

February 8, 2008

Zoning Commission Office of Zoning
Government of the District of Columbia
One Judiciary Square
441 4th Street N.W., Suite 210S
Washington, DC 20001

RE: Case No. ZC 07-33

Dear Zoning Commissioners:

I am writing to you as the Appellant Representative in **Board of Zoning Adjustment (BZA) Appeal No. 17677**. I am writing on my own behalf, and on behalf of the adjoining property, small business owner, Yeheyis Getachew and Resident-Neighbors: Debbie Roberson; Adbou Ndiaye; Flora Anne Frey; Hubert A. Williams; Misgna Gebra; and Francis "Pat" Patrick, as well as on behalf of Concerned District of Columbia Citizens (Immediate Neighbors and Alcoholic Beverage Control Board "Protestants" – with official standing - in ABC Case No. 61034-05/062P, **Harris Teeter, Inc. Retailers Class B License Application No. 73993**): Edna Chuukwa; Dylan Stoddard; Joyce A. Thomas; Gene Grotzer; Amy D. Gray; Kenneth C. Williams; Eric Bethel; and Richard B. Redenius.

Collectively, we are the Appellants in the BZA appeal that, the Office of Planning's ("OP") proposed eleventh hour, text amendment to the Reed-Cooke Overlay District law was intended, it would appear, to derail and aims to unduly influence, to the benefit of the powerful and influential property owner, **Douglas Jemal** and his tenant, *Harris Teeter, Inc.*

In addition to the fact that the proposed text amendment to the RCOD is being formally *opposed* by the **Reed-Cooke Neighborhood Association** (Appellants in a related, but separate and distinct **BZA Appeal No. 17675**, as well as being opposed by our **Advisory Neighborhood Commission (ANC-1)**, I write to formally express Appellants strong opposition to the memorandum, request and recommendation from the OP dated November 30, 2007—a "proposed amendment" that the OP has termed "an appropriate clarification" to the existing law of the District of Columbia, which proposes that Title 11 (DCMR) be "amended as follows. (New text is shown in **bold and underline**):

Chapter 14, REED-COOKE OVERLAY DISTRICT

Section 1401.1 (b) is amended as follows:

- (b) Off-premises alcoholic beverage 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;**

In addition to the above, the appellants, resident neighbors, immediate neighbors and the ABC Board Protestants, above listed, strongly opposed the proposed added language on a multitude of grounds, including but not limited to the following:

ZONING COMMISSION
District of Columbia

CASE NO. 07-33
EXHIBIT NO. 5

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1. The proposed text amendment is not a “clarification.” The proposed added language is a blatant “alteration” of the existing code that is diametrically opposed to the letter and the spirit of the existing law, and, according to the definition provided by the Office of the Parliamentarian of the United States House of Representatives, the proposed text amendment amounts to a ‘private bill,” as it is clearly intended to benefit the property owner, Douglas Jemal, at the expense of related “immediate residents,” and an adjoining small business, that will be harmed by the property owner’s proposed “prohibited” thus, illegal, use and *unfair* thus, illegal competition (all without compensation or needed immediate neighborhood improvements);
2. The proposed action is illegal and unconstitutional based upon federal and District laws, in as much as it violates the separation of powers between the Legislative and Executive branches of the Government of the District of Columbia. The Zoning Commission and the Office of Planning are part of the Executive Branch and have absolutely no right to modify laws enacted by the Legislative Branch (the Council).

The Reed-Cooke Overlay District was created by action of the Council of the District of Columbia, subject to oversight review by the Congress of the United States Congress. The only legitimate means for modifying the existing law is by action of the Council of the District of Columbia, subject to oversight review by the Congress of the United States Congress.

And, as indicated by the letters of other residents (attached), the developer, Douglas Jemal and the proposed tenant of the property on the northeast corner of 17th Street and Kalorama Road, N.W., Harris Teeter, Inc., were well aware of existing law at the time they mutually undertook the project in question. They have had ample time to seek modification of existing law through due process involving all interested parties, including the Appellants, The Reed-Cooke Neighborhood Association, The ANC and the District of Columbia City Council;

3. The OP afforded interested parties, including both groups of appellants in directly related matters ongoing and still pending before the BZA, no notice of or opportunity to be heard in connection with its proposed text amendment that, it would appear, were intended to have a direct and adverse impact on our case before the BZA;
4. It would appear, based on the fact that other than the property owner, Douglas Jemal, that neither the BZA nor the appellants were aware of OP’s action until attorneys for the property owner, used OP’s Memorandum and related Zoning Commission Case No. 07-33 as the basis for their motion to “postpone” further BZA consideration of BZA Appeals No. 17675 and 17677. The motion failed but, had it succeeded, its impact would have frozen both appeals and delayed a BZA decision until, presumably the law was changed, and BZA jurisdiction would have been summarily removed, and the appeals, themselves, made MOOT, as a matter of law.

Additionally, in the interim, as represented by Mr. Jemal’s attorney in the argument on his motion to postpone in the BZA appeals, it was the property owner’s intention, all along, to engage in the use “prohibited” by the RCOD, based entirely on the contested building permit already issued by then Deputy Zoning Administrator (DZA), Matthew LeGrant, and that is at issue in the appeals now before the BZA.

