ZONING COMMISSION OF THE DISTRICT OF COLUMBIA

In the Matter of	)	
	)	
Reed-Cooke Overlay: Off-premises Alcoholic Beverage Sales as a Permitted Accessory Use	)	Case No. 07-33

Comments of Reed-Cooke Neighborhood Association

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Dated: February 4, 2008

ORIGINAL

Table of Contents

Summary

The Reed-Cooke Neighborhood Association hereby vigorously requests that the Zoning Commission deny that Petition For Rule Making filed by the Office of Planning in the above captioned matter. The RCNA deems the actions taken by the Office of Planning and the Zoning Administrator to be without factual or legal support, an attempted denial of affected citizens due process rights, an inappropriate violation of law, and a misuse of the rule making process to assist one entity, Harris-Teeter, to circumvent the plain language of the Reed-Cooke Overlay without justification or benefit to the public interest.

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This matter comes before the Commission via a petition for rule making from the Office of Planning. The Petition requests that the Commission modify Title 11 (DMCR), Chapter 14, Reed-Cooke Overlay District, § 1401.1(b) to read:

> (b) Off-premises alcoholic beverage sales as a principal use; except that off-premises alcohol sales shall be permitted as an accessory use to a grocery store or other similar permitted use;

The net effect of the modified language, if adopted, would be to remove the necessity for persons seeking to make off-premises alcoholic beverage sales to seek a variance in accord with the rules and policies of the Board of Zoning Adjustment and in accord with the existing language of the Reed-Cooke Overlay. As the Office of Planning clearly stated in the Commission's December 10, 2007 meeting, the impetus behind the Petition is the construction of a grocery store by Harris-Teeter within the building known as the Citadel, hence, the reference to "grocery store or other similar permitted use" within the proposed language. Office of Planning provides no other basis for the requested language other than the Harris-Teeter project. Accordingly, Office of Planning provides no factual basis for the proposed language "or other permitted use."

Background

As the RCNA stated in earlier filings with the Zoning Commission and the BZA, the Office of Planning's efforts evince a blatant effort by Harris-Teeter to circumvent its duty to seek a variance under existing law. For reasons that have never been articulated within the record and for which no factual basis exists, Harris-Teeter deems that its grocery store is entitled to a preference that would exempt it from the processes and procedures set forth within the City's regulations that require a variance. RCNA disagrees vehemently with Harris-Teeter's arrogant and high-handed efforts to subvert the law to its singular purposes, particularly when there exists no factual or legal basis for its demanding such preferential treatment.

Harris-Teeter has sought and obtained variances that will support its construction of a grocery store. Before the BZA it repeatedly was provided the opportunity to seek a variance under the relevant Section 1401.1(b). Rather than seek such a variance under law, Harris-Teeter wilfully ignored its obligation and did not seek the required variance, which effort would have enabled the community and its residents to comment on whether such variance was appropriate and in the public interest. Instead, Harris-Teeter ignored its duty to seek the variance and later claimed that no variance was needed since it had been granted a building permit. This absurd conclusion was contradicted by the Mayor's office, which clearly stated that the grant of a building permit did not constitute the grant of a variance from application of the subject Section 1401.1(b). Indeed, by its participation in this matter, Harris-Teeter admits that it does not presently possess the right to engage in off-premises alcoholic beverage sales at its relevant location.

Therefore, the issues that are before the Zoning Commission are as follows:

(1) Whether Harris-Teeter should be made to act under existing law and seek a variance before the BZA;

(2) Whether the proposed language will allow off-premises alcoholic beverage sales as an additional matter of right within the Reed-Cooke District; and

(3) Whether adoption of the proposed language evinces reasoned decision making, in furtherance of equal protection, and the public interest and necessity.

The Petition Should Be Denied

The RCNA strongly urges the Zoning Commission to deny the Petition on the grounds that adoption would be an arbitrary and capricious act that its not grounded in law or fact. That adoption would be an arbitrary act is a matter of record. No other entity is seeking the adoption of the language and the Office of Planning has stated plainly that it is seeking to entertain the needs of a single entity.[1] Accordingly, the matter is directed to the benefit of a single developer, without regard to the considerations under law that exist to protect adjacent residential property owners. For the purpose of protecting equal justice and equal protection under law, the Petition should be denied. For when there is adopted special consideration that places the desires of a single commercial developer above the rights and protections of an entire community, that act is necessarily an arbitary denial of equal protection.

[1] "This is really about trying to accommodate Harris-Teeter, right. . .? That's right." Exchange between Vice Chairperson Jeffries and Ms. Brown-Roberts at Zoning Commission's December 10, 2007 meeting, *see*, Transcript at Page 58.

That adoption would be patently capricious is also a matter of record. The language is wholly unnecessary under law. As stated *supra.*, Harris-Teeter possesses a legal and procedural avenue for seeking relief that does not require adoption of the Petition or a change in Section 1401.1(b). It need merely seek a variance before the BZA, an avenue that it inexplicably refuses to take. Rather than avail itself of this existing opportunity, Harris-Teeter through the Office of Planning seeks to undermine one of the planning principles that assist in maintaining the character of the Reed-Cooke District. Neither the Office of Planning nor Harris-Teeter has explained, nor can they rationally explain, why no such variance has been sought, although the answer is obvious.

If made to act in accord with law, Harris-Teeter's proposed off-premises alcoholic beverage sales would be subject to community scrutiny and comment. The discussion would not be centered on the once-removed considerations of general zoning for the entire Reed-Cooke District, but rather would focus on the specific effects that Harris-Teeter's proposed activity would have on the surrounding residents and community. This is a discussion that Harris-Teeter seeks desperately to avoid. But it is this very discussion that the Reed-Cooke Overlay demands and supports – in principle and in application, to protect residents and to protect the character of the neighborhood. If the Commission adopts the Petition, it would deny the community the opportunity to comment before the BZA in a fair and open forum, which rules are designed to provide an avenue for public comment on specific issues related to non-permitted uses.

What the RCNA seeks by its comments herein is the continued ability of its affected residents to be heard in determining whether Harris-Teeter's proposed use is appropriate. The RCNA does

not request that the Zoning Commission prejudge the appropriateness of the proposed non-permitted activity. Indeed, the Zoning Commission has not been presented adequate evidence that would allow it to make such a decision. There exists in the record no charts, data, impact studies, traffic studies, etc. upon which the Zoning Commission might make an informed decision regarding the effect of adoption of the Petition. Accordingly, the Office of Planning is requesting that the Zoning Commission engage in decision making that is not based on facts but unsupported assumptions. The Petition improperly demands a leap of faith from the Zoning Commission that the Office of Planning possesses some factual record or legislative record in support of its Petition. But were the Zoning Commission to adopt the proposed language, it would discover soon that such faith is wholly unjustified.

Under judicial scrutiny, it will be found that the Office of Planning possesses little more than the plaintive pleas of a well financed developer to improperly obtain accommodation, where no accommodation is required or advisable. This is particularly evident in the fact that a procedural avenue, the BZA, is available for Harris-Teeter's employment. The Office of Planning has not explained why it did not simply direct Harris-Teeter to take this well traveled route, instead of cooperating in carving this unique path for Harris-Teeter's singular benefit.

Having taxed the resources of the Zoning Commission to entertain a needless Petition that is not grounded in proper legislative action, but is rather an obvious attempt to quash the rights of affected District's citizens to make comment before the BZA (i.e. cause the Zoning Commission to engage in that activity that the law states is the proper activity of the BZA) this Commission

should summarily deny the Petition as an inappropriate and obvious attempt to circumvent law by modification.

For the record, the RCNA is not naive or oblivious to the needs of the District to encourage commercial and community development by private entities. The vitality of every neighborhood requires some accommodation to commercial enterprise to assure that residents are served in having available goods for use in homes and other businesses. But such accommodation becomes intolerable when it comes at a price that requires residents' legitimate concerns to take a far lower priority than the commercial interests of a single entity. Those residents' concerns are worthy of public airing in a forum designed to resolve and reconcile differences between the commercial interests of business and the rights of home owners. By law, that forum is the BZA pursuant to a application for variance. This Commission should, therefore, deny the Petition as an improper effort to deny to Reed-Cooke District residents their due process rights before the BZA.

Shifting The Burden Of Proof

What is not considered within the Petition is the effect that adoption would have on the burden of proof necessary to demonstrate that proposed off-premises sale of alcoholic beverages is consistent with the community's interests. Under existing law, an entity proposing to engage in the non-permitted activity would request a variance from the BZA and the applicant for variance has the burden of proof to demonstrate that the activity is appropriate. If the Petition is adopted, no such variance would be required if the entity is otherwise engaged in a permitted use. Instead, the burden of proof would shift onto regulators and residents to demonstrate that the proposed sale of alcoholic

beverages is inconsistent with regulation, a very difficult task given the broad language proposed within the Petition.

As stated throughout these Comments, such a result is fully contrary to the Reed-Cooke Overlay and flies in the face of the intent in the creation of same. The Office of Planning acts without credulity when it suggests that the Reed-Cooke District did not intend to monitor carefully development and commercial activity within the affected zone. Nor can the Office of Planning state with any honesty that the residents of Reed-Cooke did not intend to consider each non-permitted use proposed by a developer, to determine what effect that grant of a proposed variance might have on the quality of life of affected residents. And there is no basis for any claim that the drafters of the Reed-Cooke Overlay intended to place the burden on residents to demonstrate the inappropriateness of otherwise non-permitted uses.

The proposed Petition stands on its head the existing law and would place the burden on residents, not developers, to bring forth evidence that off-premises sale of alcoholic beverages by a particular business was inappropriate. This is not a clarification of existing law. It is a seismic shift of responsibility away from support of local community concerns in favor of unrestricted commercial development. Existing regulation seeks to protect residents' investments in their homes and places the burden on commercial enterprise to assure that the quality of residents' lives and quiet enjoyment of property is paramount in decisions regarding development. By shifting the burden of proof, the Petition would also alter irretrievably the priorities that underlie the law. Adoption of the Petition would be a statement that the interests of commercial enterprise will be given a greater

priority than the concerns of affected residents. There is no way that such an action can be reconciled with the Reed-Cooke Overlay or good zoning practices.

To obtain a sense of what will occur, the Commission need look no further than the extreme measures taken by Harris-Teeter when it sought a Class B license from the Alcoholic Beverage Control Board without having first obtained the required variance from the BZA. Harris-Teeter filing a Motion in Limine in an effort to quash the ability of community residents to object to the grant of the license. Harris-Teeter also filed a Motion To Strike Non-Germane Evidence, that it considered unimportant because the evidence involved the adverse impact on law and the community that grant of the license might create. Harris-Teeter's position, which the Office of Planning seeks herein to codify, is that its permit to construct a grocery store trumps all community concerns regarding off-premises alcoholic beverage sales. Were this Commission to review carefully the record before the ABC (Case No. 61034-05/062P, License No. 73993) is would find clear evidence of Harris-Teeter's efforts to circumvent its lawful duty at every step, while concurrently taking every opportunity to reject and silence any concerns of affected residents. It is a shameful history, to be sure. But it is upon this history of circumvention, misrepresentation, and arrogance that this rule making is brought before this Commission, which rule making seeks to reward Harris-Teeter's unlawful and arrogant actions with a free pass.[2]

[2] Excepts from the ABC record are attached hereto at Attachment A.

The Petition Is Based On Misrepresentations

With all due respect to the Office of Planning, the claimed factual and legal basis of the Petition, as reported to this Commission within its December 10, 2007 meeting, contained material misrepresentations. Upon examination of the complete record of this matter, the Commission may easily deduce that the underlying premises given for the Petition are, in fact, false. Accordingly, having found that the premises for the bringing of the Petition are false, the Commission should summarily deny the Petition.

At the December 10th meeting, the Office of Planning's representative stated, "[t]he Zoning Administrator granted a building permit for the grocery store [Harris-Teeter] and with it, a permit to operate beer and wine sales as an accessory use."[3] This statement is false. Although the Zoning Administrator granted a building permit for the construction of a grocery store by Harris-Teeter, no permit or other authority was granted for the sale of beer or wine. In fact, a simple reading of the subject Section 1401.1(b) as it exists will demonstrate that no such action could have occurred without Harris-Teeter having applied for a variance with the BZA for an exemption from Section 1401.1(b), which it did not. Nor is there any record which shows that the sale of beer and wine is a permitted ancillary use[4] or that such activity is deemed an ancillary use to the operation of a grocery store, an activity that can be and is engaged in within the Reed-Cooke District as a matter of right, without regard to Section 1401.1(b).

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[3] Zoning Commission December 10, 2007 Hearing Transcript at Pages 53-54.

[4] Section 1401.1(b) does not provide an exemption for ancillary use, therefore, there is no legal basis for claiming such exemption via the grant of a permit to engage in a "by right" activity, grocery sales.

As further evidence that the BZA did not grant authority to Harris-Teeter to engage in off-premises alcoholic beverage sales as an ancillary use or otherwise, the Commission may review the specific statements made by the BZA at the subject hearings held on November 29, 2005; January 10, 2006; and July 11,2006. At none of these relevant hearings did Harris-Teeter request a variance from Section 1401.1(b), either directly or as an ancillary use to operation of a grocery store. In its grant of Application 17397, the BZA stated clearly that it was granting a variance under Title 11, Section 774, for a variance from the requirements under subsections 2001.3, 2201.1 and 2201.6, nothing else.[5] The BZA clearly stated that, "our focus is very narrow"[6] because "the relief that is being requested is very narrow."[7] Then, if any additional doubt exists regarding the BZA's actions and the intent of same, the Commission may look to the BZA's denial of a motion filed by affected residents concerning Section 1401.1 of the Overlay. In its denial the BZA's Chairman stated,

> I'm, frankly, very certain that the Board is not making an assertion that [a variance] is or is not required, **it was required, it was not requested**.
>
> And if it's not requested, obviously, it wasn't before us, so how can we bring a motion to reconsideration of our decision, based on relief that actually wasn't requested of us, and having a rehearing on that issue of which wasn't part of the application, would be somewhat fruitless or it would, in fact, be stepping outside of our jurisdiction, I believe, in asserting to an applicant what relief they should come for before us with.[8] (Emphasis added)

So, contrary to the assertions of the Office of Planning to this Commission, the BZA did not grant permission to Harris-Teeter to engage in off-premises alcoholic beverage sales because, despite the

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[5] *See*, BZA Hearing Transcript for November 29, 2005 at page 45.

