

**COMMENTS
OF
URBAN INVESTMENTS ADVISORS, LLC
ON
PROPOSED AMENDMENTS
TO THE
D.C. ZONING REGULATIONS**

Zoning Commission Case No. 02-06 – NC Overlay District

July 18, 2002

Section 1302.5(b)

- The language in the advertised text which states “The linear square footage of each designated roadway . . .” should be amended as per the recommendation of the Office of Planning.

- The language in the advertised text which states “. . . based upon the certified and recorded plats . . .” should be amended to say “. . . based upon the records . . .”. Not all of the plats contained in the records of the Office of the Surveyor are “certified and recorded”. The Zoning Administrator should have at his or her disposal all of the relevant records of the Office of the Surveyor in order to make informed judgments and decisions on these matters.

Section 1302.5(c)

- The total linear frontage for eating or drinking establishments should be based upon more than simply the existing records of Certificates of Occupancy by address, and field observations. We suggest that in addition, the records of the Office of Surveyor, and other records of the Department of Consumer and Regulatory Affairs, be utilized for this purpose. For instance, plats showing the lot and square will provide instant information about the amount of street frontage of a particular lot. There may be other records, including building permit plans and inspection records, which would also help the Zoning Administrator to more accurately determine the amount of ground floor linear street frontage of a particular use than either a Certificate of Occupancy or a field observation.

ZONING COMMISSION
District of Columbia
02-06
CASE NO. 02-06
EXHIBIT NO. 16

Section 1302.5(d)

- The word “or” at the end of the advertised text should be omitted. It appears to be a typographical error.

Section 1302.5(g)(1)

- The language in the advertised text refers to “. . . uses intending to occupy the same space vacated by an eating or drinking establishment, . . .” (emphasis added). The original Overlay Regulations do not regulate “space” for eating and drinking establishments, but rather “linear street frontage”. In order to be consistent, the language should be amended to delete the words “space vacated by” and insert in lieu the phrase “ground floor linear street frontage previously occupied by”.

Section 1302.5(f) and (g)

- Both of these sections include provisions that a vacant ground floor property, formerly used as an eating or drinking establishment, may not be re-used as such after a 3-year vacancy, if the percentage of eating and drinking establishments is over 25%. The 3-year limit was first proposed by DCRA, and appears in the advertised text. As further discussed below, this language should be amended to reflect the generally recognized principles of zoning law that permitted uses may continue, but that conforming uses are not to be treated more harshly than non-conforming uses.

As further explained below, the Office of Planning misses the point when it states that the eating and drinking uses are not non-conforming uses. Clearly, they are not non-conforming uses. However, because they are conforming uses, they should not be treated more strictly than non-conforming uses.

It is clear that eating and drinking uses in the NC Overlay are not nonconforming uses, because they are permitted by special exception when the percentage exceeds 25%. However, the limitations proposed on these conforming eating and drinking establishments in the NC Overlay are more strict than they are for non-conforming uses. The proposed regulation states that if an eating or drinking use which is over the 25% limit is discontinued for a period in excess of 3 years, regardless of the reason (e.g., change in ownership, renovations, seeking new tenant), the owner of the business or property loses the right to continue the eating or drinking use. As further set forth below, the applicable authorities, regulations and rulings indicate that:

- (a) Neither a change in ownership nor the manner of the ownership (individual or corporate) affects the right to continue either the

conforming or non-conforming use of a property permitted by a validly issued Certificate of Occupancy (C of O);

- (b) When the permitted conforming or non-conforming use of a property is discontinued, then absent abandonment of a non-conforming use, that permitted use may be re-established in the property;
- (c) Abandonment of a non-conforming use of a property requires an intent to abandon, plus an overt act or failure to act which demonstrates the intent to abandon; and
- (d) The only way for the District to force the termination of a valid use and the termination of the right to continue a permitted use of a property, would be to revoke the C of O for cause, and to establish a valid reason for the revocation within the confines of the Regulations.

1. Revocation of Certificates of Occupancy.

The issuance and revocation of C of O's are governed by 11 DCMR Section 3203 (the Zoning Regulations) and 12A DCMR Section 118.0 (the Building Code). Subsection 3203.1 of the Zoning Regulations states that structures and land may not be used for any purpose (other than a one-family dwelling) until a C of O has been issued to that person. Subsection 3203.8 of the Zoning Regulations states that "any use which is authorized by a [C of O] may be established and continued pursuant to the terms of the Certificate and the provisions of this Title in effect on the date that the Certificate is issued . . ." (Emphasis added).

There is nothing in Section 3203 of the Zoning Regulations which provides for or otherwise governs the termination of the right of a C of O holder to continue a lawful use specified on a C of O. Subsection 3203.10 states that, in certain instances, C of O's "shall not be renewable if permitted to lapse . . ." The only provision in Section 3203 which governs the lapse of a C of O is Subsection 3203.8(b). In that section, a C of O will lapse if the use is not established within 6 months of the date of issuance of the C of O. There is no parallel provision anywhere in Section 3203 providing for lapse for the discontinuance of a use. Nor are C of O's generally issued with expiration dates.

Section 118.1.2 of the Building Code indicates that when there is a change in ownership, "a new Certificate of Occupancy shall be issued in the name of the new owner (without reinspection), provided there is no proposed change in use

or increase in occupancy load therein". The circumstances under which one applies for a new C of O are listed on the application form:

- Ownership change
- Partial occupancy
- New building
- Use change
- Load change
- BZA number

The only possible applicability to a new eating/drinking use taking over the same space in an existing building as a previous eating/drinking use is an ownership change. It is our understanding that, in issuing a new certificate of occupancy under a name change, the DCRA normally does not inquire as to whether a property is vacant or, if so, for how long. If an applicant identifies the proposed use as the same as the previous use, then the new C of O is routinely and properly issued without question.

Section 118.4 of the Building Code sets forth a procedure for revocation of a C of O, including a list of reasons for revocation, the procedures to be followed for a revocation, and the right of appeal of a revocation. The reasons listed for revocation of a C of O in the Building Code do not include the discontinuance of a permitted use.