Appellants, in BZA Appeal No. 17677, are arguing to the contrary that the permit:

- Was issued without jurisdiction (which, under RCOD, rests with the BZA); and
 - That, in any event, the DZA's reading of the RCOD law is inconsistent with the RCOD, as it reads in plain English, even if the Office of the ZA had jurisdiction under the RCOD law to make that call which, appellants assert, it did *not*; and
5. As asserted in appellants 17677's Opposition to the Property Owner's Motion For A Postponement (see attached, including property owner's request, the OP's proposed text amendment, and a ZC supplemental): given that the BZA's decision is currently scheduled for March 4, 2008 (well before the proposed text amendment could become law), the proposed law change, if applied **retroactively** to the Jemal property, would constitute a government "taking" (without compensation) of the adjoining property owner's livelihood and, also would violate the United States Constitution prohibition against States (including the District of Columbia City Council) or the Congress of the United States enacting **ex post factor** laws (civil or criminal); and
6. Because the proposed text amendment may allow any other grocery chain to locate in our small neighborhood so long as it's 30,000 square feet or larger and dedicates no more that 5 percent of its floor space to otherwise prohibited beer and wine sales.

Accordingly, the avenue pursued here is illegal, unethical and should be flatly rejected as disrespectful of the rights of law-abiding citizens of the District of Columbia.

Respectfully Submitted,



L. Napoleon Cooper
Appellant and Appellant Representative
BZA Appeal No. 17677
2400 16th Street, N.W.
UNIT #545
Washington, D.C. 20009
202-489-9799
managingpartner@surfbest.net

PS: I request to testify at the hearing scheduled for February 21, 2008 at 6:30 PM

Attachments:

- Individual Letters from District of Columbia Residents to the Zoning Commission in Opposition to the Proposed Text Amendment to the Reed-Cooke Overlay District Law;
- Property Owner Douglas Jemal's Request to Postpone On-Going Board of Zoning Adjustment Appeal No. 17675 and BZA Appeal No. 17677;

- **Office of Planning Memorandum Dated November 30, 2007; and**
- **BZA Appellants' 17677;s Opposition to Property Owner's Motion to Postpone Filed with the Board of Zoning Adjustment in that Case.**

February 5, 2008

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One Judiciary Square
441 4th Street NW Suite 210S
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The OP memorandum proposes that Title 11 (DCMR) be "amended as follows. (New text is shown in **bold and underline**):

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Section 1401.1 (b) is amended as follows:

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The proposed added language is not a "clarification." The proposed added language is a blatant "alteration" of the existing code that is diametrically opposed to the letter and the spirit of the existing law.

The proposed action is illegal and unconstitutional based upon federal and District laws in as much as it violates the separation of powers between the Legislative and Executive branches of the Government of the District of Columbia. The Zoning Commission and the Office of Planning are part of the Executive Branch and have absolutely no right to modify laws enacted by the Legislative Branch.

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The developer and the proposed tenant of the property on the northeast corner of 17th Street and Kalorama Road, NW were well aware of existing law at the time they mutually undertook the project in question. They have had ample time to seek modification of existing law through due process involving the Council of the District of Columbia.

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Respectfully Submitted,

(Name) Alexandra Burns
 (Address) 1652 Kalorama Road NW WDC 20009
 (Telephone) 650-464-4405
 (Email Address) _____

_____ I request to testify at the hearing scheduled for February 21, 2008 at 6:30 PM

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Respectfully Submitted,

(Name)

(Address)

(Telephone)

(Email Address)


MARK S. FISCHER
2480-16th St, NW #407 WDC 20009
(202) 234-1608; (202) 997-7953
fischerwdc@msn.com

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Respectfully Submitted,

(Name) Joseph SARAULA

(Address) 2480 16th NW

(Telephone) ²⁰² 761 0601 # 432 Washington

(Email Address) DC 20009

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Respectfully Submitted,

(Name)

(Address)

(Telephone)

(Email Address)

LUKE MASON
 2480 16TH ST NW #418
 203-286-3613
 BAMS40T27@EXCITE.COM

I request to testify at the hearing scheduled for February 21, 2008 at 6:30 PM

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Respectfully Submitted,

(Name)

(Address)

(Telephone)

(Email Address)

Oscar Rivara
2480. 16 St. NW. #818.
(202) 471-0027.

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Respectfully Submitted,

(Name) AMY D. GRAY

(Address) 2480 16th St NW #901

(Telephone) (202) 986-7025

(Email Address) amygray1@rocketmail.com

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Respectfully Submitted,

(Name) Mr. Misgna Gebru
 (Address) 2480 16th St NW
 (Telephone) 202-234-7339
 (Email Address) _____

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Respectfully Submitted,

(Name) Barbara A. Chin [Barbara A. Chin]

(Address) 2480 7th St NW #632

(Telephone) 483-1076

(Email Address) bachinn@comcast.net

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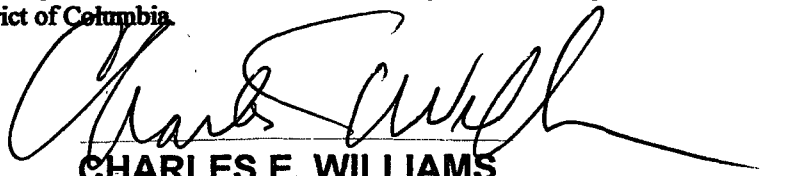
Respectfully Submitted,

(Name)

(Address)

(Telephone)

(Email Address)



CHARLES E. WILLIAMS

2480 16th Street, N.W. #332

Washington, DC 20009-6702

TEL: (202) 986-2489

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(Name)

(Address)

(Telephone)

(Email Address)

Leigh H. Mastey
2480 16th St. NW #217 DC 20009
(202) 276-3686

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441 4th Street N.W., Suite 210S
Washington, DC 20001

RE: Case No. ZC 07-33

Dear Commissioners:

I write to express my strong opposition to the request and recommendation from the Office of Planning (OP) dated November 30, 2007 for a "proposed amendment" that the OP has termed "an appropriate clarification" to the existing law of the District of Columbia.

