. Superior Court etc., 82 Ariz. 237, 311 P.2d 835 (1957). However, in the instant case the authority of the Superior Court is much broader under the statute in question (A.R.S. s 9-465, subsection E) and we believe the Superior Court was not in error in granting a writ of certiorari to review the decision of the Board of Adjustment:
'Hansen and Lewis secured a writ of certiorari for a review by the Superior Court. It should be noted that the authority of the Superior Court is much broader under Section 9-465, subsec. E than is the grant of authority under general Arizona statutes relating to writs of certiorari * * *'
Lewis v. Board Of Adjustments Of City Of Phoenix, 6 Ariz.App. 494, 496, 433 P.2d 811, 813 (1967).

EXTENSION OF THE NON-CONFORMING USE

[2][3] It is the contention of the appellees that by adding package beer and wine to the grocery store, the non-conforming use was extended thereby. Both the Building Inspector and the Judge of the Superior Court agreed with this contention. We agree with the appellant and the majority of the members of the Board of Adjustment of the City of Phoenix that this was not the case. Although the Superior Court, in a writ of certiorari, is limited when reviewing the decision of the Board of Adjustment to finding error on the part of the Board and may not substitute its opinion of the facts for that of the Board of Adjustment, Walker v. Dunham, 78 Ariz. 419, 281 P.2d 125 (1955), this Court, on appeal, may substitute its opinion for that of the Superior Court inasmuch as we are reviewing the same record. The hearing was held by the Board of Adjustment and if the evidence supports their decision, it should be affirmed not only by the Superior Court on writ of certiorari but ***186 **427** by this Court on appeal from the decision of the Superior Court.Walker, supra.

[4] Sevilla has operated this store since 1951. When the zoning was changed he was authorized to continue with his grocery store as a non-conforming use. By 1966 he wished to add package beer and wine to the list of items he sold. The question before this Court is one of definition, namely, does the term 'grocery store' normally encompass an establishment which sells package beer and wine in addition to what we ordinarily believe to be groceries? In a day when drug stores sell bicycles, supermarkets provide banking services, and service stations sell hunting licenses, the demands of competition would indicate that small businesses should not be burdened with narrow and restrictive views of what they may or may not sell. In this case a small neighborhood grocery may well need the added income which a package beer and wine license would bring, in order to survive. While mere economic necessity alone does not require that the term 'groceries' included package beer and wine, we recognize that competition and economic necessity have caused a change in the operation of many

businesses in this country. The distinctions between greengrocer, butcher, baker, and wine merchant are no longer respected and it is the rare grocery store that does not sell fresh vegetables, meats, bakery goods, and package beer and wine in addition to staples such as coffee, tea, and flour. We feel that contrary to historical usage, the ordinary understanding of present day business practices is that package beer and wine are included in the term 'groceries' and that grocery stores normally sell package beer and wine along with other groceries. It has been stated:

'The word 'grocer' is defined in Funk & Wagnall's New Standard Dictionary as 'one who deals in sugar, tea, coffee, spices, country produce, and the like, excepting fresh meats, and sometimes in bottled beer and wines, usually not to be drunk on the premises.'The Century Dictionary and Cyclopedia define 'grocery' as a place for the selling of 'general supplies for the table and for household use, as flour, sugar, spices, coffee, etc., the commodities sold by grocers'.'Private A. S. Realty Corporation v. Julian, 214 App.Div. 628, 212 N.Y.S. 430, 431 (1925). But see Purity Stores, Ltd. v. Linda Mar Shopping Center, Inc., 177 Cal.App.2d 568, 2 Cal.Rptr. 397 (1960).

We cannot say as a matter of law that the ordinary operation of a grocery store does not include package beer and wine sales and that to add these sales to a grocery store business would constitute a new or extended use as the Superior Court found in this case. Nothing we say herein should affect the granting or denial of Sevilla's application to the State Liquor Department for a license to sell package beer and wine. That is a different matter. We are concerned herein only with the problem of proper zoning.

The decision of the Superior Court is reversed and the decision of the Board of Adjustment reinstated.