2. Conforming vs. Non-Conforming Uses and the 3-Year Rule.

The Office of Planning is correct that eating and drinking uses in the NC Overlay, even in instances where the 25% limit is exceeded, are conforming uses. The definition of "non-conforming use" in the D.C. Zoning Regulations makes eating and drinking uses over the 25% limit in the NC Overlay conforming because they would be permitted by special exception in the NC Overlay zones. See Section 1304. As such, there is no basis in law or precedent for the District to force or otherwise compel the termination of such uses or the treatment of such uses any more strictly than non-conforming uses.

The right to continue such conforming uses should not as a matter of policy be more restrictive than the right to continue a non-conforming use. The proposed regulations would require a more rigid test for conforming eating and drinking uses in the NC Overlay than would be applicable to non-conforming uses in the NC Overlay.

Assuming for the sake of argument that there is a compelling public purpose to treat such conforming uses over the 25% limit as analogous to non-conforming uses, and to limit their ability to resume after a 3-year discontinuance, then it is appropriate to examine the law and rulings on non-conforming uses in this

inquiry. The District's 1938 Zoning Enabling Act specifically permits the continuation of non-conforming uses. See D.C. Official Code Section 6-641.06a (2001). This principle is as old as the concept of zoning itself. In the mid-1920's, the United States Supreme Court affirmed a California decision which upheld a zoning ordinance permitting existing uses to be continued although they were inconsistent with the use restrictions of the district in which they were situated. Young, Anderson's American Law of Zoning, 4th ed., Section 6.05 (1996).

It is widely recognized under general concepts of land use law, and in all the major land use treatises, that "conforming uses" are favored, and that "non-conforming" uses are not favored. Accordingly, conforming uses cannot and should not be treated less favorably than non-conforming uses. See Subsection 2000.3 of the Zoning Regulations. Even though non-conforming uses are disfavored in zoning, both the D.C. Code and the major land use treatises recognize the right of a non-conforming use to continue, e.g., Rathkopf, The Law of Planning and Zoning, §51.01[2][a] (2001); Yokley, Zoning Law and Practice, 4th ed., §22-2 (1979). "The right to maintain a non-conforming use does not depend upon ownership or tenancy of the land on which the use is situated. The right attaches to the land itself; it is not personal to the current owner or tenant. Accordingly, a change in the ownership or tenancy of a non-conforming business or structure does not affect the right to continue the non-conforming use." Young, supra, at Section 6.40. See also Rathkopf, supra, at Section 51.03. Non-conforming uses are protected under D.C. law to the extent that they may be continued even after a change of ownership and a lengthy vacancy. If non-conforming uses are entitled to these protections, it is axiomatic that conforming uses must be afforded at least the same protections.

Subsection 2000.5 of the Zoning Regulations governs the discontinuance of a non-conforming use. That section states that discontinuance of a non-conforming use for any reason "for a period of more than three years, shall be construed as prima facie evidence of no intention to resume active operation as a non-conforming use." There is no provision in the Zoning Regulations for absolute termination of a non-conforming use for abandonment after 3 years in the District of Columbia, without an examination of whether there is an intent to abandon. Nor should there be such a standard for conforming uses. In fact, at least one commentator has opined that the creation of an irrebuttable presumption of abandonment in the context of a non-conforming use is unconstitutional, particularly where such a presumption operates, in this context, to render valueless a substantial property interest. Rathkopf, supra, at §51B.02 [3].

3. D.C. Case Law on the 3-Year Rule for Non-Conforming Uses.

In the seminal case of George Washington University v. D.C. Board of Zoning Adjustment, 429 A.2d 1342, 1345 (D.C. 1981), the D.C. Court of Appeals recognized the widely held principle that "to establish abandonment [of a non-

conforming use], one must demonstrate (1) the intent to abandon and (2) some overt act or failure to act which carries the implication of abandonment' ". See also Wood v. District of Columbia, 39 A.2d 67 (D.C. 1944); Yokley, supra, at §22-13. Both tests must be satisfied. In the GWU case, the petitioner asserted that the abandonment of the non-conforming use was evidenced by the property owner's voluntary change from one non-conforming use to another; the related physical changes in the building; and a delay of thirteen months in filing a BZA application. As to the delay in filing the new application, the Court stated that "In the District, unlike some other jurisdictions, the mere lapse of time without active pursuit of a non-conforming use does not deprive the owner of that right." Id. at 1347.

The two-part test described in the GWU case above is generally recognized in zoning law. "A discontinuance, without more, will not invalidate a non-conforming use. For abandonment, there must be something added to inaction. A temporary cessation of user, without intent to abandon, will not constitute abandonment of a non-conforming use." Yokley, supra, at 22-13. It is also generally recognized that "a discontinuance of the [non-conforming] use for the full period prescribed by the ordinance does not foreclose the right of a non-conforming use if the interruption was accompanied by circumstances which suggest that the user did not intend to abandon his right of a non-conforming use of the premises.... Where a municipality seeks to enjoin the continuance of a non-conforming use on the ground that it has been abandoned, it has the burden of proving that the discontinuance was accompanied by intent to abandon the use." Young, supra, at Section 6.65. "The question of abandonment is said to be one of fact which depends upon an examination of all the various factors present in an individual case, and the burden of proving an abandonment of a non-conforming use is upon those who assert the abandonment." Yokley, supra, at Section 22-13.

4. Rulings of the BZA and DCRA on Abandonment.

In Application No. 12787 of Norvirens, Inc., the Board determined that, even after a 20-year vacancy, a property retained its non-conforming rights, and that the owner of the building could reconstruct the property for the prior use (i.e., the use authorized by the last proper Certificate of Occupancy). A copy of that Order is attached as Exhibit A. That case involved a property in the R-4 zone on Capitol Hill which had been occupied as a delicatessen. The building owner obtained BZA approval to change the use from a deli to professional offices, secured a building permit, and renovated the interior and exterior of the property. No C of O was ever issued for the office use, and the BZA approval lapsed. The building then sat vacant for 20 years. The owner then reapplied for BZA approval for professional office use of the property.