The OP memorandum proposes that Title 11 (DCMR) be "amended as follows. (New text is shown in **bold and underline**):

Chapter 14, REED-COOKE OVERLAY DISTRICT

Section 1401.1 (b) is amended as follows:

- (b) Off-premises alcoholic beverage 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;**

The proposed added language is not a "clarification." The proposed added language is a blatant "alteration" of the existing code that is diametrically opposed to the letter and the spirit of the existing law.

The proposed action is illegal and unconstitutional based upon federal and District laws in as much as it violates the separation of powers between the Legislative and Executive branches of the Government of the District of Columbia. The Zoning Commission and the Office of Planning are part of the Executive Branch and have absolutely no right to modify laws enacted by the Legislative Branch.

The Reed-Cooke Overlay District was created by action of the Council of the District of Columbia, subject to oversight review by the Congress of the United States Congress. The only legitimate means for modifying the existing law is by action of the Council of the District of Columbia, subject to oversight review by the Congress of the United States Congress.

The developer and the proposed tenant of the property on the northeast corner of 17th Street and Kalorama Road, NW were well aware of existing law at the time they mutually undertook the project in question. They have had ample time to seek modification of existing law through due process involving the Council of the District of Columbia.

The avenue pursued here is illegal, unethical and should be flatly rejected as disrespectful of the rights of law-abiding citizens of the District of Columbia.

Respectfully Submitted,

(Name)

(Address)

(Telephone)

(Email Address)

Francis "Pat" Petruck
2480-16th St NW #810
202-797-1513
Pat.Petruck@redstate.com

I request to testify at the hearing scheduled for February 21, 2008 at 6:30 PM

February 5, 2008

Zoning Commission Office of Zoning
Government of the District of Columbia
One Judiciary Square
441 4th Street N.W., Suite 210S
Washington, DC 20001

RE: Case No. ZC 07-33

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Respectfully Submitted,

(Name)

(Address)

(Telephone)

(Email Address)

1. Myalyn Cooper
2400 16th St. N.W. # 545
Washington, D.C. 20009

I request to testify at the hearing scheduled for February 21, 2008 at 6:30 PM

February 5, 2008

Zoning Commission Office of Zoning
Government of the District of Columbia
One Judiciary Square
441 4th Street NW Suite 210S
Washington, DC 20001

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Respectfully Submitted,

(Name)

(Address)

(Telephone)

(Email Address)

Yenyis Getachen

2440 16th St NW . #217

202-257-7814

getachenyenyis@aol.com .

I request to testify at the hearing scheduled for February 21, 2008 at 6:30 PM

December 11, 2007

VIA HAND DELIVERY

D.C. Board of Zoning Adjustment
One Judiciary Square, Suite 210-South
441 Fourth Street, NW
Washington, D.C. 20001

Re: Appeals No. 17675 and 17677 - Request for Postponement of Public Hearings Set for December 18, 2007, in Light of Zoning Commission Decision to Schedule Public Hearing on Case 07-33 (Text Amendment to Reed-Cooke Overlay)

Dear Members of the Board:

The public hearings on the above-referenced appeals commenced on November 6, 2007, and were continued to December 18, 2007, for further proceedings. At its regular monthly meeting held on December 10, 2007, the Zoning Commission ("ZC") considered a recommendation from the Office of Planning (OP) that it set for public hearing a text amendment requested by the OP in its memorandum dated November 30, 2007. The OP recommended that the Commission publish a notice of proposed rulemaking and hear the case on an "expedited basis." As discussed below, this proposed text amendment will have a direct bearing on the regulations applicable to Appeals Nos. 17675 and 17677.

While OP's initial request (a copy of which is attached) was drafted narrowly, at the ZC's December 10 meeting, OP requested that the ZC broaden the language for purposes of the public hearing. The Commission agreed with OP's modified language and voted to schedule a public hearing on the case, with the notice meeting all requirements accorded to Advisory Neighborhood Commissions ("30 business days notice").

At this time, staff of the Office of Zoning ("OZ") and the Office of the Attorney General ("OAG") are reviewing the Commission's calendar with the aim of scheduling the hearing for early 2008.

The language to be advertised and considered would amend the provision at issue in the two appeals now being considered by the BZA in its cases 17675 and 17677. Specifically, the restriction of existing § 1401.1 that now reads (in part) –

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

- (b) Off-premises alcoholic beverage sales

would be changed to read as follows –

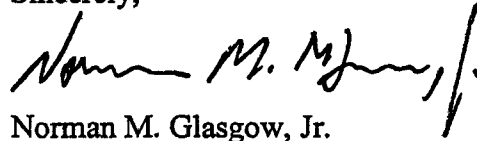
1401.1 The following uses shall be prohibited in the RC Overlay District:

- (b) Off-premises alcoholic beverage sales as a primary use.

As an intervenor in both appeals, we submit that if the Zoning Commission proceeds along the direction recommended by OP and which it is now going to consider, the questions now before the Board in these two appeals become moot. Postponement of the further hearings spares all parties and the Board from the effort to argue and resolve the provision at issue in those cases, if that provision no longer applies to the subject grocery store.

