RCNA
Improve your neighborhood. • Meet your neighbors.
Play a role in Adams Morgan's future.
Reed-Cooke Neighborhood Association
P.O. Box 21700 • Washington, DC 20009 • (202) 387-1196 • rcna@reedcooke.org

December 17, 2007

Office of Zoning
441 4th Street NW, Suite 210
Washington, DC 20009

Subject: Zoning Commission Case 07-33

Reference: D.C. Board of Zoning Adjustment Appeal No. 17675

Attachment 1: RCNA letter December 17, 2007 to D.C. Office of Planning for Reconsideration of Text Amendment to Chapter 14 Reed-Cooke Overlay district (Title 11 DCMR) at Section 1401.1(b), Zoning Commission Case 07-33

Attachment 2: RCNA letter December 17, 2007 to D.C. Board of Zoning Adjustment Appeal No. 17675

Attachments 1 and 2 are actions being taken in conjunction with the subject case. They are being provided as they relate to Case 07-33.

If you have any questions I may answer please call me at 202-234-6526.

Sincerely Yours,

Peter Lyden

Peter Lyden
Reed-Cooke Neighborhood Association
PO Box 2100
Washington, DC 20009-1700

Before the
OFFICE OF PLANNING
District of Columbia

In the Matter of	)
	)
Setdown Report - Request for a Text Amend to	)
the Zoning Regulations, Chapter 14 (Reed-Cooke	)
Overlay) Section 1401 (Use Provisions) and an	)
Expedited Public Hearing	)
dated November 30, 2007.	)

Petition For Reconsideration

The Reed-Cooke Neighborhood Association ("RCNA") hereby respectfully requests that the Office of Planning (OP) reconsider that proposed amendment to Chapter 14, Reed-Cooke Overlay District (Title 11 DCMR) at Section 1401.1(b)[1], which would provide an exception to the prohibition, without grant of a variance by the Board of Zoning Adjustment (BZA), of the prohibition against off-premises alcoholic beverage sales.[2] Specifically, the proposed amendment would add the language (b) Off-premises alcoholic sales **Provided, that this prohibition shall not apply to the sale of beer and wine occupying no more than five percent of the floor area in a grocery store exceeding 30,000 square feet of floor area** (emphasis to show language to be added). In support of its request, the following is shown:

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[1] This Petition is concurrently filed and is intended to become a portion of the record before the Zoning Commission of the District of Columbia in its treatment of the referenced Memorandum/Setdown Report.

[2] *See*, Setdown Report - Request for a Text Amend to the Zoning Regulations, Chapter 14 (Reed-Cooke Overlay) Section 1401 (Use Provisions) and an Expedited Public Hearing dated November 30, 2007.

I. The Proposed Amendment Is the Product of Improper Forum Shopping And An Attempt to Deny Affected Parties' Due Process Rights And Violated Public Policy

The purpose of the proposed amendment is to accommodate the business plans of a single entity, Harris Teeter, in its efforts to be permitted to engage in beer and wine sales in the future operation of a grocery store. There exists no record evidence that any other entity will benefit from adoption of the proposed amendment and, indeed, the RCNA is not aware of any planned construction of any other grocery store of greater than 30,000 square feet in size within the relevant area. Accordingly, the proposed amendment is not, in fact, an appropriate vehicle for Harris Teeter, but rather is an effort to circumvent that authority and jurisdiction of the BZA before which this matter is presently being addressed.

That the proposed amendment is inappropriate is obvious in that the Government of the District of Columbia has created specific and applicable means for an entity seeking a variance from a general prohibition, i.e. the BZA. In effect, the OP via the Zoning Commission would be usurping the jurisdiction of the BZA and would participate in Harris Teeter's improper circumvention of established law and due process if the amendment were adopted.[3] If persons were able to use the OP in this manner, the purpose of the BZA would be fully undermined and made superfluous. Accordingly, there exists a material, but ancillary issue, within this matter, that is, whether the OP should be employed in this manner.

