

Reed-Cooke Neighborhood Association
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D.C. OFFICE OF ZONING

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To: Zoning Commission of the District of Columbia
From: Maureen Gallagher, President of RCNA
Date: February 19, 2008
Re: Response to Office of Planning Memorandum, Final Report - Request for a Text Amendment to the Zoning Regulations, Chapter 14 (Reed-Cooke Overlay) Section 1401 (Use Provisions) and an Expedited Public Hearing (07-33)

The Reed-Cooke Neighborhood Association (RCNA) hereby requests leave to supplement the record in this proceeding to address the *Memorandum* filed by the Office of Planning dated February 11, 2008. Since the *Memorandum* includes information that was not included in the Petition For Rule Making or the earlier Setdown Report, RCNA respectfully seeks this opportunity. Grant of leave by the Commission to submit this document into the record is appropriate since the RCNA and other affected members of the public were not provided adequate notice of the now-revised, proposed text amendment and the alleged factual support given for adoption.

The Memorandum Is Deficient in Support of the Text Amendment

The *Memorandum* adds no facts to the record upon which the Zoning Commission may rely in its effort to engage in reasoned decision making. The facts that are reiterated do not support adoption of the amendment and, instead, cut against adoption of the text amendment, for reasons previously stated by the RCNA in this proceeding, but which are further illuminated in the *Memorandum*. However, what is most apparent is the following:

- The Office of Planning admits that its efforts are to accommodate a single entity, Harris-Teeter. Accordingly, the intent in proposing the text amendment is not consistent with rule making of general application, but is instead intended to allow Harris-Teeter alone to circumvent existing law.¹
- The Office of Planning has not stated why the existing procedure is deficient. No where within the *Memorandum* does the Office of Planning explain why Harris-

¹ The Office of Planning cites no other entity or class of persons who would benefit from adoption of the text amendment, or why any such class should be made exempt from the existing BZA procedures.

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Teeter cannot and should not avail itself of the procedures for seeking a variance before the BZA.²

- The Office of Planning has not explained the public interest to be served by the text amendment. Although the Office of Planning refers to the encouragement of grocery store operations within the District, the Office of Planning fails to note that the matter before the Commission is not the sale of groceries, but off-premises alcoholic beverage sales.³ No where in the record provided by the Office of Planning is shown any encouragement of this activity, either throughout the District or within the relevant area of Reed-Cooke.
- The Office of Planning has not addressed the denial of due process to affected citizens to participate in the variance process before the BZA.⁴ Since adoption of the text amendment would have this result, it was incumbent upon the Office of Planning to address the issue. It did not, therefore, its analysis is fatally flawed.

² The Commission may refer to National Cathedral Ass'n v. D.C. Board of Zoning Adjustment, 753 A.2d 984 (2000), wherein the National Cathedral was held to the duty of filing an application for variance for an accessory use. “[T]he degree of impact upon the surrounding residential neighborhood is the most reasonable test of the appropriateness of an accessory use.” *Id.* at 984, (citing Citizens Coalition, 619 A.2d at 952) (emphasis added). Accordingly, it is appropriate for the Commission to wonder, as RCNA does, why Harris-Teeter is deemed to have greater rights than the National Cathedral? The *Memorandum* does not provide an answer.

³ The *Memorandum*'s reference to Policy ED-2.2.6 and the emphasized line therein refers to accommodations regarding “depth and lot area,” i.e. area variances. No where does that policy articulate any accommodation that would include a use variance, a quite different and potentially more harmful accommodation, for which an applicant is held to a higher standard of proof. *See, Palmer v. Board of Zoning Adjustment*, D.C. App., 287 A.2d 535, 541 (1972). Accordingly, the Office of Planning's equation of one type of variance with the other is not supported by law.

⁴ Those rights that the Office of Planning's efforts would eliminate are constitutionally protected property rights and the rights of citizens to reasonably rely on statutory language in the creation of such rights and their protection provided by law. The courts have steadfastly denied statutory interpretations that cause “constitutional doubt” on a given interpretation. “The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.” DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988) (quoting Hooper v. California, 155 U.S. 648, 657 (1895)). *Accord, Burns v. United States*, 501 U.S. 129, 138 (1991); Gollust v. Mendell, 501 U.S. 115, 126 (1991).