Accordingly, for the administrative efficiency of the Board and the parties, we request that the hearings in the cases be continued until after the Zoning Commission acts on the text amendment it has now set for hearing. After the Zoning Commission completes its consideration, the two appeals could be dismissed as moot or resume, as circumstances then suggest.

Sincerely,



Norman M. Glasgow, Jr.

Attachment

cc: D.C. Office of Planning
Melinda Bolling and Doris Parker-Woolridge, for Matthew LeGrant, Zoning
Administrator
Reed-Cooke Neighborhood Association, c/o Peter Lyden, Appellant in BZA No. 17675
L. Napoleon Cooper, Appellant in BZA No. 17677
Advisory Neighborhood Commission 1-C (Intervenor in BZA 17675)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING



MEMORANDUM

TO: Zoning Commission of the District of Columbia

FROM: Jennifer Steingasser
Deputy Director

DATE: November 30, 2007

SUBJECT: Setdown Report - Request for a Text Amendment to the Zoning Regulations, Chapter 14 (Reed-Cooke Overlay) Section 1401 (Use Provisions) and an Expedited Public Hearing

1. RECOMMENDATION

The Office of Planning ("OP") requests and recommends that the Zoning Commission setdown the proposed text amendment and schedule a public hearing to be heard on an expedited basis to clarify that sales of wine and beer are allowed within a grocery store located within the Reed-Cooke (RC) Overlay. OP believes that the proposed amendment is an appropriate clarification to the existing regulations and is necessary to further the District's policies of encouraging full-service grocery stores to locate and expand throughout the city.

Title 11 (DCMR) is proposed to be amended as follows: (New text is shown in **bold and underline**):

Chapter 14, REED-COOKE OVERLAY DISTRICT

Section 1401.1 (b) is amended as follows:

- (b) Off-premises alcoholic beverage 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;**

This report also serves as the supplemental report as required by Section 3013.

2. BACKGROUND

The Reed-Cooke area is within Ward 1 and is generally bounded by Columbia Road, NW, Euclid Street, NW, 16th Street, NW, and Florida Avenue, NW but for the most part not extending out to any of those streets. The Reed-Cooke Overlay District (Chapter 14 of the Regulations)

was adopted by the Zoning Commission in 1991, by Order No. 523-A (Attachment 1). The Reed-Cooke area was the subject of a two part map and zoning text amendment which addressed the incompatibilities in use, density and height resulting from the then existing industrial C-M-2 zoning. The C-M-2 district was completely eliminated in favor of R-5-B and C-2-B districts with the Reed-Cooke Overlay.

The Reed-Cooke map and text amendment was primarily designed to implement the then adopted Comprehensive Plan and in particular the policies established for the Reed-Cooke Special Treatment Area. Those policies were cited as:

- (a) Protect current housing in the area, and provide for the development of new housing;
- (b) Maintain heights and densities at appropriate levels; and
- (c) Encourage small scale business development that will not adversely affect the residential community. (10 DCMR §1127)

The amendments were primarily focused on eliminating the industrial zoning (which did not allow residential development and which potentially allowed incompatible uses such as automobile repair, manufacturing, service and warehousing) and on how much of the area should be converted to exclusively residential zoning, as opposed to allowing for mixed-use commercial and residential development. A second major issue was the maximum height of new development, particularly in light of the narrow streets which traverse the area. The Zoning Commission ultimately decided on a balance between the R-5-B and C-2-B Districts as shown on the zoning map (Attachment 2).

The Overlay eliminated some of the uses permitted as a matter-of-right in the underlying C-2-B zones (§1401.1). One of the uses listed is "off-premises alcoholic beverage sales." (§1401.1(b)) It is OP's understanding that the intent of this restriction was to prevent what is conventionally described as a liquor store from opening in the area subject to the Overlay.

BZA Order 17395, adopted June 12, 2006 approved area variances from requirements applicable to the rear yard, loading berths, and enlargement of a nonconforming structure to allow the redevelopment of an existing building in a mixed-use project that will include a grocery store, retail or service uses, and general offices on the subject property. The Reed-Cooke Neighborhood Association (RCNA) who was a party to the proceeding submitted a motion for reconsideration of the order (BZA Order 17395-A). According to RCNA, the order improperly failed to address the issue of the applicant's plans to allow the sales of alcoholic beverages for off premises consumption which is prohibited in the Reed-Cooke overlay zone.

The Board denied the reconsideration stating that at the public hearing, the potential for off-premises alcoholic beverages sales was not an issue in the proceeding. The order granting the requested zoning relief did not also grant a variance from the prohibition against off-premises alcoholic beverage sales set forth in § 1401.1(b), as no such relief was sought by the applicant or considered by the Board.

3. PROPOSAL

The grocery store is being constructed in the Citadel building, located at 1631 Kalorama Road, at the northeast corner of the intersection of Kalorama Road and 17th Street, N.W., on a property zoned RC/C-2-B. The grocery store will have in excess of 30,000 square feet of floor area, with the area devoted to the sale of beer and wine and would comprise less than 1,500 square feet.