[6] *Id.* at 71

[7] *Id.*

[8] *See*, BZA Hearing Transcript for July 11, 2006 at page 108.

fact that such permission would be required for such use, Harris-Teeter never requested that permission. That the Zoning Administrator later exceeded its authority and drafted a letter that suggested a contrary result is merely a bad act by the Administrator and does not otherwise alter the application of law.

Accordingly, the Office of Planning's opening remarks to the Commission on December 10th contained both factual and legal errors. Harris-Teeter was not granted a permit for off-premises alcoholic beverage sales and its building permit does not create such authority under any circumstances. That the Office of Planning knows this statement to be false is apparent since, if its statement were true, there would be no reason for its bringing of the subject Petition. The matter would simply be settled pursuant to the alleged appeal process further reported by the Office of Planning at the December 10th meeting.

By its reference to an appeal, the Office of Planning suggested that the matter of off-premises alcoholic beverage sales by Harris-Teeter is being considered by the BZA. "[Harris-Teeter's] permit has been appealed and the BZA has had a public hearing but to date there has not been a ruling."[9] This statement, as it relates to actions before the BZA relevant to this matter, is false. The appeals before the BZA cannot reach the issue of whether Harris-Teeter might engage in off-premises alcoholic beverage sales. The BZA, by its own statements, restricted its previous rulings to only those variances requested by Harris-Teeter. Since Harris-Teeter did not request a variance from Section 1401.1(b) and did not obtain such variance, then there can be no appeal of a non-existent

[9] Zoning Commission December 10, 2007 Hearing Transcript at Page 54.

ruling in favor of the variance. No such ruling occurred. Insofar as the appeals reached the issue of off-premises alcoholic beverage sales, such appeals were placed on the record in an abundance of caution by interested persons who wanted to create a record before each relevant forum that might otherwise overlook the application of Section 1401.1(b) to Harris-Teeter's proposed operations. Accordingly, contrary to the Office of Planning's statement, Harris-Teeter has not sought a variance from Section 1401.1(b), the BZA has not had a public meeting on such a variance, there has been no ruling on such a variance, and, therefore, there can exist no appeal from such a variance.[10] Rather, the existing appeal deals solely with the improper actions of the Zoning Administrator in drafting the errant and legally unsupported letter. That the Office of Planning chose to mischaracterize the status of this matter before the Zoning Commission is entirely unfortunate. However, the misrepresentation of the status wholly undermines the basis for the subject Petition.

At the December 10th meeting, the Office of Planning continued to spin a false basis for its Petition by stating, "[o]ur preliminary review of the Reed-Cooke order for the Reed-Cooke area indicated that a prohibition on sales of alcoholic beverages was not intended to apply to sales within the framework of a larger use selling a very wide range of products. Rather, the intent was to limit liquor stores or stores where the principal use is alcohol sales."[11] This statement is made without

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[10] In response to one issue raised at the December 10th meeting, there can be no repugnance between any decision of the BZA and the Commission. The specific issue is not, in fact, in front of the BZA and the BZA has stated it will not rule on the issue until and unless an application for variance is filed by Harris-Teeter. The only repugnance which may occur is between the Zoning Administrator's bogus letter and the actions of this Commission.

[11] Zoning Commission December 10, 2007 Hearing Transcript at Page 54.

citation to any document or record, because no such attribution would be possible. It is simply wrong.

That the Office of Planning is weaving whole cloth is apparent when one considers the totality of the Reed-Cooke Overlay that specifically encourages the operation of small businesses, not larger enterprises. See, Section 1400.2(a)(3) "encourage small-scale business development that will not adversely affect the residential community." What the Office of Planning ignores is that the Reed-Cooke District pursuant to the Overlay never intended to accommodate a 30,000 square foot grocery store in the first instance, much less one that would engage in a non-permitted use. Therefore, the Office of Planning's alleged review and conclusion is wholly at odds with the plain language of the Overlay and this Commission need not consider the murky waters of legislative intent. What is clear is that Office of Planning's conclusion is false and unsupportable.[12]

Had the planners and drafters of the Overlay intended to create exemptions to Section 1401.1(b) for large grocery stores, such would have been an easy matter of drafting. Had those same persons desired to exclude only liquor stores or stores where alcohol sales was the primary activity, the Overlay would have reflected that intention. Again, such drafting is not beyond the ability or vision of such persons. However, the Overlay does not evince such intention. In fact, the opposite intent is obvious even via a cursory reading of the Overlay. That the Office of Planning denies the obvious is again unfortunate. Therefore, whereas RCNA's position herein is supported by the plain

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[12] RCNA anticipates the presentation of written or oral testimony into the record from persons with personal knowledge who will support RCNA's interpretation of the Overlay's intent.

language of the Overlay, the Office of Planning's position is without factual or historical support. It is, instead, false advocacy to encourage this Commission to engage in improper sophistry.

Following its recitation of false premises for the bringing forth of its Petition, the Office of Planning requested expedited treatment of the rule making with an abbreviated notice. No basis was given for this request. The Office of Planning did not cite an imminent threat to the public interest or safety. It did not support its request with some underlying concern that would justify any unusual treatment of the matter. Instead it stated, in essence, "let's hurry this one along." But why? The Office of Planning did not set forth the basis for an expedited hearing in accord with Title 11, Section 3011.7(c)(1)-(3), therefore, its request was without legal support. The only plausible explanation is that the Office of Planning was seeking to reduce the opportunity for comment and participation by the District's affected citizens. No other explanation is apparent. Therefore, not only did the Office of Planning misrepresent and mischaracterize the matter before the Zoning Commission, but it sought to involve the Commission in a cooperative effort between the Office of Planning and Harris-Teeter to limit the public's right to know and make comment, i.e. again to restrict the due process rights of affected citizens.[13]

The RCNA does not wish to speculate on the record (at this time) as to the reasons for the Office of Planning's unfortunate and inaccurate statements to the Commission on December 10,

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[13] Chairperson Hood's laudable efforts at the December 10th meeting, to assure ANC notice and involvement, is hereby commended by the RCNA. In the face of the Office of Planning's efforts to railroad adoption of the Petition, Chairperson Hood wisely assured that the ANC would be given notice and opportunity to comment.

2007. It is sufficient to note that the Office of Planning's comments certainly provide no legal or factual basis for adoption of the Petition and in view of the truth, the false statements provide an adequate basis for denial of the Petition.

Statutory Intent and Legislative History

The chief argument posed by the Office of Planning is the assertion that the Reed-Cooke Overlay did not intend to restrict ancillary off-premises sales of alcoholic beverages. To test the Office of Planning's assertion, the Commission must engage in statutory interpretation to discover any evidence in support of the Office of Planning's claim. Absent clear evidence, the Commission is bound by the canons of construction that hold that it "must presume that a [legislative body] says in a statute what it means and means in a statute what is says there." *Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992).*[14] Indeed, the drafters of statutes and regulations are "presumed to act intentionally and purposely when it includes language in one section but omits it in another." *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991). Whereas the Overlay includes language related to recognized exceptions, e.g. Section 1403.2, no exception exists under Section 1401.1(b).

With this background of statutory interpretation, the Commission must give greatest weight to the existing language of the Reed-Cooke Overlay by presuming that the contents of that

[14] *See*, also, the United States Supreme Court's recent decision in *Ledbetter v. Goodyear*, wherein the court applied the specific language of the statute rather than dally in the murky waters of legislative intent where no clear evidence existed in support of a contrary construction. The court sought no clarification.

regulation, absent ambiguity, evince the specific intent of the drafters. The drafters of the Overlay, this Commission, spent three years devising the language contained within the Overlay. Zoning Commission Order 523-A, Case No. 88-19 (February 11, 1991)[15] leaves no doubt that the rules adopted were considered carefully, with deliberation, and were intended for the specific purpose to "encourage small-scale business development that will not adversely affect the residential community." To forward this goal, the Commission identified twenty five prohibited uses, including off-premises alcoholic beverage sales, which would require a variance to be performed within the Reed-Cooke District. No where within the language creating these prohibited uses is the word "ancillary". No where within the language appears the words "grocery store" as an activity from which an exception to the prohibited uses might be implied. Stated directly, the Office of Planning is patently incorrect in both its assertion of a legislative intent that is contrary to the plain language of the Overlay and its claim that the proposed change in the language would create a "clarification." Rather, it would create a perversion of the language that was unintended by both the affected community and this Commission in the creation of the Overlay language.

As further evidence that the drafters of the Overlay intended the existing language, without exception, the Commission need look no further than Title 11 (DCMR) under Section 700 et. seq. It will find specifically created exceptions to general prohibitions. For example, Section 702.1 allows the operation of a mechanical amusement machine as an accessory use incidental to the uses permitted in Sections 701 through 711. Section 704 sets forth special exceptions for otherwise non-permitted uses for uses identified in Sections 706 through 711. In fact, the entirety of Title 11 as it

[15] A copy is attached hereto at Attachment B.

applies to permitted and non-permitted uses under Section 700 et. seq. is a specific listing of those uses for which an exception or variance might be allowed or must be sought from the BZA, and those uses for which an ancillary use might be found to be acceptable. The language is specific, clear and without ambiguity, and is fully consistent with the language of the Reed-Cooke Overlay.

The RCNA recognizes the recent efforts to encourage the development of grocery stores within the District. Indeed, in consultation between the Office of Planning and representatives of the RCNA, the Office of Planning admitted that it is this effort that is, in large part, driving the Office of Planning's activities in support of the subject rule change[16]. But these recent efforts are irrelevant for the purpose of interpreting existing law that has been on the books since 1991 and these efforts provide no basis for the fiction that the Overlay does not mean what it says. What, in essence, the Office of Planning is saying is that grocery store development, as an unwritten general rule, is to be encouraged.[17] Yet, the Commission should take official notice of the language at Section 1400.4 of the Reed-Cooke Overlay that states, "[w]here there are conflicts between this chapter and the underlying zoning district, the more restrictive regulations shall govern." Therefore, even if some general consideration was given for the operation of a grocery store, the plain language

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[16] The RCNA had to initiate the conference since no one from the Office of Planning attempted to contact the RCNA or to provide any information regarding the proposed rule making, despite the RCNA having filed a Petition For Reconsideration to the Office of Planning's Petition For Rule Making and Set Down Report, attached hereto at Attachment C, to which no response has been provided by the Office of Planning.

[17] Even if true, nothing contained within the proposed language goes to the sale of groceries. Therefore, the Commission can deny the rule making without affect on the sale of groceries by Harris-Teeter and others.

of Section 1400.4 states that the existing regulations should be applied in their more restrictive forms.

As shown above, there exists no basis for the Office of Planning's position regarding either statutory interpretation or legislative history. The introduction of the proposed language as a clarification is a canard. There is no application of law or logic that can support the Office of Planning's position and when asked to supply such support to RCNA representatives, the Office of Planning could not supply a single citation, reference or application of law in support of its position. Instead, it merely reiterated its support of Harris-Teeter's plans. As stated repeatedly within these comments, that sole agenda is insufficient as support for this alleged rule making.

The Missing Voice

At the December 10, 2007 meeting of the Commission, there were various exchanges between the Commissioners and the Office of Planning and staff. The missing voice was that of affected citizens that seek entrance into the discussion for the purpose of encouraging a reasonable outcome. Were that voice present, the exchanges would have been met with law, facts, and logic that was otherwise missing in the Office of Planning's responses to the Commission. Starting on Page 60 of the Transcript of that meeting, the following would have been added to the discussion:[18]

[18] Quotes are excerpts from Pages 60-67 of the Transcript of the Zoning Commission Hearing of December 10, 2007. The relevant pages are attached hereto at Attachment D.

Commissioner May: Well, but doesn't that open up the question of whether you're considering lifting limitations on the sale of alcoholic beverages as a secondary use to say you know, the little carry-out deli kind of thing.

Ms. Steingasser: It's possible.

In fact, it is more than possible. The proposed language allows sale without restriction to any entity that does not engage in non-permitted activity as a matter of right. The proposed language "or other permitted use" would allow any business that engages in a permitted primary use to engage in off-premises alcoholic beverage sales. As proposed, the Petition's language is so broad that the intent of the existing Section 1401.1(b) is not clarified, as claimed by the Office of Planning, but wholly and completely undermined.

Ms. Steingasser: The position is that the language needs to be clarified, that the intent was to allow it as an accessory. We want to make sure we don't create other secondary non-conforming uses in that area.

There is never given any basis or reason for further "clarification" of the existing language other than the existence of the Harris-Teeter project. There is never any consideration given to the existing process that would allow Harris-Teeter to seek a variance without the need to modify the existing language of Section 1401.1(b). There is no consideration given to the fact that if what the Office of Planning is seeking is a highly limited exemption from the existing language, Harris-

Teeter's obtaining of a variance, held exclusive for its own use and operation, would serve that purpose.

> Ms. Steingasser: I mean, if our position is that it's a clarification of existing language, then it was always the intention that anybody with a legitimate liquor license should be able to sell as an accessory use. We mean to make sure we have an opportunity to work with the Zoning Administrator to understand what he considers an accessory use versus a principal use and that we understand what is happening in the neighborhood.