The ANC and the Capitol Hill Restoration Society both opposed the office use on the basis that the 20-year vacancy indicated a termination,

abandonment and lapse of the prior use. The BZA disagreed, finding that "the non-conforming use has not been abandoned, and the applicant would have the option of reconstructing the premises to a delicatessen use, the last use for which a proper Certificate of Occupancy existed, and the last use to which the property has been put." Finding 19A. The BZA further found that in this case it "cannot force termination of a valid nonconforming use." Finding 19C. The BZA concluded that "the subject property is still vested with non-conforming rights under the Zoning Regulations, in that the property had a valid Certificate of Occupancy for a delicatessen, and that no other use has been made of the premises since that time. The Board concludes that the non-conforming use has been terminated but not abandoned"

The records of DCRA reflect a number of similar conclusions. For instance, two R-5-C properties at 1842 and 1627 - 16th Street, N. W. were occupied as daily transient uses dating back to the 1920's, and were owned by the same family. In approximately 1963, the inns were closed due to the illness of two of the owners. Although the buildings were closed, the owners never intended to terminate or abandon the active operation of the buildings for daily transient occupancy. Rather, it was their intention to resume the use once the two owners recovered from their illnesses. This was evidenced by the physical appearance of the structures, including the retention of the furniture, linens and towels, which remained in the building unchanged for 22 years.

In July of 1985, 22 years later, the properties were sold to a new owner, which renovated the buildings and opened them for daily transient occupancy use as inns pursuant to validly issued permits. The properties were zoned R-5-C at the time, and transient use was no longer permitted in that zone.

The above matter is the subject of BZA Appeal Nos. 14865 and 14866. Both appeals were dismissed on procedural grounds, but the ruling of the Zoning Administrator approving the continuation of the transient use after a 22-year termination in that case is a matter of public record in those appeals. Copies of the letter to the Zoning Administrator, a notice of his ruling, and the issued C of O's are attached as Exhibit B.

A similar ruling was made by the Zoning Administrator for the property at 1706 New Hampshire Avenue, N. W. The records of DCRA indicate that, from 1956 to 1964, the property was occupied as the offices of the German Military Mission as a matter-of-right, without the need for Board of Zoning Adjustment approval. In 1958, the property was rezoned to R-5-C, and the office use became a non-conforming use. The property was vacated in 1964. After a 10-year vacancy, BZA Application No. 11654 was filed in 1974 to change the non-conforming use of the property from chancery to offices of a non-profit organization. That Application was denied, and the property remained vacant. In 1980, 16 years

after the property was vacated, a Certificate of Opportunity Application was filed for law office use. The Application contains a notation that the law office use was permitted as a matter-of-right, without the need for BZA approval, because of the prior matter-of-right office use by the German Military Mission. The law office use was approved for zoning purposes, and Certificate of Occupancy No. 122328 was issued on September 21, 1981. Copies of those documents are also attached as Exhibit C.

The issue of continuation of a use after an extended vacancy would not normally arise in a matter-of-right conforming use situation. Therefore, it is appropriate to examine case law and administrative rulings on non-conforming uses for guidance in this matter. The court, the BZA, and the Zoning Administrator have all recognized the fact that when a property is vacant, it is necessary to look to the most recent Certificate of Occupancy for that space to determine what is the permitted use, and to determine whether, after 3 years, there is evidence of an intent to abandon the use, if it is non-conforming, (i.e. to change from one type of use to a different type of use), together with some overt act or failure to act which carries the implication of abandonment.

It has been uniformly held in the District that the mere lapse of time without the active pursuit of a non-conforming use does not deprive the owner of the right to continue that use. Nor can the Zoning Regulations be reasonably interpreted to allow a conforming use to be terminated through the mere lapse of time, absent other evidence of an intent to abandon. However, in the NC Overlay Districts, assuming that there is a compelling public purpose to treat conforming eating and drinking uses which have terminated as something different or less protected than other conforming uses, the Zoning Administrator should continue to rely on the most recent Certificate of Occupancy for a vacant space to determine whether it was an eating or drinking establishment use. If so, an eating or drinking establishment use should be permitted to continue in the property. The rules for conforming uses in the NC Overlay cannot, and should not, be more stringent than the rules for non-conforming uses.

It is well recognized by all, including the current administration of the Department of Consumer and Regulatory Affairs, that the need for these proposed standards has arisen due to historic inattentiveness to the regulation by previous administrations, dating back to the enactment of the NC Overlay regulations in 1989. The issue now is how to effectuate compliance. The goal of the regulation is not to prohibit all eating and drinking uses, but only those which exceed 25%. There are some in the community who take the position that the right to continue an eating or drinking establishment use should cease when the current business owner vacates. This is an arbitrary standard; and, as set forth above, this is also contrary to established law, and would impose an unreasonable burden on business and property owners. These are conforming uses, and the right to continue these

uses is not personal to the current owner or tenant. To the extent the District has issued permits in error, the District should adopt a remedy which recognizes the rights of the business and property owners in the NC Overlay.

It is interesting to note that the strong views expressed on this issue by some community representatives are not shared by the community at large. For instance, attached as Exhibit D are two letters to the editor of The Northwest Current which appeared in the March 6, 2002 issue of that newspaper.

Based upon the above, including the Regulations, the interpretations and the case law, the discontinuance of a conforming eating or drinking establishment use which is over the 25% limit in the NC Overlay Districts, and which was permitted with a Certificate of Occupancy, is not and should not be a bar to the re-establishment of such a use in the future. Absent (1) an intention to abandon, and (2) some overt act or failure to act which indicates an intent to abandon, the regulations should not be adopted in a manner to deprive the business owner or the property owner from continuing an eating or drinking establishment use of the property. Simply terminating a conforming use which is closed for 3 years, absent any of the protections afforded to other conforming uses, or even to non-conforming uses, is contrary to sound zoning principles and long-established precedent.