The OP proposes that the Regulations be amended to allow a grocery store which offers a full complement of goods and services be allowed to sell beer and wine as part of the range of products. The proposed text amendments would:

- Only apply to the off-premise alcoholic beverage sales use otherwise restricted in the Reed-Cooke overlay district;
- Only apply to such sales in a grocery store that is over 30,000 square feet in area and where the area devoted to sales is limited to no more than 5% of the floor area of the store, where the sales would clearly be a minor part of the overall business; and
- Continue to restrict within the Reed-Cooke Overlay's area, the sale of alcoholic beverages either as a principal use or as a component of any use other than a grocery store that is 30,000 square feet or larger.

4. ANALYSIS

OP requests a change in the text of the overlay zone to allow a grocery store that is now in the final stages of construction and build-out to proceed to occupy the space it has leased to include the sale of beer and wine. There has been a resurgence of investment by grocers in their stores in the District of Columbia. Existing grocers have built new stores and/or refurbished existing ones, and added wine and beer in almost every case since 2000.

Legislation was also enacted to induce grocers to locate in the District, first by creating a favorable tax climate (abatements) and second by allowing grocery stores to sell wine and beer at qualifying stores. The wine and beer amendments, adopted in July, 2000, specifically allowed qualifying grocery stores to operate outside the prevailing limit of 300 "Class B" licenses and, more critically, the prior limit of one such license per person or corporation, provided that the grocery store was "full service" and that sales of wine and beer would be "incidental" to the sale of other goods, specifically limiting the sales to be less than fifteen percent of overall annual receipts.

A preliminary review of 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. Rather, it approves the intent was to limit liquor stores or stores where the principal use is alcoholic sales. It is typical for stores such as Giant, Safeway and Whole Foods to offer beer and wine for sale for off-premises consumption. 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 the immediate or larger community.

Comprehensive Plan Recommendation

The amendments sought are consistent with the provisions of the Comprehensive Plan and are in the nature of a clarification and not a fundamental change of existing zoning. The amendments are consistent with the Economic Development Element and the Mid-City Element of the Plan as demonstrated below.

Grocery stores are the focus of specific policies in the Plan and a policy of the Economic Development Element states:

Policy ED-2.2.6: Grocery Stores and Supermarkets

Promote the development of new grocery stores and supermarkets, particularly in neighborhoods where residents currently travel long distances for food and other shopping services. Because such uses inherently require greater depth and lot area than is present in many commercial districts, **adjustments to current zoning standards to accommodate these uses should be considered.** (emphasis added.)

The property is mentioned by name within Mid-City Area Element:

MC-2.4 18th Street/Columbia Road

The neighborhood continues to experience growing pains as it grapples with strong demand for housing and the popularity of its entertainment scene. To the east of 18th Street, a zoning overlay was created for the Reed-Cooke area in 1989 to protect existing housing and ensure compatible infill development on a number of large properties. Several large low-rise condominium projects were developed in the 1990s and early 2000s, **and today there are plans for a new grocery store in the former Citadel skating rink.** (emphasis added)

5. BASIS FOR EXPEDITED ACTION

Sales of wine and beer have been part of Harris Teeter's plans for each store here, just as it is in its other stores in Virginia and elsewhere, and just as it is for virtually all other full service grocers investing in the District of Columbia. The Harris Teeter store in Adams Morgan is now expected to open in March, 2008, and offer the full range of products it had intended, including beer and wine (if and after a license for such sales is secured).

The plans for the store in the Citadel were set out in detailed floor layout diagrams the Department of Consumer and Regulatory Affairs ("DCRA") reviewed when the store applied for a building permit. The building permit was issued on November 13, 2006, only after DCRA concluded that all of the requirements of the Regulations had been met.

Consistent with its intent from the outset, Harris Teeter has sought needed approvals from the Alcohol Beverage Control Board ("ABCB") to secure the right to sell beer and wine. The application for the store in Adams Morgan was filed in 2005; that application was "protested" by the ANC, whose objections were resolved in a "Voluntary Agreement" between it and Harris Teeter. Objections of others were also filed later that year and in January, 2006. Among other issues, the Protestants raised a zoning question to ABCB and that Board asked for clarification.

In response to that request, the Zoning Administrator prepared a letter, dated March 21, 2007, affirming the conclusion that sales of wine and beer would be allowed by right at the location inasmuch as those sales would be in the nature of an accessory use, and that the use restrictions in the Reed-Cooke overlay (at § 1401.1) applied to principal uses. Opponents to the sale of beer and wine have appealed the issuance of the permits, contending that the sale of beer and wine is prohibited in all establishments and not only where the sale is a limited accessory use. As previously stated, the grocer's occupancy is now projected for March, 2008.

The "new Harris Teeter grocery store" has been discussed within the community since the initial announcement in 2004. There was further public discourse of the "new Harris-Teeter" store as part of the efforts to extend and revise the provisions of the "Adams Morgan Moratorium Zone," a set of rules established by the ABCB to address issues of "peace, order, and quiet" that many found objectionable in the Adams Morgan area. In fact, the Board extended the duration of the initial moratorium zone and expanded its geographic reach as well, as requested by both RCNA and the Kalorama Citizen's Association. However, in 2004, those organizations filed an amendment to their application that specifically requested that the provisions of the moratorium zone not apply to Class B licenses that grocery stores were then eligible to receive. The overall record in that case led ABCB to conclude, in pertinent part:

"... the [ABCB] recognizes that the written petition filed by KCA and RCNA specifically requests an exception to allow the issuance of new class B licenses for full service grocery stores that meet the requirements promulgated under D.C. Official Code §§ 25-303(c), 25-332(c), or 25-333(c)(2001), in an effort to allow full service grocery stores such as Harris Teeter and Safeway to locate and/or operate in the Adams Morgan Moratorium Zone with a class B license."

