BEFORE THE ZONING COMMISSION
FOR THE DISTRICT OF COLUMBIA

Text Amendment –
Eating Establishment Definitions

Case No. 06-23

COMMENTS OF THE WOODLEY PARK COMMUNITY ASSOCIATION

The rule changes proposed in this proceeding attempt to do two things First, they attempt to create new definitions that are more precise and more accurately describe different types of eating establishments. Second, they attempt to give the Zoning Administrator easy-to-apply, bright-line tests for identifying one type of establishment that has been the subject of significant controversy The Woodley Park Community Association (WPCA) supports both these goals. Unfortunately, as drafted, these proposed changes raise more questions than they answer and would not bring the clarity and certainty the Commission is looking for

The proposal introduces the term "fast food establishment"to replace the existing "fast food restaurant." It also creates a new category, "prepared food shop," which apparently is intended to include some establishments that might fall within the current fast food restaurant definition, but which do not raise the issues that fast food restaurant s raise and which, therefore, do not have to be as tightly controlled. WPCA agrees with this overall thrust. However, there is still a good deal of work to be done in crafting regulation language that distinguishes between these two types of establishments.

WPCA has a particular interest in these definitions. The Woodley Park neighborhood includes the Woodley Park Neighborhood Commercial Overlay District, which was established by section 1307 of the Zoning Regulations. The rules prohibit fast food restaurants in this overlay district (11 DCMR § 1307 5), and the proposed changes

would continue to prohibit fast food establishments Any differences between the definitions of these two terms would directly affect Woodley Park. In addition, the limitations on restaurants in neighborhood commercial overlay districts (11 DCMR § 1302 5(a)) apply to the Woodley Park overlay, and the any changes that the new definitions would have on these limitations also affect Woodley Park

What's "Cooking"?

The proposed changes make "cooking" an important zoning concept. If no food is cooked, then a business is not a fast food establishment. If any food is cooked, then it can't be a prepared food shop

So, what does "cooking" mean? Because it's not defined in the zoning regs, we look to the dictionary, which defines cook as "to prepare food for the table by a heating process." *Webster's Third International Dictionary Unabridged* (1986). What does this mean for the proposed regulations?

- Microwaving is not "cooking" because heat is not being applied to the food. So, if Burger King decides to nuke its Whoppers and fries, it's not a fast food establishment.
- Is toasting "cooking"? Probably; so toasting a bagel or pieces of whole wheat bread for a turkey sandwich won't be allowed at a prepared food shop.
- If one can somehow get comfortable with toasting bagels or bread not being "cooking," what about when meat and cheese are put on top of the bread as it runs through the toasting oven?
- How about re-heating food that has already been completely cooked? "Preparing food for the table by a heating process" would seem to include re-

heating cooked food. So a prepared food shop may serve a cold pastrami sandwich, but not a hot one.

- The proposed definition says that "prepared food" includes sushi But the rice in the sushi is cooked. Is the Commission proposing to require that sushi rice be cooked elsewhere and brought to the prepared food shop?

Just these few examples demonstrate that making cooking the crux of these two definitions would produce, at the very least, undesirable results A quick Internet review of comparable zoning regulation definitions in other localities did not find any that made "cooking" determinative. WPCA does not know whether these definitions have been the source of type of controversy that the current fast food restaurant definition has engendered, but perhaps one of them might suggest a better approach.

Finally, one of the goals of the proposed regulations is to allow the type of business to be 'readily determined as part of the Zoning Administrator's review of building permit plans." Other parts of the fast food establishment definition contain bright-line tests for the Zoning Administrator to use There is no test in the proposed rules, however, for the distinction that is at the heart of these proposals — whether there will be any food cooking taking place

Fast Food Establishment v. Fast Food Restaurant

WPCA has a special interest in the definitions of fast food restaurant and fast food establishment because those businesses are prohibited in the Woodley Park Overlay District. 11 DCMR § 1307.5 ("No hotel, inn, or fast food restaurant shall be permitted in the WP Overlay District"). The Notice does not indicate that the Commission intends the proposed definition to be substantively different from the existing one However, the

proposed definition is, in different respects, both broader and narrower than the current definition.

The new definition of fast food establishment is less inclusive than fast food restaurant in one significant way. As discussed above, to be a fast food establishment food has to be "cooked" on the premises; a business today can be a fast food restaurant if it "prepares" food, without cooking it.

On the other hand, the fast food establishment definition is broader and more inclusive than fast food restaurant in a couple of ways:

First, to be a fast food restaurant the premises must be "*devoted to* the preparation and sale" of food — so that must be the only or, at least, the primary activity. A fast food establishment need only be a place where food is cooked, so it might include any business that cooks food, even if it's a secondary activity to the main business (as long as the other requirements are met). In fact, the proposed rule specifically says that an "establishment meeting this definition shall not be deemed to constitute any other use permitted under the authority of these regulations." So a movie theatre selling popcorn becomes a fast food establishment under these rules.[1]

Second, to be a fast food restaurant, 60% of the food items sold must be already prepared or packaged before the customer places an order. If 40% are not pre-prepared of pre-packaged, then it's not a fast food restaurant. However, to be

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[1] The Commission s has partially addressed the over-inclusiveness of this definition by saying, "a restaurant or grocery store providing carryout service that is clearly subordinate to its principal use shall not be deemed a fast-food establishment." Other exceptions would have to be added to make this proposal workable.

a fast food establishment, the establishment must merely have the customer pay before eating.