By no definition of the word "clarification" could the proposed language be defined. The Office of Planning's position may be that this is a proposed clarification, but the reality is that it is an exemption for Harris-Teeter that will extend to fully overturn the language. No other logical interpretation is possible. As for Office of Planning's stated desire to know "what is happening in the neighborhood," the RCNA hereby avers that the neighborhood and its residents are quite concerned that the Commission will allow the Office of Planning, in concert with the Zoning Administrator and Harris-Teeter, to circumvent existing law and deny affected residents the opportunity to consider and comment on all aspects of the non-permitted use within a hearing before the BZA, following Harris-Teeter having properly applied for a variance. Said succinctly, the neighborhood is angry that it is being potentially legislated out of the process.

Ms. Steingasser: We think the original intention was the free-standing liquor store.

Again and always, there is no citation to a record for this statement. It is uttered without basis as though by simply repeating it again and again the Office of Planning can make it so. However, if that is what the drafters of the Overlay intended, then Section 1401.1(b) would have said, "no free-standing liquor stores." It does not.

Ms. Steingasser: [T]he Zoning Administrator has written to the record of the BZA case that he does not believe the accessory sales are regulated by [the existing law].

The Zoning Administrator's ultra vires opinion is without color of law. The Zoning Administrator's position was, in essence, that a permit to build a grocery store is equivalent to the grant of variance to engage in off-premises alcoholic beverage sales. The Office of Mayor wisely rejected the Zoning Administrator's position. The Zoning Administrator lacks the authority to engage in interpretations which are clearly outside of the plain mandates of the District's regulations. Therefore, the Zoning Administrator's actions are, at best, a personal opinion without legal foundation and, at worse, an attempt to undermine the due process rights of affected citizens.

Commissioner May: I mean, maybe there's a different way to try to address this issue and have a separate – you know, rather than amend this particular language, say something that allows this, that specifically allows it for something of this size.

There is a means of doing exactly what the Commissioner wants. It is called an application for and receipt of a variance from the BZA. No Commissioner should even consider grant of this Petition until such time as the reasons are made clear as to why Harris-Teeter has refused to seek this relief. The BZA has stated that such a variance is required for this non-permitted use and has, in essence, invited Harris-Teeter to make application for that variance. But for reasons that can only be interpreted as recalcitrance, Harris-Teeter refuses to make such application.

Ms. Schellin: I'm sure that there is going to be probably some neighborhood opposition and, I mean, there are articles in the paper today about the pro and con but it's limited to the Reed-Cooke area which is a fairly contained area that we feel we can address pretty quickly.

Ms. Schellin's dismissive and pejorative attitude toward the residents of Reed-Cooke is appalling. That this statement would be uttered at a public meeting is more than unfortunate. It is deplorable. It is, however, sadly illuminating. Reed-Cooke's residents are being treated as something to be addressed, not considered. Reed-Cooke's concerned citizens are to be dismissed as a small problem, but not a material consideration in the Commission's deliberations. In essence, Ms. Schellin states that she believes that Harris-Teeter's wine sales can be accommodated as her

first priority, while the rights and concerns of affected citizens living in the Reed-Cooke District can be handled as a nearly unimportant, secondary annoyance to the process. Ms Schellin may consider Reed-Cooke a fairly contained area, but what is not contained is the level of offense to her remarks justifiably felt by Reed-Cooke residents. When and if Ms. Schellin moves to address Reed-Cooke residents' concerns, she should begin with a sincere apology.

As the foregoing demonstrates, if there had been a single, informed member of the Reed-Cooke community offering comment to the discussion of December 10th, then the Commission would have had the benefit of accurate information and a logical, nondisruptive means of moving the matter forward. Instead of allowing the Office of Planning to go unchallenged in their remarks and statements, that missing person could have set the record straight and assisted the Commission in its appreciation of what the true status of this matter is. The truth is, nothing is broken in the law that requires the Commission's fixing. No entity, other than Harris-Teeter with the bizarre assistance of the Zoning Administrator, is seeking a change in the law. The proposed change is not a clarification, as is oft touted by the Office of Planning. It is a proposed elimination of the existing language in favor of language that is intended to benefit a single entity. The effect of adoption of the Petition has not been considered and nothing in the Office of Planning's presentation suggests that any consideration has been given to rights of adjacent residents. Instead, this entire proceeding is predicated on one and only one fact, Harris-Teeter wishes to sell beer and wine and does not wish to seek a variance for such purpose. With all due respect, the rights of a single adjacent homeowner to be heard at a public meeting that focuses on this issue pursuant to an application for variance, in

recognition of due process and equal protection under law, far outweighs Harris-Teeter's alleged right to peddle Budweiser.

Finally, that missing person might have reminded the Commission of the reasonable expectations of the residents of the Reed-Cooke District. Our residents are entitled to reasonably rely on the District's regulations and the processes adopted under law in the purchase of their homes. Residents were entitled to rely on the plain language of the Overlay. Residents were entitled to rely on their collective and individual rights to be heard when an entity seeks a variance. Residents should be able to rely on the Office of Planning, to deliver accurate information to the Commission and to act in service to the public interest, not the singular desires of a non-resident, commercial enterprise. Reed-Cooke residents should not need to remind District officials that the marginalizing of community concerns acts as a betrayal of trust that Reed-Cooke residents are entitled to have in their elected and appointed officials. In a time of distrust of government, the Office of Planning and Ms. Schellin have done great harm by failing to take into consideration the reasonable concerns of our residents, instead choosing to act by fiat in contravention of law and good public policy.

Inappropriate For Rule Making

For reasons that are not explained by the Office of Planning, the subject Petition for rule making has been inaccurately presented as proposing a needed clarification in the law to accommodate a single entity. That only one entity seeks or will benefit by adoption is clear evidence that no rule making proceeding should be administered for this purpose. Rules are not created for

a single, non-resident entity. They are intended to be general in nature to benefit the public interest, not a private interest.

What the Office of Planning has failed to show is how the public interest, including the residents of Reed-Cooke, will benefit by adoption of the Petition. There is no showing that the variance process has failed or even been tried. There is no study that suggests that residents will benefit from beer sales at the Citadel, which location is the only one to be accommodated by this alleged rule making process. There is no overwhelming necessity to bring this matter before the Commission, either now or at a later time. In point of fact, there is nothing on the record that evinces even an attempt to serve a public interest, which interest remains wholly undefined by the proponents of the Petition.

Were there no additional avenue for Harris-Teeter to gain its authority to sell beer and wine, then there may exist some slim justification for this proceeding. But there is. That Harris-Teeter refuses to take that avenue and has chosen, instead, to lobby and cajole the Office of Planning into its present position is unexplained and inexcusable. But what is equally mystifying is how any experienced member of the Office of Planning would deem this issue suitable for a rule making. There can be only one answer to this mystery – the Office of Planning further recognizes and supports Harris-Teeter's machinations in avoiding community scrutiny before the BZA. No other logical conclusion is evident.

A careful reading of the record to date demonstrates that the Office of Planning seeks to give weight to the Zoning Administrator's errant letter opinion that improperly attempted to equate Harris-Teeter's building permit as grant of a variance to Section 1401.1(b). Having been thwarted to date in an effort to usurp the authority of the BZA by that letter, the Zoning Administrator via the Office of Planning is seeking to gain in this proceeding what was not achieved by the *ultra vires* letter opinion. Said simply, this proceeding includes a "turf war" between the citizens of Reed-Cooke and the existing law on one side; and the Zoning Administrator's desire to accommodate Harris-Teeter by whatever means possible on the other. The RCNA does not know whether the Zoning Administrator's ego was previously stung in the rejection of any relevancy of that letter opinion, but such cannot be a logical basis for this Commission's actions. What is clear under any circumstances is that this Commission is being asked to engage in rule making when the proper course is Harris-Teeter's seeking a variance before the BZA.

Equity Demands Denial

Although Harris-Teeter has suggested before other fora that its investment in the development of the grocery store entitles it to some special treatment under law, this argument is wholly without merit.[19] Harris-Teeter knew or should have known the contents of the District's regulations prior to its entrance into a lease agreement. Certainly, Harris-Teeter has been aware of the contents of the Reed-Cooke Overlay for years. Yet, rather than take necessary steps to abide by the dictates of law, Harris-Teeter has sought to avoid its legal responsibilities, while unilaterally

[19] Insofar as Harris-Teeter was entitled to any incentive to construct its facilities, such incentive has been fully provided by tax breaks and need not be needlessly augmented by adoption of the Petition.

deciding to move its construction forward. Neither the RCNA nor this Commission are responsible for the unilateral and arrogant actions taken by Harris-Teeter, nor do such actions qualify Harris-Teeter for any special consideration within this rule making. To the contrary, Harris-Teeter's obvious flaunting of the law and the jurisdiction of the BZA, its attempted end-run around the Alcoholic Beverage Control Board, and its present effort to circumvent both by seeking a one-person rule, are evidence of the little regard that Harris-Teeter has for affected citizens and for the processes and procedures of the District's regulation.

A person may seek equitably relief when the impact of rule or regulation exacts an unnecessary and unforeseen hardship on that person. Similarly, a class of persons might seek relief from a regulation that, if imposed strictly, would result in unintended harm that is not in the public interest. Neither condition even remotely exists under these circumstances. There exists no unnecessary or unforeseeable hardship caused by requiring Harris-Teeter to seek a variance from the BZA. Harris-Teeter was provided adequate opportunity to seek and obtain a variance when it last appeared before the BZA, yet it unilaterally chose not to do so. Similarly, by the Office of Planning's own admission, there exists no class of persons seeking relief from the existing law; and application of the existing law has not been shown to visit any harm upon any such class. Therefore, there exists no equitable basis for grant of the Petition.

To the contrary, there exists an equitable reason to deny the Petition. Area residents reasonably relied on the content of the Reed-Cooke Overlay in the purchase of their homes. The proposed and devastating change in the existing law is unforeseen by those residents and undermines

their reasonable reliance on the existing Section 1401.1(b). Accordingly, the outcome of a balancing test to determine fundamental fairness is clear. On one hand the Commission may consider the minor effect on Harris-Teeter that a denial of the Petition would cause, i.e. causing Harris-Teeter to simply comply with law and seek the necessary variance. On the other hand, grant of the Petition would exact harm on all residents of the Reed-Cooke District by eliminating rights granted under law, forcing a non-permitted use on residents without the benefit of notice and comment, reverse by fiat long-standing processes and procedures regarding the means of obtaining authority to engage in off-premises alcoholic beverage sales, stand as precedent for future developers that the authority of the BZA can be circumvented by the Office of Planning's creation of "rules" to serve the needs of a single entity, and cause the Commission to be little more than a rubber stamp for improper actions taken by the Zoning Administrator without color of law. All of this harm to residents and the integrity of the District's laws and processes is not worth 1,500 square feet of wine and beer sales.

Said with full candor, the Commission must ask itself what its duty is and to whom does its duty lie. If the Commission's duty is to uphold the law in favor of the public interest, then it should deny the Petition. If the Commission's duty is to assure its impartial nature without regard to the wealth of persons appearing before it, it must deny the Petition. If the Commission deems that its actions cannot be dictated by the misrepresented positions of the Office of Planning, it must deny the Petition. If the Commission deems that rule making is intended to provide general guidelines, not singular relief, it must deny the Petition. If the Commission believes that a developer should not be allowed to create a *fait accompli* by its entrance into a lease agreement, it must deny the Petition.

If the Commission believes that its actions should promote the interests of the Districts' residents, it must deny the Petition. If the Commission deems itself an agent of law, a promoter of values, a voice for the community and its residents, and a bulwark against the bullying tactics of arrogant entities that assume permission even without requesting same, the Commission's course is clear. It must deny the Petition. In sum, equity, fairness and the integrity of law require that the Commission do its duty and deny the Petition.

Conclusion

The RCNA does not take a position within this proceeding on whether Harris-Teeter should be allowed to engage in the non-permitted use of off-premises alcoholic beverage sales. Rather, RCNA states that it vigorously opposes Harris-Teeter gaining such authority via the subject Petition for those reasons stated herein. The Petition should be denied as ill conceived, factually unsupported, based on inaccuracies and misrepresentations, contrary to the public interest, and resounding in a denial of due process rights and equal protection under law. Absent even a scintilla of evidence that demonstrates that the interests of Reed-Cooke residents have been considered much less weighed in the balance, there exists no equitable means by which the Commission can rule in favor of the Petition.

When the Commission asked why the Petition was filed, it was told the Petition was submitted to accommodate one entity and only one entity, Harris-Teeter. It was not brought to assist the surrounding community, benefit the public, improve on community development, or do anything other than allow beer and wine sales by Harris-Teeter. Harris-Teeter's ability to sell beer is a matter

for the BZA and the ABC, not the Zoning Commission. The proposed rule making is not intended to reach beyond the confines of a few aisles inside a grocery store. That is not rule making. That is a discussion for a variance.

Therefore, for the foregoing reasons and for good cause shown, the Reed-Cooke Neighborhood Association respectfully requests that the Commission deny the Petition.

Respectfully submitted,
REED-COOKE NEIGHBORHOOD ASSOCIATION

By _____
Maureen Gallagher, President

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

Attachment A

Excerpts From Record Before the Alcoholic Beverage Control Board

Case No. 61034-05/062P
License No. 73993

November 7, 2006

Mr. Charles A. Burger
Chairman
District of Columbia
Alcoholic Control Board
941 North Capitol Street NE
Suite 7200
Washington, DC 20002

RE: HARRIS TEETER, INC. - APPLICATION FOR RETAIL'S LICENSE CLASS "B" AT PREMISES 1631 KALORAMA RD., NW - CASE NO.: 61034-05/062P; LICENSE NO. 73993

Dear Chairman Burger:

Attached please find a MOTION TO DISMISS submitted on behalf of the Kalorama 7 in the above referenced matter.