- The Office of Planning has not shown how the Zoning Administrator's earlier opinion is based in law. The Zoning Administrator cannot and did not cite any language within the zoning regulations for its position and the Office of Planning does not provide any such language within its *Memorandum*, see, discussion *infra*. Thus, the Commission may appropriately deem that no such language exists and that the opinions expressed by the Zoning Administrator and, now, the Office of Planning are of whole cloth.
- The revised language continues to open the door to off-premises alcoholic beverage sales as an accessory use to all other permitted uses. The Office of Planning has suggested no limitations that would not fully undermine the intent of the Reed-Cooke Overlay, to the detriment of affected citizens.⁵

The foregoing considered, the Office of Planning's *Memorandum* is wholly deficient as support for adoption of the text amendment. Most startling is that the Office of Planning has not considered any balancing test between the effect of allowing all operators of a permitted use to engage in the non-permitted activity as an accessory use. Not one line is employed in the *Memorandum* to address the rights and concerns of the residents of Reed-Cooke. For that reason alone, the Commission must find that there exists no adequate factual record upon which adoption might be based.

The Attempt To Concoct A Supportive Legislative History Fails

The Office of Planning's efforts to concoct a legislative history in support of its position fully fails in view of the plain language of the existing law. The existing law does not cite to principle uses or accessory uses under Section 1401.1 That distinction is a fantasy created by the Office of Planning and Harris-Teeter's combined efforts to circumvent existing law by a bogus attempt to interpret the law in a manner that is unsupported by any citation to the zoning regulations. That effort is plainly wrong and provides no basis for adoption of the text amendment. "The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history' — which presumably means the *post* enactment history of a statute's consideration and enactment — is a contradiction in terms."⁶ There is no doubt that the Office of Planning's proposal relies on post enactment legislative history, a practice rejected by the courts.

⁵ The proposed text amendment language is an obvious and reckless attempt by the Office of Planning to make the language appear to be general in application and, therefore, acceptable as a petition for rule making. However, by trying to paint with a broad brush, when the Office of Planning only cares about a single, unique application (Harris-Teeter), the result is a total and improper reversal of the existing language to the detriment of affected citizens. These results are fully avoided by the variance process which grants unique exceptions without disturbance of the existing law.

⁶ Sullivan v. Finkelstein, 496 U.S. 617, 631 (Justice Scalia, concurring in part).

The plain meaning, ergo intent, of the existing law was to provide to affected citizens the right to participate in an open hearing regarding any application for variance from Section 1401.1. That the prohibitions were intended to apply to all uses is borne out by a reading of Section 1400.4 which clearly favors a restrictive reading of the prohibitions, not the liberal interpretation errantly offered by the Office of Planning. If, as the Office of Planning claims, the prohibitions under Section 1401.1 were to be found to contain unarticulated, uncodified exceptions related to principle uses, the language under Section 1400.4 would have no meaning.

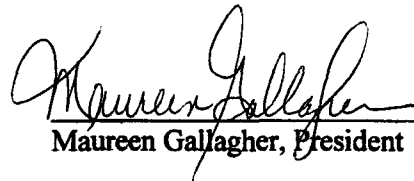
Nor does the Office of Planning address the plain meaning of Section 1403.1 which states, “An exception from the requirements [noted to be without regard as to the source of such exception, either by law or by implication] shall be permitted only if granted by the Board of Zoning Adjustment as a special exception pursuant to § 3104 after a public hearing, and subject to the following criteria.” Therefore, the Office of Planning’s incorrect and unsupportable foray into statutory interpretation and legislative history ignores not only the plain meaning of Sections 1401.1(b) and 1400.4, but it ignores the specific procedural language under Chapter 14, which makes no distinction as to the source of an exception and the process to be followed for obtaining authority to engage in a non-permitted use.

Finally, the Office of Planning admits that there exists no record within the relevant docket (ZC Case 88-19) in support of its position. *Memorandum* at 3. Rather, the Office of Planning asserts its “understanding” regarding the circumstances underlying the adoption of the Reed-Cooke Overlay. However, the Commission need not concern itself with the unreliable understanding of the Office of Planning, since the alleged understanding is in direct conflict with the plain language of Chapter 14. Accordingly, Chapter 14 must be deemed to mean what it says, regardless of the Office of Planning’s alleged and belated understanding.

Conclusion

The *Memorandum* has provided no additional support, either factual or legal, to the petition for rule making. Accordingly, the Commission is not positioned to adopt the text amendment, since any such adoption would result in an arbitrary and capricious decision, outside the boundaries of rule making, and subject to reversal by a court of competent jurisdiction. Sadly, RCNA is convinced that the Office of Planning knows that its proposal is fatally flawed, but it feels compelled to forward its bargain with Harris-Teeter for reasons that are not found within the *Memorandum*.

Insofar as Harris-Teeter requires relief from the prohibitions identified under Section 1401.1, it is free to act in accord with law and file an application for variance. The Office of Planning provides no reason why this existing procedure is insufficient for any purpose articulated within the *Memorandum*. Accordingly, RCNA respectfully requests that the Commission deny the Petition For Rule making for the foregoing reasons and for good reasons shown.


Maureen Gallagher, President