Third, a fast food restaurant "primarily serves its food and beverages in disposable containers." So a business can avoid being classified a fast food restaurant by primarily using non-disposable containers, say 51% non-disposable and 49% disposable An owner is caught in the new definition of fast food establishment if it uses any disposable items at all

These are not just abstract differences — they would have real-world results There is a popular Chipotle burrito restaurant in Woodley Park. It is not a fast food restaurant because it has no drive-through and does not satisfy either the (a)[2] or (b)[3] requirement in that definition It would appear, however, to be a fast food establishment under the proposed definition because food is cooked there, and customers pay for the food before it is consumed

We assume that Chipotle is not alone — that there are many different eating establishments that are not fast food restaurants today but would be fast food establishments tomorrow if the proposed rules are adopted. Nothing in the Commission's notice, however, suggests that the Commission intends to make such a substantial substantive change or that it has considered the effects of doing so

Bright Line or the Right Line?

We agree that whenever possible the Zoning Regulations should be clear and easy to apply. This is important both for the public and for the Zoning Administrator who

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[2] "At least sixty percent (60%) of the food items are already prepared or packaged before the customer places an order"

[3] "The establishment primarily serves its food and beverages in disposable containers and provides disposable tableware"

must apply them. Including clear, bright-line tests for the Zoning Administrator to apply is certainly desirable.

Such tests, however must be the correct ones and be ones that are not readily gamed. These proposals fail these tests

First, as noted above, there is no definition, let alone an easy-to-apply test, of when a business will engage in cooking, which is key to the definitions of both fast food establishment and prepared food shop.

Second, one of the elements of the proposed definition of fast food establishment is that "customers pay for the food before it is consumed." The test for that is "if the building permit plans depict a service counter without seating." Presumably, if the building permit plans depict a service counter *with* seating, then it is not a fast food establishment [4] So all that an owner must to do avoid having its business categorized as a fast food establishment is to show a couple of seats at its serving counter

Third, another element of that definition is that "food is served on/in anything other than non-disposable plates." This element is satisfied "if the building permit plans do not depict a dishwasher or do depict trash receptacles in public areas." But won't a business that is plainly fast food have a dishwasher for its cooking materiel? And even if it doesn't need one, an owner could have one installed just to avoid having its business declared a fast food establishment. So the dishwasher test seems to be both misguided and easily manipulated. The same can be said of the trash receptacle test. Even an eating establishment that is not a fast food establishment might have a trash receptacle in its

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[4] If this is not the case — that the presence of counter seating does not mean that the business is not a fast food establishment then the proposed tests are of minimal utility

public areas And if not having one is important, it just might be omitted from the building permit plans

Finally, the proposed bright-line tests rely on building permit plans and owner certification. There is nothing it the proposal about the remedies for false or incomplete plans or certifications Recent history has shown that it is not always easy and almost never quick to close down a business that is operating where it is not supposed to be — Exhibit 1, Kuri Bros. If a business owner wants to take advantage of a permitting process that makes the owner's statements conclusive as to the zoning classification of its business, then there must be a swift and sure remedy if those statements turn out to be inaccurate

Prepared Food Shops in Overlay Districts

WPCA has no particular issues with the proposed definition of prepared food shop, other than the overriding question about cooking noted above However, it is unclear what the Commission intends to do with this new definition in overlay districts.

The existing rules limit restaurants in overlay districts: "Restaurants, fast food restaurants, delicatessens, carry-outs, and similar eating or drinking establishments shall be subject to [certain] limitations." 11 DCMR § 1302 5 The Notice does not propose any change to this rule (even the technical correction of changing "fast food restaurant" to "fast food establishment"). In particular, it does not propose to add prepared food shops to the list of business that are limited in overlays.[5] WPCA believes that the words "delicatessens, carry-outs, and similar eating or drinking establishments" could easily be

[5] The Commission does propose such changes elsewhere It would substitute "prepared food shop" for "delicatessens, carry-outs, and similar eating or drinking establishments" in section 1309 4 and for "delicatessens" in the definition of food delivery service and in section 1703 3(b)

read to include prepared food shops, but that could be a subject of debate and litigation. Whatever the Commission intends, it should be clear in any new rules it adopts.

Prepared food shops are a convenience for people in a residential neighborhood. There are several successful and popular businesses of this type in Woodley Park today. A small prepared food shop does not create the same issues for the community as the typical restaurant. For that reason, if the Commission does intend prepared food shops to be included in section 1302.5 and limited in overlay districts, WPCA urges that these limitations not be applied to smaller establishments, those with twelve or fewer seats for patrons. Therefore, section 1302 5 should be amended to read "Restaurants, fast food establishments, prepared food shops with seating for more than twelve patrons, and similar eating or drinking establishments shall be subject to...."

Conclusion

The Commission's proposals are well intentioned, but not well executed If adopted, they would produce undesirable results, both substantively for communities and businesses and procedurally for the Zoning Administrator They should not be adopted in their present form.

Respectfully submitted,

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Message

As discussed. Thanks

John

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