Thank you for your consideration.

Sincerely,

Maureen Gallagher
1656 Kalorama Rd., NW
Washington, DC 20009

Darrell Allison
1658 Kalorama Rd, NW
Washington,, DC 20009

The District of Columbia
Alcoholic Beverage Control Board

In the Matter of:	)	
	)	
HARRIS TEETER, INC.	)	Case No. 61034-05/062P
Application For Retailer's License	)	
Class "B" At Premises 1631 Kalorama Rd., N.W.	)	License No. 73993
Washington, D.C. 20009	)	

MOTION TO DISMISS

The Kalorama 7, represented by Maureen Gallagher and Darrell Allison, hereby moves for dismissal of the above captioned application. The application for a retailer license Class "B" cannot be granted as a matter of law, accordingly, it is requested that the application be dismissed with prejudice.

The District of Columbia Municipal Regulations 11, Chapter 14, Reed-Cooke Overlay District (RCOD)'s language is contrary to the application and nothing within the application demonstrates that Applicant even considered that the application is contrary to the RCOD. Accordingly, the Application is fatally defective and should be summarily dismissed. Specifically, the following language is codified within the RCOD:

1401 Use Provisions

1401.1 The following uses shall be prohibited in the RC Overlay District:

(b) Off-premises alcoholic beverage sales;

Although Applicant sought and received variances for its proposed operations and construction that are at odds with some of the language of the RCOD, Applicant did not obtain any ruling or decision from any administrative agency or board that provides an approved variance from the specific language cited above. Accordingly, this issue is one of first impression for any Board or

administrative body. If the Board finds that it is not the appropriate forum for Applicant's receipt of such variance, then the Board should dismiss the application subject to a possible refiling following Applicant's receipt of necessary authority from the appropriate forum.

In its earlier filings with the City, Applicant has "self certified" regarding its compliance with the RCOD, excepting those specific portions for which it has obtained a variance. However, the earlier self certification did not reach the issue before this Board. No where on the record is there any evidence of Applicant's requesting and receiving a variance from Section 1401.1(b) of the RCOD.

Kalorama 7 acknowledges that Applicant is eligible for Special Exceptions to the Use Provisions in accord with Section 1403 of the RCOD. However, such special exceptions would require a specific ruling by the Board of Zoning Adjustment, articulating the scope and nature of that exception. Absent such specificity, this Board would have no means of knowing whether any grant of special exceptions include an exception to the bar on the sale of off-premises alcoholic beverages. This Board should not now be placed in a position of assuming what, if anything, the Board of Zoning Adjustment may or may not have considered in any earlier ruling regarding special exceptions. The burden is upon the Applicant to show as a condition to Applicant's threshold eligibility before this Board that the Board of Zoning Adjustment specifically granted a special exception to Section 1401.1(b) or the application should be summarily dismissed as contrary to law.

Although the entire record of this proceeding and related proceedings demonstrate that Applicant has obtained special exceptions for its overall operation upon the premises, the record is silent as to the issue of alcoholic beverage sales or any special exception granted therefore. Accordingly, at best the Applicant has attempted to circumvent the process by bringing a premature

application to this Board for which the necessary condition precedent cannot be shown to exist. More likely, Applicant is attempting to "bootstrap" improperly the variances previously granted to include the sales of alcoholic beverages.

However, the means and nature and purpose of variances are quite specific to assure that neighborhoods are adequately considered and protected from developers attempting to leverage some permission into a license for unfettered operation and construction. As this Board may note as a portion of Applicant's Motion in Limine, the variances granted to the Applicant were quite specific in nature as to truck traffic and a similar, detailed variance was provided for construction under Section 1403.1(d) of the RCOD related to alleyways. However, Applicant has not presented to this Board any decision which includes a special exception that reaches Section 1401.1(b). Therefore, this Board has no choice under law other than to declare that the Application is defective, failing to be supported by the grant of a special exception under Section 1403 of the RCOD, and must be summarily dismissed, subject to possible refiling if and when Applicant obtains a special exception in support of its application.

For the foregoing reasons and for good reasons shown, the Kalorama 7 respectfully requests dismissal of the above captioned application.

Respectfully submitted,

Maureen Gallagher
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(202) 462-3830
maureen.gallagher@verizon.net

Darrell Allison
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(202) 667-9744
dhadc@aol.com

CERTIFICATE OF SERVICE

We, Maureen Gallagher and Darrell H. Allison, hereby certify that on the _____ day of November, 2006, a copy of the foregoing Motion To Dismiss was sent via certified mail, return receipt requested, to the following:

Paul L. Pascal
Pascal & Weiss
1008 Pennsylvania Avenue, SE
Washington, D.C. 20003

Dorchester 11
c/o Wilson Reynolds
2370 Champlain Street, N.W., Suite 23
Washington, D.C. 20009

Dorchester 43
c/o Campbell C. Johnson
2480 Sixteenth Street, N.W., Apt. 234
Washington, D.C. 20009

Reed Cooke Neighborhood Association
c/o Wilson Reynolds
P.O. Box 21700
Washington, D.C. 20009

_____
Maureen Gallagher

_____
Darrell H. Allison

November 7, 2006

Mr. Charles A. Burger
Chairman
District of Columbia
Alcoholic Control Board
941 North Capitol Street NE
Suite 7200
Washington, DC 20002

RE: HARRIS TEETER, INC. - APPLICATION FOR RETAIL'S LICENSE CLASS "B" AT PREMISES 1631 KALORAMA RD., NW - CASE NO.: 61034-05/062P; LICENSE NO. 73993

Dear Chairman Burger:

Attached please find an OPPOSITION TO APPLICANT'S MOTION IN LIMINE submitted on behalf of the Kalorama 7 in the above referenced matter.

Thank you for your consideration.

Sincerely,

Maureen Gallagher
1656 Kalorama Rd., NW
Washington, DC 20009

Darrell Allison
1658 Kalorama Rd, NW
Washington,, DC 20009

The District of Columbia
Alcoholic Beverage Control Board

In the Matter of:	)	
	)	
HARRIS TEETER, INC.	)	Case No. 61034-05/062P
Application For Retailer's License	)	
Class "B" At Premises 1631 Kalorama Rd., N.W.	)	License No. 73993
Washington, D.C. 20009	)	

OPPOSITION TO APPLICANT'S MOTION IN LIMINE

Maureen Gallagher and Darrell Allison, appearing *pro se*, adjacent property owners who come before this Board to protest the application for retailer license Class "B" at the above captioned premises submitted by Harris Teeter, Inc. ("Applicant"). Ms. Gallagher and Mr. Allison are members of a group of concerned real property owners and residents who believe that grant of the subject application will result in adverse consequences to the surrounding neighborhood, not least of all the peaceful enjoyment of the real property owned by Ms. Gallagher, Mr. Allison and others (collectively "Protestants"). As persons who own and occupy property on Kalorama Road, directly across from the subject premises, Protestants are lawfully persons of interest to this matter. Protestants oppose Applicant's Motion as being without merit or equity and as an attempt to limit improperly the scope of the Board's jurisdiction in this matter. Therefore, Protestants respectfully request that the Motion be denied and in support state the following:

The evidence sought to be excluded by Applicant is relevant to the Board's decision and should not be excluded. Indeed, such exclusion would be contrary to law and precedent; and Applicant's attempt to remove from consideration that evidence is a bald effort to minimize the decision making authority of the Board. Additionally, the Applicant's basis for its Motion involves untested assertions that have not been scrutinized by the Board for accuracy or relevance. Accordingly, Applicant's Motion is both legally and factually improper as a matter of equity and law.

Protestants respectfully direct the Board to the decision, Kopff v. District of Columbia Alcoholic Beverage Control Board, 381 A.2d 1372 (1977), wherein the Court stated clearly that:

> The case law and other legal authorities recognize that the strict rules of evidence applicable to the trial of cases are of limited use in the administrative arena. Because there is no jury to shield, and individual agency members are presumed capable of properly assessing the reliability and weight of evidence, greater flexibility and discretion as to admission are permitted. 2 Dave, Administrative Law Treatise s 14.01 et seq. (1958). Failure to apply these generous principles of admissibility can be a basis for reversal of an agency decision, although prejudice must be shown. Wallace v. District Unemployment Comp. Board, D.C. App., 294 A.2d 177 (1972); Carter-Wallace, Inc. V. Gardner, 417 F.2d 1086 (4th Cir. 1969).

Id. at 1385. Accordingly, the courts have repeatedly found that administrative boards are free and, indeed, encouraged to avoid strict limitations of evidence that might prejudice the process and participants. Instead, a full and open record is deemed appropriate to assist the Board in determining the outcome of a given matter. Conversely, if the record is restricted by actions of the Board, the Board will subject itself to judicial scrutiny to determine, "whether the Board erred in excluding [evidence] and, if so, whether prejudice resulted." Id. On balance, therefore, the Board should deny Applicant's Motion as contrary to the creation of a full and open record upon which the Board would weigh all relevant evidence in arriving at its decision.

1. **Consumer Traffic, Generally**: The Motion requests that any examination of consumer traffic be limited to that traffic generated by persons seeking to obtain alcoholic beverages alone. In making its argument, Applicant opines that compared to the total amount of customer traffic, such traffic is "less than 1% of the sales." Applicant provided no additional evidence in support of this bald statement. The Board has no way of knowing whether this statement is accurate. The burden

of proof remains on the moving party and employing any standard of proof, this statement is without support, citation or meaning for any purpose.

In fact, simple logic further demonstrates that even if the statement were true, the application of that statement to support Applicant's Motion is ridiculous, since Applicant would include in its count of the supposed, remaining 99% of its customers, persons who purchased soda and wine, persons who purchased a pack of cigarettes with their six pack, or persons who purchased a bottle opener to remove beer caps. In essence, the Board is being asked to ignore the customer that purchases a single bag of chips to go with a keg of beer.

The correct issue is, rather, what amount of the total traffic would not patronize the establishment if alcoholic beverages were not available? Said another way, how many customers will go to the store primarily to purchase alcoholic beverages, regardless of whether an additional item is purchased? The issue is the traffic to be generated by the presence of alcohol sales, not whether those same customers make other purchases.

In previous meetings and statements, Applicant has repeatedly claimed that alcohol sales are a vital portion of its business and are expected to add materially to Applicant's expected profits. Yet, for the purpose of its Motion Applicant is attempting to minimize the impact of alcohol sales by tossing out its unsupported, irrelevant 1% figure. Clearly, Applicant cannot have it both ways. The undisputed fact is that proposed alcohol sales will generate a material amount of the total customer traffic. However, in any event the Board should hear evidence regarding traffic figures, including such figures which include persons who purchase alcoholic beverages and other goods. Applicant's Motion, that the Board don blinders and ignore the fact that alcoholic beverage customers often buy

additional goods even if it is just ice, is a request for a draconian limitation of the Board's examination and should be summarily denied.

2. **Peace, order, quiet and the effect of the establishment on residential parking needs and vehicular and pedestrian safety**. Applicant blithely extends its argument to these important issues as well by trying to limit improperly the jurisdiction of the Board. Applicant states, "[t]he vast majority of Applicant's customers purchase food and other groceries and such operations are not subject to regulation by the Alcoholic Beverage Control Board." Motion at 2. Taken alone, the statement is correct insofar as those customers limit their purchases to non-alcoholic items. However, the Board's jurisdiction is clear and inclusive regarding all sales of alcohol, including alcoholic beverages purchased among other items. Applicant's attempt to dissuade the Board from exercising its clear jurisdiction is without merit.

Applicant is proposing to operate an establishment which sells alcoholic beverages. The mere presence of those beverages provides ample jurisdiction to the Board to examine and consider all adverse impacts to the surrounding neighborhood from the operation of the establishment, regardless of whether the store also sells other items. Since Applicant has not chosen to physically and operationally separate its operations between non-alcoholic items and alcoholic beverages, this Board should not be asked to either. Customers' grocery carts can hold both Corona and limes, therefore, that vehicular traffic is clearly within the Board's jurisdiction for examination, as are all of the consequences to the surrounding neighborhood arising from Applicant's unilaterally chosen means of marketing both items together.

It would be a dereliction of the Board's duty not to recognize that issues such as peace, order, quiet and pedestrian safety are of greater concern due to the proposed introduction of alcoholic beverages into the basket of goods to be sold by Applicant. Since other administrative boards may not focus on the effect of alcohol sales on a neighborhood, leaving such considerations to the Board, it is incumbent upon the Board to give strict scrutiny to Applicant's proposals. Accordingly, Applicant's Motion is both jurisdictionally and equitably flawed. The Board has both the jurisdiction and the duty to consider carefully the propriety of the application in view of any adverse effect on the surrounding neighborhood, including adverse impacts to peace, order, quiet and the effect of the establishment on residential parking needs, and vehicular and pedestrian safety. Therefore, Protestants respectfully request that Applicant's Motion be denied and that the Board hear evidence on the effect of all customer traffic which includes purchase of alcoholic beverages.

3. **Truck traffic**. Applicant relies on misapplied law in its Motion requesting that the Board not consider the effect of truck traffic. Citing Kopff v. District of Columbia Alcoholic Beverage Control Board, 413 A.2d 152 (1980),[1] Applicant is stating that the Board's jurisdiction is limited to actions outside the scope of the Board of Zoning Appeals. This is untrue. The cited case noted that the Board properly relied on an issued certificate of occupancy and that it was not compelled by law to consider fire safety related to the total number of diners that an establishment might serve. In that case, the jurisdiction of the Board was not at issue. The issue was whether the Board was correct in not hearing additional evidence on a matter deemed settled by the issuance of the certificate of occupancy.