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[3] As the OP noted in its Memorandum, Harris Teeter had an opportunity to request a variance of 1401.1(b) before the BZA and did not. "[N]o such relief was sought by [Harris Teeter] or considered by the Board." Memorandum at Page 2 of 6.

Taken even in the best possible light, it is apparent that the OP's Setdown Report arises out of Harris Teeter's forum shopping. Although the OP's November 30, 2007 Memorandum does not set forth the impetus for its taking its recent actions, the RCNA cannot conceive of any other probable source for the action. Harris Teeter's improper engagement in forum shopping is an obvious attempt to stay or make moot those appeals pending before the BZA (Appeals No. 17675 and 17677). RCNA notes that the OP does not identify these pending appeals within the background contained in the Memorandum, but the existence of these matters is relevant to the instant discussion. RCNA avers that Harris Teeter is attempting to politicize this matter by seeking a political solution to a problem of its own making, rather than address the specific concerns of the community before those fora mandated by law. This effort speaks volumes in suggesting that entities of a particular size and substantial resources are entitled to and able to cause the Government of the District of Columbia to amend established due process rights without concurrent benefit to or consideration of affected residents. Such a precedent is improper and should not be forwarded by OP, regardless of the good intentions of the OP in providing its cooperation to date.

Since Harris Teeter's actions are both obvious and improper and would result in harm to appellants before the BZA who have borne the cost of participating before the proper forum to date, the RCNA hereby requests that the proposed amendment, upon reconsideration, be rejected. Additionally, the actions taken by the OP are consistent with the issue of a variance, not the adoption of a generally applicable rule or regulation that might be equally applied. Therefore, the proposed amendment should be deemed fatally flawed for all purposes, including the fact that it is wholly contrary to public policy regarding the legislative function of the OP.

II. The Premises For The Proposed Amendment Are In Error

In its Memorandum, the OP sets forth bases for adoption of the proposed amendment which are in error. Accordingly, even if the proposal was not the product of improper forum shopping and a misuse of the processes of the D.C. Government, the true facts and circumstances underlying this matter do not support adoption.

As noted on Page 2 of 6 of the Memorandum, the clearly articulated policies underlying the Reed-Cooke Overlay are set forth. Of particular relevant is "**(c) Encourage small scale business development that will not adversely affect the residential community.**" Insofar as the proposed amendment meets neither test articulated within this subsection, the OP's finding that the amendment is consistent with the language and intent of the Zoning Commission Order 523-A, Case No. 88-19, February 11, 1991 ("1991 Order"), is mystifying. Harris Teeter does not propose a "small scale business." The subject business is a full service grocery store, not a mom-and-pop operation. Although the issue of whether the operation of a full scale grocery is appropriate is not before the OP, the fact that the proposed operations (even without the amendment) are in conflict with the intention and language of the Reed-Cooke Overlay should be apparent to all even following a cursory reading of the 1991 Order.

The second portion of subsection (c) that seeks to prohibit development activities that might adversely affect the residential community[4] is, however, at issue. As specifically stated at 1401(b),

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[4] Without the benefit of public comment and a full record, the OP's statement within the Memorandum at Pages 3-4 of 6 that, "OP does not believe that the small area devoted to the sale of beer and wine subsumed within the larger grocery store would cause any adverse impacts on

off-premises alcohol sales is deemed to be an activity which places at risk the community's residents. The 1991 Order does not include any qualifying language or conditional interpretations or exceptions. Instead, the 1991 Order focuses solely on the action of making such sales, without regard to the means or nature of such sales, or whether such sales are caused by the operation of grocery store, a flower shop, or a gas station.[5] There exists no basis for providing a special dispensation for alcohol sales as a portion of the sale of food. If that were the case, then a sandwich shop employing 5% of its floor space should be eligible. Stated another way, 5% of the 30,000 square foot area to be employed by Harris Teeter[6] is equivalent to 1,500 square feet devoted to the sale of alcohol. Therefore, by logical extension any amendment to the Reed-Cooke Overlay should allow for off-premises sale of alcoholic beverages by any establishment employing less than 1,500 square feet aka a liquor store. At least a small liquor store would be consistent with Section 1128 (b)(3) of the Land Use Element in that it is a "small-scale business." It is obvious, therefore, that

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the immediate or larger community" is without support. There exists no record upon which the OP relies. There is no evidence contained in the Memorandum. There is only a bald conclusion without basis or evidentiary support.