DONOFRIO, C.J., and STEVENS, J., concur.
Ariz.App. 1969.
Sevilla v. Sweat
9 Ariz.App. 183, 450 P.2d 424

END OF DOCUMENT

E-2

2522 MINOR FLEXIBILITY BY ZONING ADMINISTRATOR'S RULING

2522.1 The Zoning Administrator is authorized to permit the following deviations, if the Zoning Administrator determines that the deviation or deviations will not impair the purpose of the otherwise applicable regulations:

Page 25-20

(a) Deviations not to exceed two percent (2 %) of the area requirements governing minimum lot area, percentage of lot occupancy, and areas of courts and roof structures;

(b) Deviations not to exceed the greater of two percent (2 %) or twelve (12) inches
of the linear requirements governing minimum lot width; and

(c) Deviations not to exceed the greater of ten percent (10%) or twelve (12) inches of the linear requirements governing rear yard, side yard, and minimum dimensions of the court and court niche and roof structure setback requirements, provided that all deviations of roof structure setback requirements comply with the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, as amended; D.C. Official Code ~~ 6-601.01 to 6-601.09 (2001) (formerly codified at D.C. Code ~~ 5-401 to 5-409 (1994 Repl. & Supp. 1999))).

SOURCE: Final Rulemaking published at 46 DCR 7853 (October 1, 1999); as amended by Final Rulemaking published at 47 OCR 9741,9742 (December 8,2000); and Final Rulemaking published at 47 DCR 9741-43 (December 8, 2000), incorporating by reference the text of Proposed Rulemaking published at 47 DCR 8335, 8536-37 (October 20,2000).

GO RNMENT OF THE DISTRICT OF C LUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR

March 21, 2007

Mr. Norman M. Glasgow, Jr.
Mr. Steven E. Sher
Holland and Knight, LLC
Suite 100
2099 Pennsylvania Avenue, NW
Washington DC 20006

Re: Harris Teeter Grocery Store at the Citadel

Gentlemen:

This is to confirm the substance of our discussion on Thursday, January 18, 2007, concerning the above referenced project. The project property, located at1631 Kalorama Road, NW, is zoned C-2-B (Commercial) and is in the Reed-Cooke Overlay District (RC). The subject property is being renovated for use as a grocery store and offices, pursuant to Order No. 17395 of the Board of Zoning Adjustment.

The Reed-Cooke Overlay District prohibits "off-premises alcoholic beverage sales." (11 DCMR §1401.1(b)) However, a grocery store is a use permitted as a matter-of-right in a C-1 District under §701.4(l) and is therefore permitted as a matter-of-right by carry-over in the C-2 Districts. Accessory uses customarily incidental and subordinate to the uses permitted in a C-2 District are also permitted (see §722.3).

You have advised that the grocery store to be located on the property desires to sell alcoholic beverages as part of the items for sale on the premises. The sale of beer and wine is customarily a part of what is sold at a retail grocery store and is normally subordinate to the food and grocery sales.

The Council of the District of Columbia amended the alcoholic beverage control law (D.C. Official Code, §§ 25-331, 25-332 and 25-333) to provide an exception to the moratorium on Class B licenses for businesses where the primary purpose is the sale of a full range of food items and where the sale of alcoholic beverages is incidental to the primary purpose and furthermore does not exceed

more than fifteen percent of the total volume of gross receipts on an annual basis (D.C. Law 13-298, effective May 3, 2001).

Decisions of previous Zoning Administrators, the Board of Zoning Adjustment and the D.C. Court of Appeals have upheld the principle that a use would be considered incidental, subordinate and accessory if it constituted less than twenty percent of the business volume or square footage of the overall use (see, especially, *Association for Preservation of 1700 Block of N Street, N.W. and Vicinity v. D.C. Board of Zoning Adjustment* (DC App., 384 A.2d 668, 1978).

Accordingly, I concur that the subordinate sale of beer and wine for off-premises consumption is an allowable accessory use for a retail grocery store and that the restrictions in §1401.1(b) applies to principal uses only and not to accessory sales within a grocery store.

Please let me know if you have any further questions regarding this matter.

Best regards,

Bill Crews

Bill Crews
Zoning Administrator for the District of Columbia