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[1] Motion at 3.

However, the issue of truck traffic as it relates to alcohol sales, has not been considered or settled in this matter. Nor should the matter be limited to only truck traffic that is solely from beer and wine distributors. As stated *supra.*, the sales of ancillary goods to the consumption of alcohol is within the jurisdiction and area of concern for this Board. Although Protestants, unlike Applicant, would not suggest that the Board is unable to take into consideration all relevant information, including the findings of the Board of Zoning Appeals, Protestants aver that the Board has all necessary jurisdiction to consider all truck traffic in view of the fact that such traffic would occur concurrently with the presence of vehicles operated by persons who are more likely to have consumed alcohol prior to their visit to the premises, a fact not considered by the Board of Zoning Appeals.

Nor did the earlier decision reach any conclusion following consideration of the fact that most alcoholic beverages are sold in glass bottles. Although grocery items are primarily sold in plastic bottles, with less opportunity for breakage; alcoholic beverages are contained in glass bottles that can more easily shatter, causing problems arising both from shards of glass and from the attraction of vermin who might feed upon the spillage. Accordingly, truck traffic which is intended to deliver wine and beer will necessarily create a greater hazard to the surrounding neighborhood than, say, a bread truck. There is nothing in Applicant's Motion which suggests that this fact and other considerations related to alcohol sales were considered previously. Accordingly, the Board is not bound by the earlier decision and its mandate requires that it consider the matter *de novo* for the same reason as it should consider all matters relevant to this application. Such consideration is fully consistent with the Board's jurisdiction and obligations to review carefully the application in view

of Applicant's chosen means of selling alcohol as a material portion of Applicant's entire marketing strategy.

Conclusion

Curiously, Applicant provided no basis for its Motion. Applicant has not stated how it might be harmed by the introduction and consideration of the evidence which it seeks to exclude. Applicant has not claimed that it will be prejudiced by the creation of a full record or the exercise of the total jurisdiction of the Board. Instead, Applicant merely moves the Board to restrict its examination for reasons that are wholly unstated. By failing to provide any basis for its Motion, Applicant has rendered its Motion fatally defective.

Conversely, Protestants aver that the Board's grant of the Motion would prejudice greatly Protestants who are entitled to the creation of a complete record upon which the Board may decide. By grant of the Motion, the Board would limit inequitably Protestants' ability to provide relevant information to the record and would severely cripple Protestants' evidentiary avenues to participate meaningfully in this process. As the courts have long held, denial of the ability to provide evidence into the record, which denial necessarily prejudices the rights of participants, is deemed reversible error. The burden of showing that such a denial of right is appropriate lies squarely upon the Applicant and Applicant has entirely failed to show or even claim why such an action should be taken by the Board.

Therefore, for the above stated reasons and for good cause shown, Maureen Gallagher, individually and as a member of Protestants, hereby respectfully requests denial and dismissal of Applicant's Motion in Limine.

Respectfully submitted,

_____
Maureen Gallagher

_____
Darrell Allison

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CERTIFICATE OF SERVICE

We, Maureen Gallagher and Darrell Allison, hereby certify that on the _____ day of November, 2006, a copy of the foregoing Opposition To Motion In Limine was sent via certified mail, return receipt requested, to the following:

Paul L. Pascal
Pascal & Weiss
1008 Pennsylvania Avenue, SE
Washington, D.C. 20003

Dorchester 11
c/o Wilson Reynolds
2370 Champlain Street, N.W., Suite 23
Washington, D.C. 20009

Dorchester 43
c/o Campbell C. Johnson
2480 Sixteenth Street, N.W., Apt. 234
Washington, D.C. 20009

Reed-Cooke Neighborhood Association
Wilson Reynolds
P.O. Box 21700
Washington, D.C. 20009

_____
Maureen Gallagher

_____
Darrell Allison

THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

IN THE MATTER OF:	)	
	)	
HARRIS TEETER, INC.,	)	**CASE NO.: 61034-05-062P**
APPLICATION FOR RETAILER'S	)	**LICENSE NO.: 73993**
LICENSE CLASS "B" AT PREMISES	)	
1631 KALORAMA RD., N.W.	)	
WASHINGTON, D.C. 20009	)	

OPPOSITION TO APPLICANT'S MOTION TO STRIKE NON-GERMANE EVIDENCE AND REQUEST FOR ORDER DENYING MOTION TO DISMISS

The Kalorama 7 (Movants) hereby file its opposition to Applicant's Motion To Strike Non-Germane Evidence and Request For Order Denying Motion To Dismiss (Motion To Strike) filed within this proceeding. In its Motion and supporting Findings of Fact and Conclusions of Law, Movants carefully set forth the testimony of the Board of Zoning Adjustment (BZA) statements within the hearing arising out of Applicant's request for variances. In its Motion To Strike, Applicant does not dispute any of the Findings of Fact or Conclusions of Law offered by Movants. Instead, Applicant simply seeks to wipe away the Motion by stating, without any examination of the procedure employed by the BZA or the subject matter of the BZA's earlier actions, that the issues raised in the Motion and supportive pleadings are "non-germane" or "irrelevant". However, within its Motion To Strike, the Applicant agrees with every element of the Motion, except one.

The issue of whether alcoholic beverages may be sold by Applicant is a matter for the BZA. Both parties agree on this issue. The law is quite clear and neither party is objecting to the BZA's exclusive authority over this issue. Accordingly, Applicant's reference to case law in support of this issue is wholly unnecessary. Movants fully agree.

Further, both parties agree that the issue was raised by Movants before the BZA pursuant to the earlier hearings. And, both parties agree that the BZA determined that the issue was not germane "to the applications before them." Motion To Strike at 2. Where the parties diverge is on the issue of WHY the BZA made that determination. The record is clear. The BZA's determination was predicated on its official notice that the Applicant had not placed before the BZA any application for variance of the Reed-Cooke Overlay as it pertains to sales of alcoholic beverages. Having not been presented with a request for variance of that specific prohibition, opposition which focused on that issue was deemed irrelevant. The BZA was correct. It was not presented with the question and, therefore, narrowed its scope to deal with only the specific variances which were before it. Applicant's suggestions to the contrary are wholly without merit and continue a pattern of misrepresentation before this Board.

As full illustration of the veracity of Movants' statements above, attached hereto is the full text of the BZA's Decision and Order. No where in the BZA's decision does the word "alcohol" appear. No where within the decision does the BZA state that it has granted a variance of Section 1401.1, that same variance which the BZA claimed in its hearings that Applicant has to have. The only description of the proposed use of the subject property is as a grocery store. As to the cited section within Applicant's Motion To Strike, the full text reads as follows:

> 23. A grocery store, retail or service establishment and office use are permitted as a matter of right in the C-2-B zone. 11 DCMR §§ 701.4(l), 701.(c), 721.1. None of the proposed uses are prohibited within the Reed-Cooke overlay district pursuant to §1401.1.

Again, the BZA ruled correctly. An entity may operate "a grocery store, retail or service establishment" as a matter of right. What is not mentioned by the BZA and is not a matter of right is the sale of alcoholic beverages. The BZA listed those uses which the Applicant proposed. Applicant never proposed the sale of alcoholic beverages, never requested a variance for such purposes, and never placed the question before the BZA, therefore, the BZA did not rule on the matter. Instead, the BZA only ruled upon those uses described by Applicant in its application for variances, which did not include a request for variance from Section 1401.1 regarding alcoholic beverage sales. Therefore, when the BZA decided that "[n]one of the proposed uses are prohibited within the Reed-Cooke Overlay..." the BZA spoke to the proposed uses as described by Applicant, which description never included sale of

alcohol. Said simply, Applicant did not propose it, so the BZA did not rule on it and, instead, ruled only on what was in front of it, which did not include the issue of alcohol sales.

As explained above and as is fully supported by the specific terms of the BZA decision attached hereto, Applicant is once again trying to misrepresent the actions of the BZA. There is no reasonable basis for Applicant's claims. There is no variance granted. There is no such language within either the hearing testimony or the BZA's decision. In sum, there is nothing on the record that supports Applicant's position and everything on the record fully undermines it.

Given Applicant's recalcitrant behavior and specious filing of its application for which it knows no good basis lies; and given the unnecessary and wilful expenditure of this Board's and Movants' resources to respond first to a frivolous application and later, to point out to the Applicant again and again that its application is, at best, premature; this Board should act promptly and properly to dismiss the application. The Applicant is not eligible. The application is not ripe for consideration. The variance has not been granted.

If it had been granted, Applicant would have presented clear evidence of that grant to this Board, not crafted snippets of decisions that suggest that a variance might exist or case law that is wholly off point. What the Board would be reviewing is a variance, not Applicant's meandering and meaningless advocacy.

Respectively Submitted,

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CERTIFICATE OF SERVICE

We, Maureen Gallagher and Darrell H. Allison, hereby certify that on the _____ day of December, 2006, a copy of the foregoing OPPOSITION TO APPLICANT'S MOTION TO STRIKE NON-GERMANE EVIDENCE AND REQUEST FOR ORDER DENYING MOTION TO DISMISS was sent via first class mail, postage prepaid, to the following:

Paul L. Pascal
Pascal & Weiss
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Washington, D.C. 20003

Dorchester 11
c/o Wilson Reynolds
2370 Champlain Street, N.W., Suite 23
Washington, D.C. 20009

Dorchester 43
c/o Campbell C. Johnson
2480 Sixteenth Street, N.W., Apt. 234
Washington, D.C. 20009

Reed-Cooke Neighborhood Association
c/o Simi Batra/Peter Lyden
P.O. Box 21700
Washington, D.C. 20009

_____
Maureen Gallagher

_____
Darrell H. Allison

The District of Columbia
Alcoholic Beverage Control Board

In the Matter of:	)	
HARRIS TEETER, INC.	)	Case No. 61034-05/062P
Application For Retailer's License	)	
Class "B" At Premises 1631 Kalorama Rd., N.W.	)	License No. 73993
Washington, D.C. 20009	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW

The Kalorama 7, represented by Maureen Gallagher and Darrell H. Allison, hereby provides to the Board its finding of fact and conclusions of law relevant to the Board's consideration of the above captioned application and the pending Motion To Dismiss filed by the Kalorama 7 in this matter. This submission is made in response to the Board's request for a fuller record which it may consider in determining what action might be appropriate regarding the application and the Motion To Dismiss. Accordingly, the following is stated:

1. **That Applicant has not addressed within its application the legal relevance of the Reed Cooke Overlay District ("RCOD") and the prohibition contained thereunder regarding the operation of a business engaged in the sale of alcoholic beverages, is tantamount to a *prima facie* failure to provide required evidence in support of its application.**

This Board is charged with the duty to determine whether the public interest, convenience and necessity would be served in the grant of an application to sell alcoholic beverages. As this duty is the nexus of the Board's jurisdiction and the stated basis for the application, Applicant is charged with the duty to bring forth evidence in support of its application that such activity is consistent with the Board's mandate. Inherent to the consideration of the application is the proposed location of the business and its attendant impact upon the surrounding community, including adjacent property owners such as the Kalorama 7.

The Kalorama 7 aver that the specific language of the RCOD is reflective of their concerns. That Applicant has unilaterally chosen not to address or, more likely, has chosen to ignore the specific language of the RCOD demonstrates that Applicant is unwilling or unprepared to provide required evidence that the proposed activity is consistent with community concerns, standards, or even a modicum of interest in the impact that its proposed activity will have on adjacent property owners or the community as a whole. Accordingly, Applicant is unprepared to make a credible showing that its proposed use is in the public interest, and meet its primary burden of proof

before this Board. For this reason, the application should be summarily dismissed.

2. The specific language of the RCOD is legally applicable, relevant and controlling in the Board's decision regarding this application.

The District of Columbia Municipal Regulations 11, Chapter 14, Reed-Cooke Overlay District (RCOD)'s language is contrary to the application and nothing within the application demonstrates that Applicant even considered the RCOD. Accordingly, the Application is fatally defective and should be summarily dismissed. Specifically, the following language is codified within the RCOD:

1401 Use Provisions

1401.1 The following uses shall be prohibited in the RC Overlay District:

(b) Off-premises alcoholic beverage sales;

As stated in the earlier-filed Motion To Dismiss, there is no evidence that any administrative body waived, caused a variance, provided an exception, or otherwise rendered the above language inapplicable to Applicant's proposed use. Certainly, Applicant has not brought forth or included as a portion of its application any such decision. Accordingly, this Board must find that the cited language within the RCOD is controlling for all purposes as it pertains to Applicant's eligibility to bring its application at this time. Even a cursory reading of the RCOD language and application of the specific prohibition contained thereunder would cause this Board to conclude that it is without authority to grant special exception to Section 1401.1(b), conditionally or otherwise.

3. The authority and jurisdiction to waive or provide a variance to Section 1401.1(b) rests solely with the Board of Zoning Adjustment and nothing within the RCOD provides any authority within this Board to grant a special exception, conditionally or otherwise.

Kalorama 7 acknowledges that Applicant is eligible for Special Exceptions to the Use Provisions in accord with Section 1403 of the RCOD. However, such special exceptions would require a specific ruling by the Board of Zoning Adjustment, articulating the scope and nature of that exception.

The burden is upon the Applicant to show as a condition to Applicant's threshold eligibility before this

Board that the Board of Zoning Adjustment specifically granted a special exception to Section 1401.1(b) or the application must be summarily dismissed as contrary to law. The Kalorama 7 aver that Applicant cannot meet this eligibility requirement and can provide no proof that such a special exception was ever requested or granted. To the contrary and as discussed below, the Board of Zoning Adjustment specifically stated in its treatment of the variances sought by Applicant that it was not ruling on any such exception.