[5] The OP statement that "the Reed-Cooke Order indicates that the prohibition on sale of alcoholic beverages was not intended to apply to sales within the framework of a larger use selling a very wide range of products" is pure sophistry, Memorandum at Page 3 of 6. There is nothing in the 1991 Order that suggests, states, implies or infers this conclusion; and the OP has not cited and cannot cite a single statement within the 1991 Order in support of this conclusion.

[6] As a relevant aside, the proposed operation of the grocery store already violates the intentions of the 1991 Order to restrict the overuse of narrow streets in the community. Therefore, there really is no means of reconciling Harris Teeter's plans and the Reed-Cooke Overlay; and the OP's attempt to so do is an unfortunate reshaping of the legislative history.

there exists no logical basis for the proposed amendment which would discriminate in favor of a single entity, Harris Teeter, for purposes that are prohibited under law *unless a variance is obtained which Harris Teeter has never sought.*

For reasons that are wholly unsupported by the facts and circumstances of this matter, Harris Teeter has consistently stated before all fora that it did not require a variance to engage in off-premises alcohol sales. Instead, it claims that its authority to operate a grocery store is sufficient to cover the prohibited activity. Therefore, by Harris Teeter's own, oft-repeated admission, the proposed amendment is not necessary. Granted, the RCNA vehemently disagrees with Harris Teeter's position which is at odds with the law, but it is still significant that Harris Teeter continuously denies any requirement that it seek a variance before the BZA, but is taking an opposite position relevant to the proposed amendment.

The second stated basis for the proposed amendment is that it is consistent with the D.C. Government's encouragement of the development of grocery stores. However, the issue is not the construction and operation of a grocery store. Indeed, Harris Teeter might possess all authority required to sell groceries from the subject location. The issue is the development and construction of 1,500 square feet for the sale of beer and wine, not food. Therefore, rejection of the proposed amendment is not at odds with the encouragement of development of facilities that sell groceries. There exists no basis and none is claimed that states that a grocery store must sell both eggplant and beer.

However, of greater relevance is the simple test for determining whether Harris Teeter should be allowed to sell beer and wine from 1,500 square feet of retail space. That test is not whether Harris Teeter is operating a grocery store. That test is not whether Harris Teeter's operation of a grocery store is consistent with recent policies. The test is whether Harris Teeter qualifies for a variance in accord with existing law – period. And that issue has never been adequately addressed by any fora. Certainly, the OP's Memorandum does not rely on any existing record.

III. Expedited Treatment Is Not Justified

The sole underlying basis for the proposal to expedite action on the amendment is that Harris Teeter has made investments in the property. Harris Teeter's business decisions were in view of the law and were made unilaterally, without public comment. That is its right. Harris Teeter has the right to put at risk any amount of money that it chooses and the RCNA would not take from Harris Teeter such right, however, RCNA would also not take from Harris Teeter its accepted risk.

Harris Teeter, acting under the advice of competent counsel, decided to enter into a lease and make substantial investment in the Citadel to construct a grocery store. If it also relied upon its ultimate ability to make off-premises alcohol sales, that reliance may or may not be justified, but it cannot be the basis for expedited treatment. It was fully aware of the law and procedure involved in obtaining the necessary variance to the Reed-Cooke Overlay. It knew that its intended use of the property would be subject to examination by the affected community and its residents. It knew that it would be required to seek authority from the BZA. Yet, with all of its substantial knowledge and

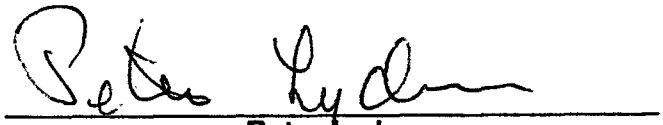
with the support of legal counsel, it chose unilaterally to move forward with its business plans. That choice cannot be the basis for relief in the form of expedited action.