5. The Office of Planning Misses the Point.

In its July 12, 2002 Memorandum to the Zoning Commission, beginning at page 5, the Office of Planning misses the point. It is clear to all that eating and drinking establishments, even those over the 25% limitation, are conforming uses. There is also no doubt that the Zoning Commission can adopt, and has adopted, regulations which allow less intense uses as a matter-of-right, but as those uses become more intense, approval is by special exception. But that is not what is at stake here. What is at stake here is how to get the current percentage of eating and drinking uses, variously described in the Cleveland Park overlay as between 24% and 27%, down below 25%.

As for the absolute 3-year time limitation, the Office of Planning does not address the fact that non-conforming uses are permitted to continue more than 3 years after the date of abandonment, if certain facts are present. It must be shown that there is (1) no intention to abandon, and (2) an overt act indicating no intention to abandon. Renovation and leasing activity is sufficient to rebut the 3-year presumption of discontinuance for a non-conforming use. The proposed regulations for eating/drinking use in the NC Overlay state that if the 25% limit is exceeded, then even if the owner indicates no intention to abandon, and undertakes active leasing efforts, this is not sufficient to overcome the 3-year deadline.

The Office of Planning distinguishes this by explaining that, in such instances, an eating/drinking use may apply for a special exception. However, in a non-conforming use situation, if there is no intention to abandon and there are overt acts indicating no intention to abandon, there is no need for a special exception.

The Office of Planning is seeking to carve out a special provision in the Zoning Regulations for the few conforming eating and drinking establishments over the 25% limit in the NC Overlay zones, and to treat those uses in a manner different from all other conforming uses in the District of Columbia, and in a manner inconsistent with a long-held body of law, regulations and interpretations which apply in the District of Columbia and across the nation. There is no compelling reason to carve out one type of conforming use, and to treat it differently from every other conforming use in the District of Columbia. There is no reason or justification for treating conforming uses more stringently than non-conforming uses.

WAS1 #1103867 v1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 12787, of Norvirens, Inc., pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Sub-section 7104.2 and 7105.2 to enlarge a non-conforming use from a delicatessen (first floor) to a professional office and to extend the non-conforming use of a professional office to the second floor, in an R-4 District at the premises 232 East Capitol Street, N. E., (Square 759, Lot 800).

HEARING DATE: October 25, 1978

DECISION DATE: November 1, 1978

FINDINGS OF FACT:

1. The subject property is located in an R-4 zone district at the northwest corner of East Capitol and 3rd Street, N. E., known as 232 East Capitol Street, N. E.

2. The subject property has been vacant for approximately 20 years. The last use of the property was as a delicatessen, first floor, pursuant to Certificate of Occupancy No. 91121.

3. The applicant proposes to use the subject premises as professional offices.

4. Research of records indicates that a public hearing for a change from a delicatessen to professional office use for the first floor of the building was held on November 29, 1956. The Board granted that application with the understanding that the premises would be used for an architect's office, with a staff of no more than seven persons, and that the building be remodeled to remove any appearance of a commercial character.

5. Further research indicates that a building permit was issued, and certain interior and exterior work was done on the property to change it from a delicatessen use to an office use. No Certificate of Occupancy was ever issued for an office, and the approval of the Board related to office use thus lapsed. The property has been vacant since the renovation was accomplished in 1958.

6. The building has been altered on the outside in that the entrance from East Capitol Street has been closed to

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accommodate a display window occupying the entire width of the structure. The only entrance to the building is now available at the rear of the building from 3rd Street.

7. The East Capitol Street frontage of the subject square is developed with row houses including a Lutheran Church. There are some offices in the row house structures. Directly across East Capitol Street, the entire frontage of the block is occupied by the Folger Shakespeare Library. There are other non-residential uses on property owned by the Folger diagonally across from the site and other non-residential uses, primarily churches, in the area.

8. The subject lot is approximately fourteen feet wide and 75 feet deep. The building covers almost the total area of the lot, and contains approximately 2000 square feet.

9. The existing use of a delicatessen is first permitted as a matter-of-right in a C-1 District. Professional offices are also permitted as a matter-of-right in the C-1 District.

10. The Zoning Regulations do not require any parking to be provided for the proposed use.

11. The change of use from a delicatessen to offices is to a less intense use, which is likely to generate less traffic, both vehicular and pedestrian, than the previous use.

12. The Board notes that there is an existing office use in the block which has operated without apparent external adverse effects for some time.

13. The Municipal Planning Office by report dated October 20, 1978, recommended denial of the application on the grounds that:

- a. The first floor of the building which was used as a delicatessen until 1956, has been unused for commercial purposes and vacant for approximately twenty years.
- b. The existing layout of the first floor has been changed in a manner that with minor modifications could easily lend itself to residential use which would be a conforming use in the R-4 District.
- c. The building in its present form is not suitable for use as a delicatessen.

The Board addresses these issues in response to the ANC and other persons opposed to the application, below.

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14. The Stanton Park Neighborhood Association, by letter dated October 25, 1978, stated that residential use of the property was preferable to commercial use, but that if office use was the only possible use, the association would not oppose such use if adequate parking spaces were provided.

15. Advisory Neighborhood Commission 6-B by testimony at the hearing confirmed by written report dated November 2, 1978, opposed the application on the grounds that the building has been unoccupied and unused for over twenty years and the non-conforming use as a delicatessen has been abandoned and therefore terminated. The ANC further requested a continuance, if the Board decided the use was not abandoned, because it was not given an opportunity to consider a residential use option for the property.

16. The Capitol Hill Restoration Society, by testimony dated October 23, 1978, opposed the application on the grounds that the property has been vacant and unused for over twenty years, and the non-conforming rights have thus lapsed. The Society also stated its constant opposition to extension of non-conforming uses, and found that the proposed use would be objectionable because it is not a neighborhood facility which would introduce an incompatible use into the residential unit block of 3rd Street and would provide no parking.