4. Applicant's suggestion that its proposed sale of off-premises alcoholic beverages was an "accessory use" granted by the Board of Zoning Adjustments is either a misrepresentation or, at the very least, wholly disingenuous.

Insofar as this Board considers the character qualifications of applicants, Applicant's assertion of an "accessory use" grant by the BZA is wholly without merit and misrepresents the official record of this matter. The relevant Public Hearings before the Board of Zoning Adjustment (BZA) occurred on November 29, 2005; January 10, 2006 and July 11, 2006. The Kalorama 7 respectfully requests that this Board take judicial notice of the contents of the official transcripts from those hearings, in particular the following:

> "[w]hat is critical to all cases is this. You should know full well that at the end of a hearing on a case, the record will be closed. It's important to understand that because the Board ...only deliberates on the record that is created before us . . ." BZA Transcript, 11/29/05 at pages 7-8.

Therefore, if the BZA had granted the special exception to the RCOD, that special exception would have been granted on the record and pursuant to the record created by the BZA's treatment of Applicant's specific requests for variance. There is no such record. Instead, the BZA described the specific application upon which it would rule as follows:

> "Application 17397 of Jemal's Citadel LLC, pursuant to 11 DCMR section 3103.2, for a variance from the rear yard requirements under section 774, a variance from the nonconforming structure requirements under subsection 2001.3, a variance from the requirement to provide a loading berth that is 55 feet deep under subsections 2201.1 and 2201.6, to allow a mixed use project including a grocery store and general offices." Id at Page 45.

This Board may take official notice that the above description does not cite any reference to the RCOD, including without limitation, Section 1401.1(b). Therefore, Applicant did not seek and did not obtain any special exception to that Section and any suggestion to the contrary by Applicant is belied by the record.

Indeed, Applicant testified in the hearings before the BZA on 11/29/05, and provided specific evidence regarding the only variances sought before the BZA, including the introduction of expert witnesses. Applicant

never suggested, intimated, or provided even a scintilla of evidence in support of off-premises alcoholic beverage sales and no witness introduced by Applicant spoke to this issue. Therefore, as stated by Commissioner Jeffries, the BZA deemed that "our focus is very narrow" Id. at page 71. In fact, Commissioner Jeffries cautioned the parties that the BZA would maintain its narrow scope and confine its consideration to the specific variances sought by the Applicant stating, "[t]his is a very narrow window the way I read it, unless someone else sees it differently, but I think the relief that is being requested is very narrow." Id.

The hearing transcript of 11/29/06 speaks to those variances from those activities which Applicant could engage in as a "matter-of-right" which include the operation of a grocery store. However, pursuant to the RCOD the sale of off-premises alcoholic beverages is not a matter of right and requires a special exception. Accordingly, the BZA only considered the sale of groceries, not alcoholic beverages, in its deliberations. Any attempt by Applicant to characterize the deliberations of the BZA as contemplating alcoholic beverages sales as a portion of its decision is simply false. Applicant admitted that no such variance or special exception was sought in that testimony provided by Mr. Williams on behalf of Applicant who stated to the BZA:

> The variances that are being sought here are two very, very, very specific things and they run not to what is the purpose of the C-2-B Zone or what is the purpose of the RC Overlay, but rather they run to the question of can we meet a technical requirement? (emphasis added)

Therefore, by Applicant's own admission before the BZA, it did not seek any special exception to the RCOD and sought, instead, to narrow the scope of the BZA's consideration to only technical requirements regarding such things as the size of the loading dock.

At the 11/29/05 hearing, the Kalorama 7 provided testimony and written evidence opposing the Applicant's requests before the BZA. *See*, Attachment A hereto. Within that written testimony, Kalorama 7 specifically noted that the proposed activity was in violation of Section 1401.1(b) and, therefore, the variances sought should not be granted as the underlying issues treated by the RCOD had not been addressed by the variances sought. At the least, that written testimony placed the Applicant on actual notice that its ability to proceed toward obtaining necessary authority for engaging in off-premises alcoholic beverage sales would require compliance with the RCOD. That Applicant chose unilaterally not to amend its application before the BZA to include this issue does not provide a basis for this Board to do what Applicant intentionally chose to ignore.

But to be extremely clear, it must be noted that at no time did the BZA suggest that a special exception to the RCOD was not required or that its recognition of the Applicant's intention to operate a grocery store extended to the sale of alcoholic beverages. Instead, the BZA found the issue or alcohol sales outside of the scope of its narrow examination of the request for variances brought before it by Applicant. When the issue of off premises alcohol sales was raised, *see*, Id. at page 325, Vice Chair Miller explained that "I don't want to have too much exchange over that, but I just want to say that it can apply if you can weave in your arguments with respect to the adverse impacts related to the relief that is being sought or it may apply in another forum. You may have another way to use the Reed Cooke Overlay to seek relief, but it just may not be in this particular case." Id. at Page 326. Essentially, the BZA stated that a request for special exception regarding alcohol sales was not before it, therefore, arguments or protests based on alcohol sales were not relevant to the matters before the BZA. Contrary to the BZA's position, off-premises alcohol sales are specifically before this Board and, therefore, the relevance of the Section 1401.1(b) is without question.

At the BZA hearing of 1/10/06, Chairperson Griffis again summarized the scope of the BZA's consideration, stating, "when we come down, what we have and what we're talking about is the size of a loading berth, the relief from that, and the provision of the rear yard." BZA Transcript, 1/10/06 at page 11. Therefore, despite the Kalorama 7's attempt to get the BZA to address the RCOD as a relevant consideration in the BZA's deliberations regarding the variances requested, the BZA declined to take that step and, instead, maintained its very narrow scope to the two aforementioned issues. The BZA's motion to grant the variances requested by Applicant repeats the description of the matters before the BZA as were stated on 11/29/06 and does not include any reference to Section 1401.1(b) specifically or by inference, nor any portion of the RCOD.

Finally, if this Board requires additional proof of the BZA's non-treatment of the specific issue of alcohol sales, the BZA's final hearing dealt with a motion to reconsider its granting of the specific variances, which motion noted the BZA's failure to consider Section 1401.1 of the RCOD. The BZA denied the motion for the following stated reasons:

> I'm, frankly, very certain that the Board is not making an assertion that relief is or is not required, it was required, it was not requested.
>
> And if it's not requested, obviously, it wasn't before us, so how can we bring a motion to reconsideration of our decision, based on relief that actually wasn't requested of us, and having a rehearing on that issue of which wasn't part of the application, would be somewhat fruitless or it would, in fact, be stepping outside of our jurisdiction, I believe, in asserting to an applicant what relief they should come for before us with. BZA Transcript, 07/11/06 at Page 108. (emphasis

added)

Therefore, the BZA stated quite clearly two relevant points. First, that the relief, *i.e.* the grant of special exception to Section 1401.1 of the RCOD, is required under law. And, second, that the relief was not requested by Applicant. Therefore, Applicant's suggestion that its operation of a grocery store includes off-premises alcoholic beverage sales as an "accessory use" approved by the BZA is incorrect, both legally and factually. Perhaps of even greatest significance, Applicant's statement to this Board was a knowing misrepresentation. Given Applicant's actual knowledge of the foregoing BZA proceedings and Applicant's participation in those hearings with the specific intent to narrow the BZA's consideration to only those "technical" issues raised, its performance before this Board evinces a total lack of candor.

5. Grant of conditional authority is unwarranted and inequitable and outside of the jurisdiction of this Board.

The members of this Board informally suggested that some form of conditional authority might be granted to Applicant until such time as it might apply for a special exception before the BZA. With all due respect to this Board, the acts and omissions of the Applicant do not warrant the grant of any authority, including conditional authority. Before this Board is an Applicant that has not been negligent, but rather, recalcitrant in meeting its obligations under the RCOD. Applicant did not simply forget a step in the process. Applicant ignored the step and tried, instead, to get this Board to believe that the BZA decided issues which Applicant, by its own actions and admissions, intentionally never placed before the BZA. In the words of the BZA, "it was required, it was never requested." Id. Instead, Applicant sought to short circuit the process by ignoring the requirements of the RCOD and tried to slip one past this Board. Applicant's actions are too slick by half. This Board should not reward such behavior, but rather, discourage this Applicant and others from attempting to bring their applications before this Board based on false or highly distorted testimony.

Nor should the BZA be made to decide, if and when the matter comes before it, whether a special exception to Section 1401.1(b) is appropriate at a time during which Applicant is operating under some conditional authority. The grant of conditional authority would allow Applicant to mount improperly equities in its favor based on actions taken pursuant to that conditional authority and then argue to the BZA that it might be injured if the BZA did not grant a special exception. The net effect would be an improper reversal of the burden of proof, relieving to some material extent Applicant's obligation to prove to the BZA that it was entitled to grant of a

special exception to the clear prohibitions contained within the RCOD.

Concurrently, adversely affected adjacent property owners would be made to suffer during the pendency of that conditional authority without the benefit of due process, *i.e.* the right to challenge the grant of the special exception. This cart before the horse result is not contemplated under the RCOD. To the contrary, the RCOD is quite clear that the special exception must be granted prior to the operation of prohibited enterprises. Stated plainly, the obvious intent of the RCOD is to protect the community, not provide some unjustified advantage for non-compliant developers. Accordingly, the Kalorama 7 respectfully aver that this Board does not have jurisdiction or authority to grant conditional authority just as the BZA stated that it did not have authority to treat a matter which is not before it. What is not before this Board is a request for special exception. Therefore, this Board cannot grant or cause, even conditionally, a special exception, particularly when all authority to grant a special exception lies within the jurisdiction of another forum.

Conclusion

Applicant is not entitled to have considered its application. It is not legally eligible for the license requested. It has made no effort to obtain eligibility. It has intentionally avoided seeking the necessary eligibility which the BZA stated was required. It has intentionally misstated the scope of the BZA's grant of variances. Its claims regarding "accessory use" are disingenuous and a knowing misrepresentation of the intention and the effect of its earlier actions before the BZA. Applicant has, therefore, demonstrated that it is ineligible as a matter of law, equity and principle to hold the requested license at this time, conditionally or otherwise.

The Kalorama 7, therefore, respectfully request that the Application be summarily dismissed as contrary to law and equity, and not subject to resubmission until and unless Applicant acquires all threshold eligibility required, including obtaining any and all special exceptions to the RCOD as are mandated under law.

Additionally, and as this Board may find reasonable and appropriate, the Kalorama 7 requests that this Board take such punitive action as it deems appropriate in recognition of Applicant's illegal and intentional end run around the dictates of the RCOD, the decisions of the BZA, and its obligations to deal in total candor with this Board. It cannot be without notice that the Kalorama 7 has spent considerable resources to provide to all interested for the community's concerns. The Kalorama 7 opposed the Applicant's later withdrawn PUD; appeared before the BZA and provided good faith testimony; and has now been placed to the improper burden to point out to this Board Applicant's lack of fidelity to the mandates of law and process. The Kalorama 7 is prepared to expend its resources appropriately to exercise its due process rights. However, in recognition of the obvious fact that the Kalorama 7 has been unfairly and unnecessarily burdened by its appearance before this Board due solely to the

improper actions of Applicant; and this Board has also been made to expend its limited resources to address an application which was knowingly placed before it without color of law, punitive action is appropriate. Therefore, for the above stated reasons and for good reasons shown, the Kalorama 7 request that the application be dismissed and that such punitive action be taken as the Board deems appropriate to discourage such activities by this and future applicants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We, Maureen Gallagher and Darrell H. Allison, hereby certify that on the 29th day of November, 2006, a copy of the foregoing Findings of Fact and Conclusions of Law was sent via certified mail, return receipt requested, to the following:

Paul L. Pascal
Pascal & Weiss
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Reed-Cooke Neighborhood Association
c/o Simi Batra.Peter Lyden
P.O. Box 21700
Washington, D.C. 20009

Maureen Gallagher

Darrell H. Allison

Attachment B

Zoning Commission Order 523-A, Case No. 88-19 (2/11/91)

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER 523-A
Case No. 88-19
(Reed-Cooke Special Treatment Area:
Text and Map Amendment)
February 11, 1991

The Zoning Commission initiated this case to consider amendments of the text and map of the Zoning Regulations that would implement the Comprehensive Plan for the National Capital, and in particular, Section 1128 of the Land Use Element, which reads as follows:

Section 1128. Reed-Cooke Special Treatment Area

(a) The Reed-Cooke area is designated as a special treatment area.

(b) The policies established for the Reed-Cooke special treatment area are as follows:

(1) Protect current housing in the area, and provide for the development of new housing.

(2) Maintain heights and densities at appropriate levels; and

(3) Encourage small-scale business development that will not adversely affect the residential community.

D.C. Law 8-129, the District of Columbia Comprehensive Plan Amendments Act of 1989, became effective on May 23, 1990. Law 8-129 did not amend Sec. 1128; however, Sec. 2(a)(10)(L) of Law 8-129 adopted Sec. 1136(b)(42) to provide that the Generalized Land Use Map, as revised, would generally depict the Reed-Cooke Special Treatment area as "included in the moderate density residential land use category."

The Zoning Commission believes that the action that it effects by this order harmonizes Sec. 1128 and Sec. 1136(b)(42) of the Land Use Element. The rezoning action protects current housing and provides for the development of new housing, by rezoning the C-M-2 zoned portions to R-5-B, C-2-A, or C-2-B, within the Reed-Cooke (RC) Overlay. These zoning map changes provide a favorable zoning environment for continued residential and new residential development.

This contrasts sharply with the previous C-M-2 zoning, under which no new dwelling would be allowed. See 11 DCMR 800.4.