Were the OP or the Zoning Commission to allow Harris Teeter to feign equities created by Harris Teeter's unilateral actions, the agencies would be creating a precedent which states, in effect, *the processes and procedures of the Government of the District of Columbia are subject to waiver and accommodation for all persons who act to invest substantial sums without the benefit of prior consent.* The RCNA strongly doubts that the OP would take the same position if the intended items for sale were handguns. Although an extreme comparison, the logic is appropriate. The question is not the size of the investment, but the activity under examination and whether the vendor has acted in accord with law and established procedure prior to making the investment. In accord with the Reed-Cooke Overlay, Harris Teeter has not and the OP should not create a backfill of law and facts, where none existed due to Harris Teeter's recalcitrance. Certainly, the creation from whole cloth of the proposed amendment should not be performed in an expedited manner.

IV. Conclusion

For the above stated reasons and for good reasons shown, both the OP and the Zoning Commission should summarily reject the proposed amendment for the above stated reasons and, instead, direct Harris Teeter to seek whatever relief is available from the BZA. There exists no factual, legal or equitable basis for the adoption of the proposed amendment, which seeks to favor a single entity and provide to it greater rights than the affected community's residents.

Respectfully submitted



Peter Lyden
Reed-Cooke Neighborhood Association
P.O. Box 21700
Washington, D.C. 20009

CERTIFICATE OF SERVICE

I hereby certify that a copies of the Reed-Cooke Neighborhood Association Petition for Reconsideration was hand delivered on this day to:

Office of Planning, 801 Capitol St NE, Suite 4000, Washington DC, 20002

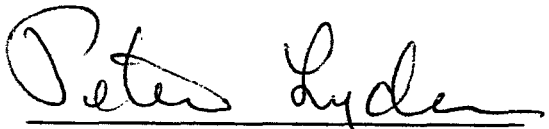
DC Department of Consumer and Regulatory Affairs, Melinda Bolling and Doris Parker-Woolridge

D.C. Zoning Comission, 441 4th Street NW, Suite 210, Washington, DC 20009

Holland & Knight, Mr. Norman Glasgow, Holland & Knight LLP, 2099 Pennsylvania Ave Suite 100, Washington, DC 20006

L. Napoleon Cooper, 1455 Pennsylvania Ave N.W., Suite 100, Washington, DC 20004

Advisory Neighborhood Commission 1-C, Chairman Brian Weaver, PO Box 21652 Washington, DC 20009



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December 17, 2007

Ms. Miller
Chairman
Board of Zoning Adjustment
441 4th Street, NW, Suite 210 South
Washington DC, 20001

Subject: Board of Zoning Adjustment Appeal No. 17675

Reference a: Letter dated December 11, 2007, Holland & Knight Request for Postponement of Public Hearing Set for December 18, 2007

Attachment 1, Petition for Reconsideration of Text Amendment to Chapter 14 reed-Cooke Overlay district (Title 11DCMR) at Section 1401.1(b), Zoning Commission Case 07-33

Dear Chairman Miller,

The request (reference a) filed on December 11, 2007 by Holland & Knight, LLP is without regard to the rights of the parties to the matters pending before the Board, including those appellants that have expended time and resources to bring their respective appeals. Also, since Holland & Knight are intervenors in these proceedings and have not claimed that any decision arising out of the Board's actions will, in fact, cause injury to Holland & Knight, the request is without factual basis for the purpose of grant.

RCNA deems that the Holland & Knight request presumes some outcome of ancillary matters which may or may not have some bearing on these proceedings, whereas RCNA asserts that the outcome of the appeals and the evidence gathered there under are equally likely to assist the Zoning Commission and/or the Office of Planning in building a record that might forward the discussion before those fora. Therefore, the public interest would be served by a combined record, including the record developed in these appeals, that might be offered to the ZC to assist it in its efforts.