17. Both the Advisory Neighborhood Commission and the Capitol Hill Restoration Society cited the case of Silverstone et. al. v. BZA as evidence regarding the abandonment of a non-conforming use. The Board finds that the Silverstone case, wherein the Board denied an application for a variance to permit a flat use which was previously a permitted use, can be distinguished from the present case. In the Silverstone case, the use which was non-conforming had been terminated and had been replaced by a conforming use. In the present case, the non-conforming use had been terminated, but no other use had been substituted. The Board finds that renovations had been made pursuant to a previous order of the Board to use the building for offices but that no Certificate of Occupancy had been issued. The Board thus believes that the non-conforming rights associated with this property, whether for office or delicatessen use, still exist.

18. There was opposition from surrounding and neighboring properties to the use of this property for anything other than residential use. The abutting property owner to the west appeared and testified in support of the application, stating that she did not anticipate any objectionable effects from the proposed use, and that the use would improve the present building.

19. As to the issues and concerns of the ANC, the Restoration Society and other persons in opposition, the Board finds the following:

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- A. The non-conforming use has not been abandoned, and the applicant would have the option of reconstructing the premises to a delicatessen use, the last use for which a proper Certificate of Occupancy existed, and the last use to which the property has been put. The owner of the property has not made any deliberate or physical changes to the building to prevent its use for commercial purposes. In fact, the property is better suited at present for office use than delicatessen use.
- B. It could be argued that offices for lobbyists located within two blocks of the U. S. Capitol would be a neighborhood facility. However, the Board notes that under Paragraph 7109.11, the Board may approve a change of non-conforming use if the proposed use will be "the type of use which although not a neighborhood facility will not be objectionable."
- C. The Board cannot force termination of a valid nonconforming use. The Board is not required, as in a variance case, to find that the property cannot be used for residential purposes, or that residential use is more desirable than the proposed non-conforming use.
- D. Given the findings already made, the ANC had sufficient time to consider the alternative possibilities for use of this property.
- E. The application does represents an extension of a non-conforming use, to the second floor. However, given the small size of the building and the location of the access to the upper floors it is not reasonable to expect that the upper floors could be used for residential purposes.
- F. The property is located at the northwest corner of the intersection of 3rd and East Capitol Streets, N. E. The property faces East Capitol Street, even though the entrance is on 3rd Street. As has been previously set out, there are many non-residential uses in the immediate block, including the entire south side of East Capitol Street, and several lots on the north side as well.
- G. The Board is concerned about the absence of parking. The Board notes however, that no parking is required by the Zoning Regulations. The Board notes the existence of good public transit facilities, in the area, including both bus and subway. The Board notes the proximity to the Capitol and the likelihood

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that much of the traffic to and from the building will be by foot. The Board however is sufficiently concerned about potential impact that it will limit the grant of this application for a specific period of time, in order to evaluate the real impact of the proposed use.

CONCLUSION OF LAW AND OPINION:

The Board concludes that the subject property is still vested with non-conforming rights under the Zoning Regulations, in that the property had a valid Certificate of Occupancy for a delicatessen, and that no other use has been made of the premises since that time. The Board concludes that the non-conforming use has been terminated but not abandoned, and that in fact, the last physical alterations to the building were done to enable its use as an office, the same use herein requested.

The Board concludes that the requested change of use can be granted, in that the proposed use is permitted in the most restrictive district in which the previous use is permitted. The Board concludes that while the proposed use is not directly a neighborhood facility, it will not likely have objectionable effects, similar to other office uses in the area, and will not be out of character with the area. The Board is concerned however, that the lack of parking spaces may prove to be a problem. In order to carefully monitor the potential effects of the changes, and consistent with the authority set forth in Paragraph 7109.13, the Board has therefore determined to grant the application for a limited period of time.

The Board concludes that it has accorded to the Advisory Neighborhood Commission the "great weight" to which it is entitled, and for the reasons stated herein, is compelled to take a different position on the application than that advocated by the ANC.

The Board concludes that an applicant who demonstrates that he has complied with all of the conditions which are required for the granting of a special exception is entitled by law to that special exception. The Board concludes that the granting of this application will be in harmony with the general purpose and intent of the Zoning Regulations and Maps, will allow a less intense use of the property and will not tend to affect adversely the use of neighboring property. It is therefore ordered that the application is granted subject to the following conditions:

1. Approval shall be for a period of FIVE YEARS;
2. Use of the premises as office space shall be limited to an architect, dentist, doctor, engineer,

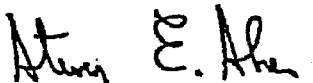
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lawyer or similar professional person.

VOTE: 3-1 (Chloethiel Woodard Smith, Ruby B. McZier and Charles R. Norris to grant, William F. McIntosh to deny; Leonard L. McCants not present, not voting).

BY ORDER OF THE D. C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:


STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 17 JAN 1979

THAT THE ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS ONLY UNLESS APPLICATION FOR A BUILDING AND/OR OCCUPANCY PERMIT IS FILED WITH THE DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT WITHIN A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER.

WILKES, ARTIS, HEDRICK & LANE

CHARTERED

ATTORNEYS AT LAW

1666 K STREET, N. W.

WASHINGTON, D. C. 20006

(202) 457-7800

ADDRESS: WILAN
TELEPHONE: 202-457-7814

'S DIRECT DIAL

51 MONROE STREET
ROCKVILLE, MARYLAND 20850
4020 UNIVERSITY DRIVE
FAIRFAX, VIRGINIA 22030

July 25, 1985

BY HAND

James J. Fahey
Zoning Administrator
Room 333
614 H Street, N.W.
Washington, D.C. 20001

Re: Hotel Embassy and Hotel Windsor

Dear Mr. Fahey:

In response to your request made at our July 16, 1985 meeting concerning 1627 16th Street, N.W. and 1842 16th Street, N.W., we have prepared the following analysis and respectfully request that you approve the use of the two structures as "inns." Prior to the adoption of the definition of "inn," the buildings were used exclusively for transient guests who rented rooms or suites on a daily basis.