The owner has invested heavily in the restoration of the property and tenant is under contract and obligation for the planned opening of the store in March, 2008. The property owner and tenant are therefore requesting that the text amendment be set for hearing on an expedited basis so that the Commission can resolve the appropriateness of adopting the amendment so the store may secure the required Certificate of Occupancy prior to March, 2008.

6. CONCLUSION

OP recommends that the Zoning Commission set down the proposed amendment for public hearing on an expedited basis.

Title 11 (DCMR) is proposed to be amended as follows: (New text is shown in **bold and underline**):

Chapter 14, REED-COOKE OVERLAY DISTRICT

Section 1401.1 (b) is amended as follows:

- (b) Off-premises alcoholic beverage 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;**

This report also serves as the supplemental report as required by Section 3013.

ATTACHMENTS:

1. Zoning Commission Order 523-A
2. Zoning Map
3. BZA Order 17395-A

JLS/mbr

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



REVISED AGENDA
Regular Public Meeting
1239th Meeting Session (19th of 2007)
Monday, December 10, 2007 @ 6:30 P.M.
Office of Zoning Hearing Room
441 4th Street, N.W., Suite 220-South
Washington, D.C. 20001

I. PRELIMINARY MATTERS Mrs. Schellin

NONE

II. STATUS REPORT Office of Planning

III. CONSENT CALENDAR Mrs. Schellin

NONE

IV. HEARING ACTION Office of Planning

- A. Z.C. Case No. 07-26 (O Street Roadside LLC - Consolidated PUD & Related Map Amendment @ Square 389, Lots 829 & 830)
- B. Z.C. Case No. 07-29 (Bozzuto Development Group - Map Amendment @ Square 514, Lot 864)
- C. Z.C. Case No. 05-36A (K Street Development - 2nd Stage PUD @ 250 K Street, N.E.)
- D. Z.C. Case No. 07-33 (Office of Planning - Text Amendment to Reed-Cooke Overlay, Chapter 14)

V. PROPOSED ACTION Mrs. Schellin

- A. Z.C. Case No. 07-13 (Trustees of the Corcoran Gallery of Art and MR Randall Capital LLC - PUD and Related Map Amendment @ Square 643-S)

VI. FINAL ACTION Mrs. Schellin

- A. Z.C. Case No. 06-30 (Pollin Memorial Community Development - Consolidated PUD & Related Map Amendment)
- B. Z.C. Case No. 06-48 (Text & Map Amendments - Georgia Avenue Commercial Overlay District)
- C. Z.C. Case No. 05-05 (Text Amendment - Emergency Shelters in C-M-1 & C-M-2 Districts)

D. Z.C. Case No. 07-24 (Text Amendment – CBRFs)

VII. CORRESPONDENCE..... Mrs. Schellin

NONE

VIII. REPORT OF THE SECRETARY..... Mrs. Schellin

A. Reminder Schedule

IX. OTHER BUSINESS..... Mrs. Schellin

A. New Cases Filed:

1. Z.C. Case No. 03-27A (Clemons 4600 Partners, LLC – 2-year Time Extension)
2. Z.C. Case No. 05-28A (Parkside Residential LLC - 2nd stage PUD & Related Map Amendment @ Square 5041, Lots 809, 814, 815, 817, 818, 820)
3. Z.C. Case No. 07-31 (Joseph Young, Ralph Higgs, Jr. & 717-721 T St. NW, LLC – Map Amendment @ Square 416, Lots 24-27, 821, 822)
4. Z.C. Case No. 07-32 (NJA Associates, LLC - Review in the CG Overlay @ Square 743N, Lots 48, 52, 53, 74 & 78)
5. Z.C. Case No. 07-33 (Office of Planning – Text Amendment to Reed-Cooke Overlay (Chapter 14; Section 1401))

B. Orders Published:

1. Z.C. Notice of Final Rulemaking & Order No. 06-23A (Text Amendment – Eating Establishments)
2. Z.C. Order No. 05-35 (Horning Brothers - Consolidated PUD & Related Map Amendment @ Square 5877, Lots 50, 61, 78, 832, 835, 853-858, 873, 878 & 879))
3. Z.C. Order No. 06-08 (Fort Lincoln/Gateway Village LLC - Consolidated PUD @ Square 4325, Parcels 173/145)
4. Z.C. Order No. 06-41 (Camden Development, Inc. - Consolidated PUD & Related Map Amendment @ Square 653, Lot 918)
5. Z.C. Order No. 06-46 (MR N Street Southeast LLC, MR Ballpark 5 LLC & WMATA - Review in the CG Overlay District @ Square 701, Lots 3, 98-118, 144-147, 161, 162, 167, 815 & 824); and
6. Z.C. Order No. 07-23 (Georgetown University - Further Processing & Amendment to Campus Plan @ 37th & O Sts. N.W.).