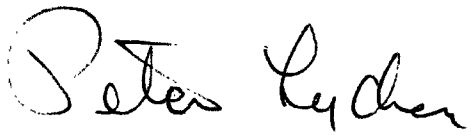
As stated in the attached Petition For Reconsideration, it is obvious to all observers and participants in this matter that the introduction of the OP's Memorandum is evidence of Harris Teeter's (or related parties) attempt to usurp the jurisdiction of this Board and engage in improper forum shopping. That Holland & Knight serves as counsel to the appellees further demonstrates that appellees will engage in political chicanery in lieu of a fair and open hearing in

an effort to deny appellants their due process rights. This Board should not cooperate in such activity and should recognize an impermissible end run when they see one.

Were Holland & Knight truly interested in "the administrative efficiency of the Board and the parties" it would assert the parties' duty to engage in a timely and proper hearing, without further delay brought about by Harris Teeter's recalcitrant insistence on avoiding its responsibilities under law and to the affected community and its residents. Instead, Holland & Knight's request is in furtherance of the appellees concerted efforts to avoid proper examination and public comment. That Holland & Knight may have its own agenda, related to its previous counsel given to one or more parties, is not significant, except that whatever interest Holland & Knight has must be deemed second in right to the rights of affected members of the community.

For the above reasons, including those articulated in the attached petition (Attachment 1), RCNA hereby respectfully requests that these matters be scheduled for hearing without regard to the machinations of appellees or their counsel.

Sincerely Yours,



Peter Lyden
PO Box 2100
Washington, DC 20009-1700

CC:
D.C. Office of Planning
D.C. Department of Consumer and Regulatory Affairs, Melinda Bolling and Doris Parker-Woolridge, for Mathew LeGrant, Zoning Administrator
L. Napoleon Cooper, Appellant in BZA appeal no. 17677
Advisory neighborhood Commission 1-C

CERTIFICATE OF SERVICE

I hereby certify that a copies of the Reed-Cooke Neighborhood Association letter of December 17, 2007 requesting continued action for BZA appeal No. 1675 was hand delivered on

this day to:
Office of Planning, 801 Capitol St NE, Suite 4000, Washington DC, 20002

DC Department of Consumer and Regulatory Affairs, Melinda Bolling and Doris Parker-Woolridge

Holland & Knight, Mr. Norman Glasgow, Holland & Knight LLP, 2099 Pennsylvania Ave Suite 100, Washington, DC 20006

L. Napoleon Cooper, 1455 Pennsylvania Ave N.W., Suite 100, Washington, DC 20004

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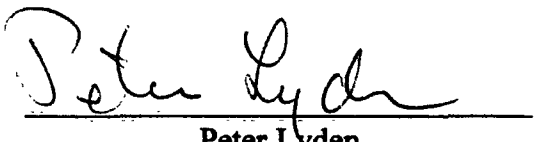

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December 17, 2007

Ms. H. Tregoning
Director
Office of Planning
801 Capitol St. NE, Suite 4000h
Washington DC, 20002

Subject: Petition for Reconsideration of Text Amendment to Chapter 14 Reed-Cooke Overlay District (Title 11 DCMR) at Section 1401.1(b), Zoning Commission Case 07-33

Reference: D.C. Board of Zoning Adjustment Appeal No. 17675

Attachment 1: Petition for Reconsideration of Text Amendment to Chapter 14 Reed-Cooke Overlay district (Title 11 DCMR) at Section 1401.1(b), Zoning Commission Case 07-33
Attachment 2: RCNA letter December 17, 2007 to D.C. Board of Zoning Adjustment Appeal No. 17675
Attachment 3: RCNA letter December 17, 2007 to the D.C. Zoning Commission

Dear Ms. Tregoning

Attachment 1 is our Petition to you for reconsideration of text amendment to Chapter 14 reed-Cooke Overlay district (Title 11 DCMR) at Section 1401.1(b), Zoning Commission Case 07-33. We request your reconsideration of this case for the reasons stated in our petition.

Also attached (2 & 3) are our letters to the D.C. Board of Zoning Adjustment and the D.C. Zoning Commission for actions related to this request for reconsideration.

If you have any questions I may answer please call me at 202-234-6526.

Sincerely Yours,

Peter Lyden

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