I. Site Descriptions.

A. 1627 16th Street, N.W. - Hotel Embassy.

The Hotel Embassy is located at 1627 16th Street, N.W. (Lot 148, Square 193) in an R-5-C District. The site is improved with a 4 story stucco building constructed in 1911. The site is located in the Sixteenth Street Historic District. The most recent Certificate of Occupancy (A-11961) permitted the site to be used as a "lodging house." The building has approximately 24 units. There are approximately 6 bathrooms and 2 kitchens per floor. There is no central dining facility.

B. 1842 16th Street, N.W. - Hotel Windsor.

The Hotel Windsor is located at 1842 16th Street, N.W. (Lot 126, Square 177) in an R-5-C District. The site is improved with a 4 story brick structure constructed in 1914. The site is located in the Sixteenth Street Historic District. The most recent Certificate of Occupancy (A-10751), dated

EXHIBIT B

WILKES, ARTIS, HEDRICK & LANE

CHARTERED

James J. Fahey

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July 25, 1985

July 16, 1951, permitted the site to be used as a "lodging house." The building has approximately 30 units. There are approximately 4 bathrooms and 2 kitchens per floor. The first floor has a central dining facility but it was closed during World War II due to food rationing.

II. Background.

Both the Hotel Embassy and the Hotel Windsor were owned, operated and controlled by the Dadian family from approximately 1940 to July, 1985. Both structures originally had Certificates of Occupancy as hotels. Permit No. 74678 was issued for the Hotel Embassy on May 27, 1942 and Permit No. 74078 was issued for the Hotel Windsor on March 25, 1942. The Certificates were changed in 1951 to permit the buildings to be used as "lodging houses" due to a change in definition of "hotel" in the Zoning Regulations. Central dining facilities were required for hotels. The Dadians were assured, however, that the actual use for daily transient guests could continue with a "lodging house" occupancy permit.

The Dadians operated both structures under their exclusive control. Linens and towels were provided. Guests were either referred from other hotels in the city or they made prior reservations. Typically, the two operations accommodated military servicemen and school groups visiting the City. Rooms and suites were rented strictly on a daily basis. There was no weekly or monthly occupancy rate.

In approximately 1963, the Dadians could no longer operate the two buildings and they were closed. Two of the owners who managed the hotels were hospitalized with serious illnesses and both eventually died of these illnesses. The third owner practiced law and could not devote his time to the structures. Although the buildings were closed, the Dadians never intended to terminate or abandon the active operation of the two buildings for daily transient occupancy. Rather, it was their intention to resume the use once the two sisters recovered from their illnesses. This is evidenced by the physical appearance of the structures including the retention of the furniture, linens and towels. It was not until July, 1985 that Arthur Dadian finally sold the two buildings to the Roundel Corporation.

WILKES, ARTIS, HEDRICK & LANE
CHARTERED

James J. Fahey
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III. Proposed Use.

The new owner of the Hotel Embassy and the Hotel Windsor intends to continue the daily transient occupancy use in accordance with the requirements for an "inn." Specifically, the use will be limited to "... habitable rooms or suites reserved exclusively for transient guests who rent such rooms or suites on a daily basis." Section 1202 of the Zoning Regulations. There will not be a central dining area in either facility although continental breakfasts for the guests may be served. Also, there will not be any commercial adjuncts, function rooms or exhibit space.

IV. Discussion.

The issue presented is whether a "lodging house" that provided daily, transient occupancy qualifies under the current definition of "inn" since the term "lodging house" was removed from the Zoning Regulations in 1958. At the outset, it should be noted that zoning regulations are in derogation of a property owner's common law right to use his property for any purpose, and consequently, those regulations must be strictly applied in favor of the interests of the property owner. 1 Rathkopf, Law of Zoning and Planning, 9-1 (4th ed. 1984).

As stated previously, the existing Certificates of Occupancy for the two buildings permit them to be used as "lodging houses." At the time these permits were issued in 1951, a "lodging house" was defined in conjunction with rooming house as "A dwelling providing for compensation lodging for 3 or more roomers." A hotel, at that time, was defined as "Every place where food and lodging are provided for 10 or more transient guests, provided, however, that this definition shall not be interpreted to include private clubs." D.C. Zoning Regulations, 1951 edition. The Zoning Regulations were amended in 1958 and the term "lodging house" was deleted. No explanation for this was given in the legislative history of the 1958 amendments.

The current Zoning Regulations also do not include the term "lodging house." The term that best describes the prior use of the two structures is "inn." An "inn" is defined in Section 1202 as follows:

A building or part thereof wherein habitable rooms or suites are reserved exclusively for transient guests who rent such rooms or suites

WILKES, ARTIS, HEDRICK & LANE
CHARTERED

James J. Fahey
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on a daily basis. Guest rooms or suites may include kitchens, but central dining other than continental breakfast for guests is not allowed. Commercial adjuncts, function rooms, and exhibit space as permitted in hotels are not allowed. The term inn shall not be interpreted to include motel, hotel, private club or apartment house. {Emphasis deleted).

Both the Hotel Embassy and the Hotel Windsor were operated so that habitable rooms or suites were rented to transient guests on a daily basis. There were no central dining facilities in either building at the time of their closing.

The Zoning Commission recognized that certain uses could be classified as an "inn" when it created the term in 1980 in Case No. 79-1 (Treatment of Hotels). In the Statement of Reasons regarding the treatment of inns, the Commission stated:

... that there are a number of existing facilities in the city which are residential type hotels. Such facilities are generally not obtrusive in their neighborhoods because they have no function rooms, exhibit space or commercial adjuncts. Such facilities also do not meet the literal definition of a hotel because they have no central dining facility. The Commission therefore determined to permit such uses and to allow them in the same zones and in the same manner that hotels are permitted. Such facilities could presently exist in any of those zones as either a rooming house, apartment house or similar residential use.

Both the prior use as a "lodging house" and the proposed use for daily transient occupancy meet the requirements for an "inn."

V. Conclusion.

Based upon the above, the current owner of the Hotel Embassy and the Hotel Windsor respectfully request a ruling from you to permit the two structures to be used as "inns."

WILKES, ARTIS, HEDRICK & LANE
CHARTERED

James J. Fahey
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The owner intends to renovate the buildings but will keep their operation the same as the prior use. Would you please acknowledge your approval of the proposed use in the space provided below.