Sharon S. Schellin
Secretary to the Zoning Commission
Office of Zoning

cc: Vincent C. Gray, Chairman
Council of the District of Columbia

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Appeal of:)
)
L. Napoleon Cooper)
(Appellant Representative);) **BZA Appeal No. 17677**
)
Yeheyis Getachew;)
)
Resident-Neighbors:)
) **Opposition to Intervenor**
Debbie Roberson, Abdou Ndiaye,) **(Motion to Postpone)**
Flora Anne Frey, Hubert A. Williams,)
Misgna Gebra and Francis "Pat" Patrick;)
)
Concerned D.C. Citizens ("Immediate)
Neighbors" and ABC "Protestants")
With *Valid* ABC Board Standing):)
)
Edna Chuukwa; Dylan Stoddard;)
Joyce A. Thomas; Gene Grotzer;)
Amy D. Gray; Kenneth C. Williams;)
Eric Bethel; and Richard B. Redenius,)
)
)
This Appeal, Filed On May 25, 2007, Is to Continue)
On December 18 and The Board has Scheduled Its)
Decision for January 8, 2008. The Appeal is from a)
March 21, 2007 Letter from Zoning Administrator)
Crews Validating A Building Permit issued *Without*)
Jurisdiction or Propriety; in Clear Contradiction of)
Municipal Regulations; and Authorizing, Illegally,)
A Use Expressly "Prohibited." Further This Appeal)
Takes Exception to: 1) How the Letter Was Secured)
(Given the Purpose for Which It Was Obtained); 2))
The Extra-Legal Basis It Has Provided for License)
Application No. 73993 to Advance in the Ongoing)
Alcoholic Beverage Control Board Process; and 3))
Takes Exception to the Letter's False Conclusion)
That Once an ABC License is in Hand, the "Owner")
May Engage In Large-Scale "Prohibited" Sales in)
Our Small Neighborhood: "As a Matter of RIGHT.")

**OPPOSITION TO PROPERTY-OWNER'S REQUEST FOR A
POSTPONEMENT OF HEARINGS AND THE BOARD OF ZONING
ADJUSTMENTS DECISION IN BZA APPEAL NO. 17677**

I. INTRODUCTION

L. Napoleon Cooper hereby sets forth below the opposition of BZA Appeal No. 17677 Appellants (the "Appellants"), to Intervenor, Mr. Douglas Jemal's (the "Owner") Letter-Motion seeking to "postpone" the December 18, 2007 hearing and the scheduled, January 8, 2008, decision in BZA Appeal No. 17677, in light of the fact that the Zoning Commission (the "ZC") on December 10, 2007 in Case 07-33, agreed to add dramatic "private"¹ (benefiting one Owner) language amendments to the Reed-Cooke Overlay District provision on some future date not yet disclosed to the public or to the Appellants.

II. THE FACTS

As has been the shameful practice of the Owner, the Office of Zoning (the "OZ"), the District of Columbia Alcoholic Beverage Control Board (the "ABCB"), and others, in connection with this matter, excluding this Board, the Appellants, those of us who filed this appeal, were never informed that such

¹ The legislative term most "appropriate" for the proposed RCOD amendments, according to the Office of the Parliamentarian for the United States House of Representatives.

material developments were being actively explored and the focus of secretive, at lease, non-public, discussions and communications involving influential undisclosed public officials not *yet* known to the Appellants. Also, Appellants, those of us most likely to be damaged or otherwise adversely impacted by these devious machinations, only learned of these important matters, *fiats accomplis* as, no doubt, was this Board, by letter from the Owner's attorneys, and were never so much as afforded procedural due process or any chance to be heard.

These proposed private Amendments to the Reed-Cooke Overlay District (the "RCOD") provision will substantially alter the legal requirements for the RCOD, NOT simply "clarify" or be a "clarification" thereof, as was asserted in the November 30, 2007 District of Columbia Office of Planning (the "OP") Memorandum submitted for consideration and adoption on an "expedited basis" to the District of Columbia Zoning Commission (the "ZC").

(For details see the Owner's Letter-Motion dated December 11, 2007 and its exhibits, the OP's "Text Amendment Recommendation," and the "Revised Agenda" of the Zoning Commission, dated December 10, 2007, attached.)

The RCOD regulations, as amended, will: 1) effectively invalidate the District of Columbia Board of Zoning Adjustment's (the "Board") jurisdiction and authority over the issues presented by this appeal and related regulations; 2)

will authorize new grocery stores that locate in our small, primarily residential, neighborhood to sell alcohol *if* they exceed 30,000 square feet in floor space; 3), will and is intended to apply, retroactively, to the parties, subject property and issues now pending before this Board in BZA Appeal No. 17677; and 4) they evidence no consideration of any kind having being given to the concerns of residents, affected neighborhoods or to the rights of minority small businesses who will be displaced and destroyed in the process.

Further, these proposed private amendments to the existing RCOD provision include no requirement whatsoever for just compensation being provided the immediate neighborhood that will be impacted, adversely, *nor* for the small businesses that will be devastated by its retroactive application.

III. ARGUMENT

Rather than submit to the lawful jurisdiction of this Board, the Owner, Douglas Jemal, seeks, through his law firm of 1400 attorneys, to have further proceedings in this appeal frozen *until* the Zoning Commission has effectively removed altogether, its jurisdiction, ability and public duty to protect RCOD.

Also, after protesting bitterly against any further delay in connection with this matter: delay heretofore resulting from the property Owner's own actions,

the Owner at this late date asks *this* Board to effectively freeze its own proceeding, knowing that such an act would: 1) deny Appellants 17677 their procedural due process rights, including to petition and to be heard on the official record; 2) permit the owner to secure a rewrite of governing law that will legalize its currently proposed prohibited, thus illegal, activity; and 3) shield this fabricated rewrite of governing RCOD law from the Constitutional prohibition against Congress, any state or the District of Columbia enacting *ex post facto* laws, criminal or civil—a result clearly not intended by the framers of the United States Constitution.