Consideration of this case has been long and has presented the Commission with the need to make a difficult choice. The amendment to the Land Use Element reflects the same difficulty. Existing residential, commercial, and industrial uses are juxtaposed in the area. All are thriving, at least sufficiently to deserve protection. These uses are not easily made compatible, and their proximity causes problems that detract from the reasonable enjoyment of the residential uses. The difficulties are compounded by narrow, crowded streets, and sharply-angled and dog-leg intersections.

The Office of Planning conscientiously crafted a proposal that undertook to resolve these issues. The OP proposal clearly established the correct direction and included the essential elements of the decision that the Commission has reached. That proposal was to rezone the area to C-2-B within the RC Overlay. OP concluded that a C-2-B base zone would protect and encourage residential uses consistently with the Comprehensive Plan, and at the same time provide a greater measure of viability for the established commercial and industrial uses, again consistent with the plan, than would an R-5-B base.

The Commission's conclusion is different in several ways from the OP recommendation, but is essentially based on the OP analysis. The Commission has decided that a substantial area of R-5-B base zoning is reasonable and necessary to protect current housing and provide for the development of new housing, and that a lower height limit is necessary to effect the same policies.

The final action that the Commission effects by this Order is based upon two notices of proposed rulemaking, which appeared in the D.C. Register on August 3, 1990, and November 9, 1990 (37 DCMR 5106 and 7139, respectively). The second notice followed a public hearing on September 13, 1990, at which the Commission considered several issues that were not within the scope of the earlier public hearing. The comments on the proposed rules are set forth below.

RAM, the Reed-Cooke Neighborhood Association, urged that special exceptions not be allowed as a means of relief from the RC Overlay provisions; that access to and from parking uses be limited to streets wider than sixty feet; and that assembly halls, auditoriums, and public halls, be added as prohibited uses. RAM also observed that the Citadel Soundstage had stopped operating.

assembly halls, auditoriums, and public halls, be added as prohibited uses. RAM also observed that the Citadel Soundstage had stopped operating.

ANC 1-C continued to urge the Zoning Commission to set a hearing on pure residential zoning; limit height to 50 feet, including roof structures within the 50-foot limit; and provide linkage for housing for low and moderate income families, with the benefits linked to the Reed-Cooke area. ANC 1-C also supported proposed 11 DCMR 1400.5(c) and (d), and 11 DCMR 1401.1(u) through (x).

The 18th & Columbia Road Business Association supported the 50-foot height limit; parking uses, with ANC review, rather than as a special exception; and flexibility for the height and floor area of PUDS.

A number of property owners or their counsel requested particular exemptions or changes to accommodate various specific properties, including the Security Storage Site at 1701 Florida Ave., the site leased by C&P Telephone Co. at 1711 Florida Ave., and the former National Geographic warehouse at 1707 Kalorama Road.

The Zoning Commission referred both notices of proposed rulemaking to NCPC, the National Capital Planning Commission. By comments dated October 4, 1990, and December 14, 1990, NCPC reported that the proposed amendments would not adversely affect the federal establishment or other federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan.

At its meeting on February 11, 1991, the Zoning Commission considered the written comments, and determined:

1. Deletion of proposed sub-sections 1401.2 and 1401.3 is appropriate, because of the termination of the particular use that the provisions would have protected;

2. The preferred version of proposed sub-section 1402.1 is the version that includes an incentive to provide low and moderate income household units;

3. It would not be practical to prohibit access to parking uses from streets that are not wider than sixty feet; and

4. Other recommended changes have been considered, but do not require explicit discussion.

The Zoning Commission believes that the proposed amendments to the Zoning Regulations are in the best interest of the District of Columbia, are consistent with the intent and purpose of the Zoning Regulations and Zoning Act, are not

inconsistent with the Comprehensive Plan for the National Capital, and will appropriately implement and advance the objectives and policies established in the Comprehensive Plan.

In consideration of the reasons set further herein, the Zoning Commission hereby orders APPROVAL of amendments to the Zoning Regulations to establish and map a Reed-Cooke Overlay Zone District, and make related amendments to the Zoning Map. The specific amendments to the Zoning Regulations are as follows:

1. Amend the text of the Zoning Regulations by adopting a new Chapter 14 of Title 11, to read as follows:

CHAPTER 14 REED-COOKE OVERLAY DISTRICT

1400 GENERAL PROVISIONS

1400.1 The Reed-Cooke Overlay District is applied to the portions of Squares 150, 2557, 2558, 2560, 2562, 2563, 2566, 2567, and 2572 in the Reed-Cooke Special Treatment Area, as defined in the Comprehensive Plan, that are zoned non-residentially as of January 1, 1989.

1400.2 The purposes of the District are as follows:

(a) To implement the objectives of the Reed-Cooke Special Treatment Area (Section 1128 of the Comprehensive Plan as adopted), which are to:

(1) Protect current housing in the area, and provide for the development of new housing;

(2) Maintain heights and densities at appropriate levels; and

(3) Encourage small-scale business development that will not adversely affect the residential community.

(b) To ensure that new non-residential uses serve the local community by providing retail goods, personal services, and other activities that contribute to the satisfaction of unmet social, service, and employment needs in the Reed-Cooke and Adams-Morgan community; and

(c) To protect adjacent and nearby residences from damaging traffic, parking, environmental, social, and aesthetic impacts.

1400.3 The Reed-Cooke Overlay District and the underlying commercial and residential zone districts shall together constitute the Zoning Regulations for the geographic area identified in sub-section 1400.1.

1400.4 Where there are conflicts between this chapter and the underlying zoning district, the more restrictive regulations shall govern.

1400.5 In addition to other applicable provisions of this title, the requirements of this chapter shall apply to the following:

(a) All new construction;

(b) All additions, alterations, or repairs that, within any 18 month period exceed in cost 50 percent (50%) of the assessed value of the structure as set forth in the records of the Office of Property Assessment on the date of the application for a building permit;

(c) Any use that requires a change in the use listed on the owner's or lessee's certificate of occupancy; and

(d) Any existing use that requires a new permit from the Alcoholic Beverage Control Board.

1400.6 If there is a dispute between the property owner and the Zoning Administrator about the cost pursuant to sub-section 1400.5(b), the cost shall be determined by the average of the estimates furnished by three independent qualified contractors, the first of whom shall be selected by the owner, the second of whom shall be selected by the Zoning Administrator, and the third of whom shall be selected by the first two contractors.

1400.7 The estimates provided for by sub-section 1400.6 shall be prepared and submitted according to a standard procedure and format established by the Zoning Administrator, and the cost of estimates shall be at the expense of the property owner.

1401 USE PROVISIONS

1401.1 The following uses are prohibited in the Reed-Cooke Overlay District:

(a) Bar or cocktail lounge;
(b) Off-premises alcoholic beverage sales;
(c) Restaurant or fast food restaurant;
(d) Hotel or inn;
(e) Transient accommodations that are not home occupations;
(f) Movie theater;
(g) Gasoline service station or repair garage;
(h) Automobile laundry;
(i) Drive-through;
(j) Automobile or truck sales;
(k) Boat or other marine sales;
(l) Motorcycle sales or repair;
(m) Automobile rental agency that stores or services automobiles within the Overlay District;
(n) Billiard parlor or pool hall;
(o) Video game parlor;
(p) Bowling alley;
(q) Funeral mortuary or other similar establishment;
(r) Parcel delivery service establishment other than one that is exclusively dedicated to serving a sound stage or a movie, video, or television production facility that existed on the effective date of this chapter;
(s) Veterinary hospital;
(t) On-premises dry cleaning establishment;
(u) Assembly hall, auditorium, or public hall;
(v) Bus passenger depot;
(w) Antenna tower in excess of twenty (20) feet in height;
(x) Satellite reception dish that is greater than fifteen (15) feet in diameter; and
(y) Any use prohibited in the CR District by sub-section 602.1 of this title, except a parking lot as permitted by sub-section 1403.2 of this chapter.

1402 HEIGHT AND BULK PROVISIONS

1402.1 The maximum height permitted in the Reed-Cooke Overlay District shall not exceed forty (40) feet plus roof structure as defined in this title; provided that in the RC/C-2-B District the Board of Zoning Adjustment may approve a maximum height of fifty (50) feet with appropriate set-backs from the street, plus roof structures, subject to

determination by the Board that the project will provide for the on-site construction or substantial rehabilitation of low and moderate income household units, as defined by the regulations of the Department of Housing and Community Development of the District of Columbia, of a total gross floor area equal to fifty percent (50%) of the additional gross floor area made possible by this exception.

1402.2 For the purpose of this chapter, no Planned Unit Development shall exceed the matter-of-right height, bulk, and area requirements of the underlying district.

1403 EXCEPTIONS

1403.1 An exception from the requirements of this chapter shall be permitted only if granted by the Board of Zoning Adjustment as a special exception after a public hearing, and subject to the following criteria:

(a) The use, building, or feature at the size, intensity, and location proposed will substantially advance the stated purposes of the Reed-Cooke Overlay District;

(b) Vehicular access and egress shall be designed and located so as to minimize conflict with pedestrian ways, to function efficiently, and to create no dangerous or otherwise objectionable traffic condition;

(c) Adequate off-street parking shall be provided for employees, trucks, and other service vehicles;

(d) If located within a C-2-B zone, the use shall not be within 25 feet of a Residence District, unless separated therefrom by a street or alley;

(e) Noise associated with the operation of a proposed use will not adversely affect adjacent or nearby residences;

(f) No outdoor storage of materials, nor outdoor processing, fabricating, or repair shall be permitted; and

(g) The use, building, or feature at the size, intensity, and location proposed will not adversely affect adjacent and nearby property or be detrimental to the health, safety, convenience, or general welfare of persons living, working, or visiting in the area.

1403.2 A parking lot or parking garage shall be permitted if approved by the Board of Zoning Adjustment as a special exception, subject to the following:

(a) The parking lot or garage shall meet the conditions specified in sub-sections 214.4 through 214.8 of chapter 2 of this title;

(b) The parking lot or garage shall meet the conditions set forth in sub-section 1403.1 of this section; and

(c) The Board may require that all or a portion of the parking spaces be reserved for residential parking, unrestricted commercial parking, accessory parking for uses within 800 feet, and shared parking for different uses by time of day.

2. Rezone from C-M-2 to RC/C-2-B the following lots and squares:

a. In Square 2560, Lots 64, 125, 875, and 882;

b. In Square 2572, Lot 36;

c. In Square 2562, all lots now zoned C-M-2 and not occupied by the Marie Reed School, including Lots 95, 97, and 824;

d. In Square 2567, Lots 58 through 60, 81, and 851;

e. In Square 2566, all lots now zoned C-M-2 and not rezoned to RC/R-5-B in the following paragraph numbered 3; and

f. Any lot in Square 2560, 2567, or 2572 that is now zoned C-M-2 and not specifically listed in this paragraph.

3. Rezone from C-M-2 to RC/R-5-B the following lots and squares:

a. In Square 2563, Lots 73, 79 through 81, 97, 98, 101, 816, 862, 879, 880, 883 through 885, and 887;

b. In Square 2558, the portion of the Square that is now zoned C-M-2;

c. In Square 2562, the portion of the Square that is now zoned C-M-2 and occupied by the Marie Reed School;

d. In Square 2566, Lot 36; Lot 55 (or 95) (occupied by Colortone Press); and Lots 839 and 841 from Ontario Road to a line parallel to and 70 feet east of Ontario Road; and

e. Any lot in Square 2558 or 2563 that is now zoned C-M-2 and is not specifically listed in this paragraph.

4. Rezone from C-M-2 to RC/C-2-A following lots and squares:

a. In Square 2557, Lot 800;

b. In Square 150, Lot 800; and

c. Any lot in Square 150 or 2557 now zoned C-M-2, and not specifically listed in this paragraph.

Vote of the Zoning Commission on proposed action on April 16, 1990: 4-0, in part; 5-0, in part; and 3-1, in part (Maybelle Taylor Bennett, John G. Parsons, Tersh Boasberg, and William Ensign to approve proposed amendments to the text of Title 11; and, except as specified herein, to approve proposed amendments to the Zoning Map; Lloyd D. Smith not voting, not present; Maybelle Taylor Bennett, John G. Parsons, Tersh Boasberg, William Ensign, and Lloyd D. Smith to approve proposed rezoning in Square 2562; John G. Parsons, Maybelle Taylor Bennett, and Tersh Boasberg to approve proposed rezoning in Square 2566; William Ensign, opposed; Lloyd D. Smith not present, not voting).

Vote of the Zoning Commission on proposed action on October 15, 1990: 4-1 in part, and 5-0 in part (Lloyd D. Smith, John G. Parsons, Maybelle Taylor Bennett, and William Ensign to approve an alternative text of 11 DCMR 1402.1; Tersh Boasberg, opposed; and Lloyd D. Smith, John G. Parsons, Maybelle Taylor Bennett, William Ensign, and Tersh Boasberg to approve proposed 11 DCMR 1400.5(c) and (d), and 11 DCMR 1401.1(u) through (y).

This order and amendments to Title 11, DCMR, and to the zoning map, were revised and adopted by the Zoning Commission at its meeting on February 11, 1991, by a vote of 5-0 (Maybelle Taylor Bennett, William L. Ensign, Tersh Boasberg, Lloyd D. Smith, and John G. Parsons to approve.

Pursuant to 11 DCMR 3028, this Order shall be final and effective when it is published in the D.C. Register, that is, on APR 26 1991.

TERSH BOASBERG
Chairman
Zoning Commission

EDWARD L. CURRY
Executive Director
Zoning Secretariat

nopr88-19/LJP63

Attachment C

Petition For Reconsideration To Setdown Report

RCNA
Reed-Cooke Neighborhood Association

Improve your neighborhood. • Meet your neighbors.
Play a role in Adams Morgan's future.