Respectfully submitted,

WILKES, ARTIS, HEDRICK & LANE,
CHARTERED

By Wayne S. Quin
Wayne S. Quin

David S. Houston
David S. Houston

Based upon the proposed use outlined above, the two structures may be used as "inns" in accordance with all applicable Zoning Regulations.

James J. Fahey
Zoning Administrator

tls

RECEIVED SEP 35

WILKES, ARTIS, HEDRICK & LANE

E ADDRESS WILAN
COPIER ROM-457-7814

CHARTERED

ATTORNEYS AT LAW

1888 K STREET, N. W.

WASHINGTON, D. C. 20006

(202) 457-7800

51 MONROE STREET
ROCKVILLE, MARYLAND 20850
4020 UNIVERSITY DRIVE
FAIRFAX, VIRGINIA 22030

ER'S DIRECT DIAL
1-7825

September 5, 1985

David H. Hampson
Roundel Corporation
P.O. Box 9071
McLean, VA 22102

Re: Hotel Embassy And Hotel Windsor

Dear Mr. Hampson:

In response to our July 25, 1985 request for a ruling, the Zoning Administrator has determined that he will permit 1627 16th Street, N.W. and 1842 16th Street, N.W. to be operated as inns. Accordingly, the use stated on your building permit applications recently filed for the properties will be processed and approved as inns. The buildings will still have to meet all other zoning requirements. Please do not hesitate to contact me if you have any questions concerning this matter.

Sincerely,



David S. Houston

tls

CERTIFICATE OF OCCUPANCY

No. B146005

Washington, D.C., July 3, 1985

Permission is hereby granted to Winden Associates
to use the basement, 1st-3rd floor(s) of the building located on Lot 126 Square 177
known as premises 1842 16th St. N.W. for the following
purpose(s): Trm - 38 Rooms

(not sexually oriented.)
THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES
AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated,
ONLY for the premises, or part thereof, and for the purpose(s), indicated
above, and IS NOT TRANSFERABLE to another person or premises under ANY
conditions. ANY CHANGE in the type of business, ownership of business, or
part of premises used therefor, will render this Certificate VOID and a NEW
Certificate must be obtained.

ZONE

R-5-C

FEE \$ 64.60

DEPARTMENT OF LICENSES, INVESTIGATIONS AND INSPECTIONS GOV'T. OF DIST. OF COL.

OFFICE COPY

By [Signature] Chief, Permit Branch
Permit Clerk

★ ★ ★
BLMA-17
(Rev 6/86)

District of Columbia Government
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration Zoning Division
P.O. BOX 37200 — Washington, D.C. 20013-7200

No. B 15027

CERTIFICATE OF OCCUPANCY

June 26, 1987
(date)

Permission is hereby granted to JERRY S. GOREN
to use suite(s) N/A on the 1st, 2nd, 3rd & 4th floor(s)
of the building located on lot(s) 148 square 193
known as premises 1627 16th Street, Northwest for the following
purpose(s) Inn-- 40 rooms
Not sexually oriented.

BZA #: _____

EXPIRATION DATE: _____

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES
AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY
for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT
TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE
in the type of business, ownership of business, or part of premises used therefor, will
render this Certificate VOID and a NEW Certificate must be obtained.

ZONE
R-5-C

FEE \$ 59.00

Donald G. Murray, Acting Director

By [Signature]
Designee

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF LICENSES, INVESTIGATIONS, AND INSPECTIONS
OFFICE OF LICENSES AND PERMITS
PROPERTY PERMIT BRANCH

COPY FOR YOUR INFORMATION

W. M. APPLICATION FOR CERTIFICATE OF OCCUPANCY—COMMERCIAL

(WRITE WITH TYPEWRITER OR INK)

Do NOT use this form if Certificate is to be issued for Hotel, Flat or Apartment, Rooming, Boarding or Tenement House, Day Nursery, Private Club, Convalescent Home, or Other Residential Use.

THIS OCCUPANCY ENCOMPASSES

8200 SQUARE FEET

DATE 9-15-80

FEE \$37.80

To THE DIRECTOR OF INSPECTION:

I, WILLIAMS, request the issuance of a Certificate of Occupancy for the use of the premises described below, and agree to comply with all applicable laws and regulations of the District of Columbia, and any terms and conditions appearing on BOTH sides of this application and CERTIFICATE of Occupancy issued on the basis of this application.

Full Name of Owner(s) of Business: HENRY R. SCOTT, FALRY, ESQUIRE

Trade Name of Business: R. SCOTT FALRY, ESQUIRE

(See instructions on reverse side) (This trade name must be identical with that shown in application for business license)

Description of Premises for which Certificate is Requested: 1706 NEW HAMPSHIRE AVE. N.W. Lot 153

Address: 1706 NEW HAMPSHIRE AVE. N.W. Lot 153

(of building to be occupied)

Name and address of owner of building: R. SCOTT FALRY 2770 UNICOM LANE, N.W.

To the best of your knowledge is the building now being condemned? NO

Material of building: MASONRY No. of Stories High: 4 Basement: YES

Proposed use: LAW OFFICES

Which Floor(s) will be occupied for above use: ALL FLOORS AND BASEMENT

Previous use: ADMINISTRATIVE OFFICES FOR THE GERMAN MILITARY ATTACHE

If previous use was residential, how many living unit are being abandoned? N/A

READ INSTRUCTIONS AND INFORMATION ON REVERSE SIDE OF THIS APPLICATION

PENALTIES ARE PROVIDED FOR MISREPRESENTATION.

To Be Filled in by Clerk

Use District 5-P1
Height District 10-1-80
Area District 10-1-80
Transcript of No. _____
E. D. No. _____
B. Z. A. No. _____
Bldg. Permit No. _____
Previous use see record
No. _____
Name of Clerk _____

IF OWNER OF BUSINESS SIGNS:

Signature of Owner R. Scott Falry
(in ink) 2770 UNICOM LANE, N.W.
Home Address WASH., D.C. 2005 Tel. No. 966-8988

IF AUTHORIZED AGENT FOR OWNER OF BUSINESS SIGNS:

Name of Agent _____
Address of Agent _____
Name of Owner(s) of Business _____
(as shown above)
Signature of Agent _____
(in ink)

APPROVED:

RESERVED FOR APPROVALS

F.S.