P.O. Box 21700 • Washington, DC 20009 • (202) 387-1196 • rcna@reedcooke.org

December 17, 2007

Hand delivered
To O.P. Receptionist

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

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

File

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

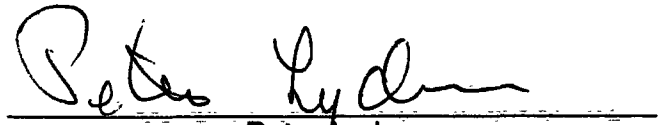
with the support of legal counsel, it chose unilaterally to move forward with its business plans. That choice cannot be the basis for relief in the form of expedited action.

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

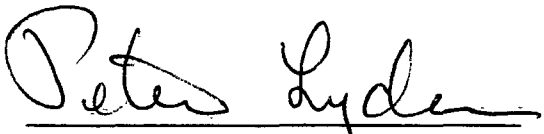
DC Department of Consumer and Regulatory Affairs, Melinda Bolling and Doris Parker-Woolridge

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



Peter Lyden
Reed-Cooke Neighborhood Association

Attachment D

Excerpts From Transcript of Zoning Commission Meeting of 12/10/07

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

+ + + + +

REGULAR MEETING

+ + + + +

MONDAY

DECEMBER 10, 2007

+ + + + +

The Regular Meeting of the District of Columbia Zoning Commission convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 6:30 p.m., Anthony J. Hood, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

ANTHONY J. HOOD	Chairperson
GREGORY N. JEFFRIES	Vice-Chairperson
CURTIS ETHERLY, JR.	Commissioner
MICHAEL G. TURNBULL	Commissioner (AOC)
JOHN PARSONS	Commissioner (NPS)

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN	Secretary
DONNA HANOUSEK	Zoning Specialist
ESTHER BUSHMAN	General Counsel

OFFICE OF PLANNING STAFF PRESENT:

JENNIFER STEINGASSER
JOEL LAWSON
KAREN THOMAS
MATT JESICK
STEPHEN MORDFIN
STEVE COCHRAN
TRAVIS PARKER

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

JACOB RITTIG, ESQ.

The transcript constitutes the minutes from the Regular Meeting held on December 10, 2007.

So will the staff record the vote?

MS. SCHELLIN: The staff records the vote five to zero to zero to set down Zoning Commission Case Number 05-36A as a contested case. Commissioner Jeffries moving, Commissioner May seconding. Commissioners Hood, Etherly and Turnbull in favor.

CHAIRPERSON HOOD: Next we have Zoning Commission Case Number 07-33, Office of Planning Text Amendment to the Reed-Cooke Overlay, Chapter 14. It was not Mr. Cochran this time. Okay, Ms. Brown-Roberts.

MS. BROWN-ROBERTS: Good evening, Mr. Chairman and members of the Commission. I'm Maxine Brown-Roberts from the Office of Planning. BZE Order 17359 approved in June of 2006, approved the development of a grocery store on the property otherwise known as the Citadel in the Reed-Cooke area. The Zoning Administrator granted a building permit for the grocery store and with it, a permit to operate beer and wine sales as an accessory

use. This permit has been appealed and the BZA has had a public hearing but to date there has not been any ruling. This application has been brought to you today in order to clarify the intent of the zoning regulations on the prohibition of alcohol beverage sales within the Reed-Cooke overlay.

Our preliminary review of the Reed-Cooke order for the Reed-Cooke area indicated that a prohibition on sales of alcoholic beverages was not intended to apply to sales within the framework of a larger use selling a very wide range of products. Rather, the intent was to limit liquor stores or stores where the principal use is alcoholic sales.

In our submission, we propose that the sales area not occupy not more than five percent of the store. And that the store have a minimum of 30,000 square feet. Tonight was are asking to amend that proposal and we are proposing to change the request to off-street

alcohol beverage sales as a primary use.

After our application was submitted to the Zoning Commission, we had some further conversations in our office and we thought that we needed to have a broader analysis of exactly what that would entail. And therefore, we want to spend some time in conversation with the Zoning Administrator and also the Committee on any limitation of the size of the area and also of the store size.

In requesting that the Commission schedule a hearing on an expedited basis, the Office of Planning specifically requested that the Commission permit a notice of hearing to be immediately advertised rather than waiting for the 20 days otherwise required. And that the hearing could take place after a notice of hearing as been advertised for 30 days instead of 40.

In addition, the Office of Planning requests that the Commission authorize the immediate publication of a

notice of proposed rulemaking. The Office of Planning, therefore, requests that the proposal be set down for public hearing on an expedited basis. Thank you, Mr. Chairman.

CHAIRPERSON HOOD: Okay, colleagues, any questions of Ms. Brown-Roberts? If not I -- any questions? Ms. Brown-Roberts, let me ask, I think you said in your statement and I think probably in your report, I just don't remember or recall it, that when this was done the intent was not to go for -- just to go at primary uses like liquor stores, okay? Is that what --

MS. BROWN-ROBERTS: Yes, that's what I stated.

CHAIRPERSON HOOD: Okay, because my original question was why was this in front of us, but I won't ask that one. What I will ask is about the expedited hearing. You're asking for 30 days. And I think -- normally, in the report you have what the community is saying. I didn't see that. It may be in

here, but I don't remember. But anyway, I think what I would like to see as far as the expedited hearing, we can expedite it as much as possible but we want to make sure that monthly meeting for the ANC is allowable, even if we have to take this in on a special public meeting. I don't know how we get there but we want to make sure that the ANC at least has a chance --

MR. RITTIG: Mr. Hood, I have a suggestion.

CHAIRPERSON HOOD: Sure.

MR. RITTIG: Instead of just giving it the 30 days as requested by the Office of Planning, I could consult and work with the Office of Zoning Staff to make sure that the 30-business day notice required of the ANC Act is not violated and that we advertise it so it -- the date gives the full 30 days that's required by the ANC Act.

CHAIRPERSON HOOD: Thank you. Anybody have any questions?

VICE-CHAIRPERSON JEFFRIES: This is really about trying to accommodate Harris-Teeter (phonetic) right, and their wonderful beer and wine section, right?

MS. BROWN-ROBERTS: That's right.

VICE-CHAIRPERSON JEFFRIES: Okay. Thank you.

MS. STEINGASSER: And if I could just reinforce what Ms. Brown-Roberts was saying, that the language before you after discussion in-house we've actually are now requesting that they advertise more broadly so that the community does have an opportunity to work with OP and that we can then -- you know, whatever action we take is more narrow and not broader. We don't have to readvertise. It's just kind of a safety net.

COMMISSIONER MAY: So do you have different language to propose for the advertisement?

MS. BROWN-ROBERTS: Yes, yes.

COMMISSIONER MAY: Which is, do we

have that?

MS. BROWN-ROBERTS: It says, "Off premises alcoholic beverage sales as a primary use".

MS. STEINGASSER: So instead of the underlying bolded language that starts with the word "provided", it would just say as an accessory use.

MS. BROWN-ROBERTS: As a primary, sorry, as a primary use.

MS. STEINGASSER: Primary.

CHAIRPERSON HOOD: Can you read it for us?

MS. BROWN-ROBERTS: Yes.

CHAIRPERSON HOOD: Thank you.

MS. BROWN-ROBERTS: "Off-premises alcoholic beverages sales as a primary use". The preamble sort of says it prohibits.

CHAIRPERSON HOOD: What I was saying "off-premises alcoholic beverages sales as a primary use provided".

MS. BROWN-ROBERTS: No, we're just

going to leave it there.

COMMISSIONER MAY: Period.

MS. BROWN-ROBERTS: Yeah, period.

COMMISSIONER MAY: As a primary use, period. Doesn't that open --

CHAIRPERSON HOOD: That's simple enough.

COMMISSIONER MAY: Well, but doesn't that open up the question of whether you're considering lifting limitations on the sale of alcoholic beverages as a secondary use to say you know, the little carry-out deli kind of thing.

MS. STEINGASSER: It's possible. That's one thing we want to make sure we understand before we advertise it too strictly. At first we took a more surgical approach to how we wanted to look at it and then we thought, well, we don't know that we're not making other uses now non-conforming. The position is that the language needs to be clarified, that the intent was to

allow it as accessory. We want to make sure we don't create other secondary non-conforming uses in that area.

COMMISSIONER MAY: Just making it broader.

VICE-CHAIRPERSON JEFFRIES: We want to make it broader till we have time to do some more research prior to the hearing.

COMMISSIONER MAY: The reason I would be concerned about that is that, I mean, you're looking to move this on an expedited basis. And I'm afraid if you make it so broad and simply just say as a primary use, that you're going to invite all sorts of questions that you'd prefer not to have to address in that short timeframe and so you're going to wind up with instead of it being, you know, 30 days to the hearing and then a relatively quick decision, you could wind up fussing with this for six months and then come back to this language so that it can be --

MS. STEINGASSER: We could or we

could end up -- I mean, if our position is that it's a clarification of existing language, then it was always the intention that anybody with a legitimate liquor license should be able to sell as an accessory use. We want to make sure we have an opportunity to work with the Zoning Administrator to understand what he considers an accessory use versus a principal use and that we understand what is happening in the neighborhood. If we create it surgically that the implication by reverse is that anything that's not 30,000 square feet regardless of how long they've been there with a legitimate liquor license is now non-conforming, that's an adverse effect we don't want to create. So it just gives us the broadest umbrella to make sure we do the research in time. We plan to focus on this very quickly.

COMMISSIONER MAY: I'm not sure how advertising in this way would make some use non-conforming because as it is, doesn't

the language just read off-premises alcoholic beverage sales, period?

MS. STEINGASSER: That's how it reads now. So we're saying -- we're clarifying it by saying as a principal use.

COMMISSIONER MAY: I mean, that's a pretty broad restriction to start with, right?

MS. STEINGASSER: Right. And we think it's broader than was originally intended. We think the original intention was the free-standing liquor stores.

COMMISSIONER MAY: Right.

MS. STEINGASSER: We want to make sure that we're not capturing any legitimate certificate of occupancy with legitimate Class B liquor license that's selling --

COMMISSIONER MAY: Oh, I see. You're going to render them non-conforming.

MS. STEINGASSER: Non-conforming because the implication --

COMMISSIONER MAY: But they would

have already been rendered non-conforming by this as it is, not even as a proposed language no matter how you propose it. It would have been --

MS. STEINGASSER: Well, not necessarily because the Zoning Administrator has written to the record of the BZA case that he does not believe the accessory sales are regulated by this.

COMMISSIONER MAY: I see.

MS. STEINGASSER: What we want to do is clarify that issue and hopefully before the BZA's decision comes through so that we don't have conflicting positions and interpretations.

COMMISSIONER MAY: Okay, now I see where the wrinkle is. I'm just -- maybe I'm alone in this worry but I'm afraid that it's going to wind up creating such a broad discussion. I mean, maybe there's a different way to try to address this issue and have a separate -- you know, rather than amend this

particular language, say something that allows this, that specifically allows it for something of this size.

VICE-CHAIRPERSON JEFFRIES: So, Commissioner May, your concern about just what's being noticed here, I mean, what's being advertised because --

COMMISSIONER MAY: Yeah, absolutely. I'm just afraid that, you know, by advertising it too broadly you're going to create a, you know, a much greater concern in the community and it's going to wind up being lengthier hearings and lengthier discussions and your goal of having this completed on an expedited basis will not be met.

VICE-CHAIRPERSON JEFFRIES: So what do you propose in the alternative?

COMMISSIONER MAY: Well, you know, it just occurred to me now that a way to handle this would be instead of trying to amend this, and I don't know if there's a C that comes after the B, or where you -- you

know, where you move it one level up in the outline form, but to provide a specific allowance for the type of use that's proposed. So you're not changing the regulation except to say this is now explicitly allowed, 30,000 square feet, five percent is not explicitly allowed. Do you know what I mean?

MS. SCHELLIN: I do know what you mean and we have to discuss it. I do and we discussed that in house about what is the implication of having an explicitly permitted use and then prohibited use? Is it by reference if it's not explicitly permitted, it's prohibited.

COMMISSIONER MAY: Is it prohibited.

MS. SCHELLIN: And that's what we don't have a feel for yet. We may end up with a longer hearing but that's better than two separate hearings when we have to come back and reclarify the language because we've created a series of non-conformities. I'm

sure there is going to be probably some neighborhood opposition and, I mean, there are articles in the paper today about the pro and con but it's limited to the Reed-Cooke area which is a fairly contained area that we feel we can address pretty quickly.

COMMISSIONER MAY: Okay, all right, well I've said enough, sorry.

CHAIRPERSON HOOD: Any other questions? Okay, with that I would move that we set down Zoning Commission Case Number 07-33 with the new language "off premises alcoholic beverages sales as a primary use", period and ask for a second.

VICE-CHAIRPERSON JEFFRIES: Second.

CHAIRPERSON HOOD: Moved and properly seconded, any further discussion? Any further discussion? All those in favor?

(Aye)

CHAIRPERSON HOOD: Any opposition? So ordered. Staff, would you record the vote?

MS. SCHELLIN: Chairman Hood, just to clarify, does your motion include the immediate advertising of the proposed rulemaking?

CHAIRPERSON HOOD: What I would like to -- yeah, immediate but then Mr. Rittig said he's going to --

MS. SCHELLIN: He's going to work, right, right. I just wanted to make sure the public hearing notice and the proposed rulemaking are two separate documents.

CHAIRPERSON HOOD: Okay.

MS. SCHELLIN: I just wanted to make sure. The vote is recorded five to zero to zero to set down Zoning Commission Case Number 07-33 as a rulemaking case, Commissioner Hood moving, Commissioner Jeffries seconding, Commissioners Etherly, May and Turnbull in favor.

CHAIRPERSON HOOD: Okay, the next case -- no, proposed action, I'm sorry, proposed action Zoning Commission Case Number