Date EXHIBIT C APPROVED FOR INSTANCE ON D

NOTICE TO PROSPECTIVE PURCHASER: Your application will not be approved and Certificate issued until all inspection agencies have been made and inspection agencies have certified compliance

1706 NEW HAMPSHIRE AVE. N.W. Lot 153

Form 100-20

CERTIFICATE OF CURE/FINE

No. 8-122428

Washington, D.C.

1. Name of the person or persons

2. Date of the hearing

3. Court

4. Name of the building located on lot

5. Town or precinct

6. The following

7. Record

RECEIVED 8-24-96

THIS CERTIFICATE IS TO BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES AND IS TO REMAIN IN FULL FORCE AND EFFECT UNTIL THE COURT HAS ORDERED OTHERWISE. IT IS THE DUTY OF THE OWNER OF THE PREMISES TO MAINTAIN THIS CERTIFICATE IN FULL FORCE AND EFFECT AT ALL TIMES. IF THE CERTIFICATE IS NOT MAINTAINED IN FULL FORCE AND EFFECT, THE COURT MAY ORDER THE PREMISES TO BE SEIZED AND SOLD TO SATISFY THE DEBT. THE COURT MAY ALSO ORDER THE OWNER OF THE PREMISES TO PAY THE COSTS OF THIS CERTIFICATE. IF THE CERTIFICATE IS NOT MAINTAINED IN FULL FORCE AND EFFECT, THE COURT MAY ORDER THE OWNER OF THE PREMISES TO PAY THE COSTS OF THIS CERTIFICATE. IF THE CERTIFICATE IS NOT MAINTAINED IN FULL FORCE AND EFFECT, THE COURT MAY ORDER THE OWNER OF THE PREMISES TO PAY THE COSTS OF THIS CERTIFICATE.

ZONE

FEE

1.00

8. Attorney's name and address

OFFICE

March 6, 2002

City shouldn't chase away Starwood Urban

The position taken by your Feb. 27 editorial, "Too many restaurants," on the regulation of restaurants in neighborhood commercial overlay districts — particularly with respect to Starwood Urban — would result in bad public policy and, if implemented, might likely subject the city to an unnecessary lawsuit with a good chance of prevailing. The Department of Consumer and Regulatory Affairs proposals regarding vacant space previously used as an eating establishment balance the neighborhood's interest in not being overrun by restaurants and the developers' right to rely on current law when making investment decisions. In the case of Cleveland Park, these interests are not even in conflict.

If the linear frontage allowed for restaurants has been exceeded in Cleveland Park, the District government is to be blamed.

The overlay regulations have been in place since 1989, when the restaurants were under the 25 percent limit. Because of the absence of enforcement and measurement by the city, at least prior to spring 2000, developers weren't on legal notice that property they intended to purchase where restaurants existed could not continue to be used for that purpose. Starwood purchased its property prior to this first measurement. To disallow restaurants would clearly devalue the property and could very well constitute a taking under the law.

In spring 2000, DCRA began measuring the overlays in response to Advisory Neighborhood Commission 3C resolutions and a roundtable that I convened as commission chair, with representatives from citizen and business groups, attorneys for businesses that owned property in the overlay districts, the chair of the Zoning Commission that considered and issued the regulations in 1989 and the attorney from the Office of Planning that proposed them. The question of how to measure was controversial. Those involved with the formulation of the 25 percent limit indicated that it was a somewhat arbitrary figure intended to prevent a neighborhood from becoming "saturated" with eating establishments.

How to correct the years of inattention was also problematic. Why should Starwood, which purchased the property before any measurements, be the one that is prevented from using space for restaurants, as opposed, for instance, to the gas station which added an eating establishment where there had not been one before, but did it more quickly than Starwood?

The Current states that if Starwood wants to locate restaurants on the block, it must invite back the former tenants. I am unaware of any law that compels a developer who invests millions in renovating and improving commercial property to keep specific tenants. Some of the best tenants have remained at the property. The neighborhood rallied behind Bella Roma in not opposing its move from the Starwood property to a few doors down, and apparently Bella Roma didn't succeed at the new location. Must Starwood invite Bella Roma back?

Let's not chase Starwood away.

Ruthanne Miller
Cleveland Park

Overlay enforcement isn't good solution

I would like to respond to your Feb. 27 editorial, "Too many restaurants." The position you advocate, strong enforcement of the commercial overlay district prohibiting additional restaurants in the Cleveland Park and Woodley Park commercial strips, is just plain wrong, and reflects the increasing number of NIMBY-promoting stories in your newspaper.

Such fear-mongering only stems to frighten longtime residents with visions of Cleveland Park turning into another Adams Morgan or Georgetown. I've lived here for five years and would actually like to see more restaurants and food-related businesses open in the area.

You note that the neighborhood is already well-served by several restaurants, but there are several gaps. We could really use a good, inexpensive diner here, an ice cream shop, an Italian restaurant to replace the ones that closed or moved, and perhaps a Xando/Cosmo-type cafe. Please note that these dining establishments are not primarily bars, or dance clubs like those that attract hordes of college patrons to Adams Morgan or Georgetown. The nature of the establishments in Cleveland Park and Woodley Park tends more toward fine, upscale dining.

One of the issues described in your editorial is the allegedly high parking demands made on the neighborhood by restaurant patrons. The solution is to promote use of the Metro by patrons and more strictly regulate valet parkers servicing these restaurants.

Issues such as the National Cathedral School's athletic center, the opposition to the Giant renovation, and now the overlay issue will only serve to hurt the business-friendly environment the city is trying to foster, and result in further sprawl in the suburbs rather than smart growth here in D.C.

Anthony Nigrelli
Woodley Park