In fact, by way of legislative history, the *Federalist Papers* (the historical record) refer specifically to *ex post facto* laws in both contexts but clearly intended for the prohibition against *ex post facto* laws to extend to civil laws, such as the RCOD amendments, as James Madison noted in Federalist No. 44:

“Bills of attainder, *ex-post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation ... [T]he sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed parts of the community. They have seen, too, that

one legislative interference is but the first link of the long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measure, inspire a general prudence and industry, and give a regular course to the business of society.”

The Constitutional prohibition against enacting ex post facto laws would apply in this case were this Board to deny, as it must, the owner’s motion to postpone these proceedings until *after* the Zoning Commission has amended the existing RCOD provision and, thereafter, if the “private” RCOD, Owner’s amendment is applied, retroactively, to the parties in BZA Appeal No. 17677.

Accordingly, in order for this Machiavellian proposal to succeed, as it appears the Owner, the Office of Planning, the Office of the Attorney General and others, yet unknown, are anticipating, their plan required *this* Board to grant the Owner’s December 11, 2007 motion and to agree *not* to issue its January 8, 2008 decision until *after* the RCOD provision has been gutted by the ZC.

Here again, the motion to postpone seeks to allow the Owner to “have its cake and eat it too.” To reward the Owner’s strategic disregard of existing law on the one hand, and on the other, protect it from the consequences of that

strategy in the event it fails, as their actions betray that are now conceding it may, as evidenced by this extraordinary, extra-constitutional proposal.

Accordingly, we, Appellants 17677 very strongly oppose their motion.

Further, Appellants 17677 oppose the Owner's motion to postpone on grounds that it is but the latest manifestation of a suspected unseemly, long-standing and on-going collaboration between the Owner, Douglas Jemal, and certain government officials intended to enable his "Citadel" project to violate District of Columbia zoning laws, including the requirement that its proposed "prohibited" use be subjected to and submitted for *necessary* approval to the lawful jurisdiction of the District of Columbia Board of Zoning Adjustment.

Now that the Owner was rebuffed in its 11th hour attempt to have BZA Appeals Nos. 17675 and 17677 dismissed, the Owner's motion shamelessly asserts that effectively denying Appellants 17677 the opportunity to present our appeal on December 18, 2007, as scheduled, will "[spare] all parties and the Board from the effort to argue and resolve the provisions at issue" in this case.

The truth of the matter is that the Owner, notwithstanding this, its latest, expression of contempt for the jurisdiction of this Board, is well aware of the fact that, as there is nothing to be resolved *or* that can be legitimately argued

with respect to applicable RCOD provision, its real goal is to eliminate the possibility and to minimize any impact of this Board's scheduled January 8, 2008 decision favoring, as existing law clearly mandated, the Appellants.

Further, Appellants 17677 assert that the Owner seeks a delay in these proceedings until it has had an opportunity to use its considerable influence not only to see the RCOD provision amended to permit an otherwise illegal proposed use, but also to avoid Appellant litigation that would otherwise challenge *any* retroactive application of the amended provision, on grounds that retrospectively applying said amended provision to this appeal would violate Article 1 Sections 9 and 10 of the United States Constitution, as well as its Ninth, Tenth, Fourteenth and Fifth Amendments (absent just compensation).

With respect to the Owner's assertion that its motion to postpone will add "administrative efficiency" to the proceedings for the Board and the parties, the truth is exactly the opposite. Appellants 17677 will vigorously protest the amendments proposed for the RCOD provision, including before: 1) the Zoning Commission; 2) the City Council; 3) the House of Representatives Committee on Oversight and Government Reform; and 4) before the United States Senate Committee on Homeland Security and Government Affairs. Further, in the *very* unlikely event that the proposed "private" amendment will ever be sustained by

the Congress requiring this Board, thereby, to retroactively apply it either to the parties or the property at issue in this appeal, Appellants will immediately begin litigation in the appropriate courts to prevent that law from taking effect.

Initially, Appellants will seek injunctive relief pending appeal, all the way to the United States Supreme Court, if necessary. Thereafter, Appellants will engage in a full scale Constitutional challenge, also to the United States Supreme Court if necessary. Note of which will be efficient, administratively.

Further, in this connection, Appellants may very well be assisted in this connection by some of our Nation's preeminent constitutional scholars, legal societies and libertarian associations, as they have been waiting over the last 200 years (since the landmark opinion of *Calder v. Bull* (1798)), for the right Court and a clear-cut set of facts, such as would be presented here, to present the definitive case against the enactment of *civil* ex post facto laws, to the full United States Supreme Court.

Appellants raises these points to this Board not intending to threaten in any way shape or form, but only to support Appellants assertion that, contrary to the suggestion of the Owner's letter-motion that any postponement of these proceedings would be brief, because a resolution of this matter is on track to follow an "expedited" timeline, because the likelihood is it very well may not.

IV. CONCLUSION

As the proposed amendment to the RCOD would be extra-constitutional and is intended to retroactively clear a path around District zoning laws and regulations in order, unlawfully, to permit the Owner to engage in an activity it knows to be expressly prohibited, and therefore, illegal, and considering the fact that the Owner has known from the very beginning that its proposed use would damage and adversely impact the Appellants, including: 1) driving Appellant Yeheyis Getachew, the adjoining small grocer of 11 years operation, and others intended to be protected by the RCOD provision, completely *out of business* (without consideration or compensation); 2) will endanger and disrupt the lives of immediate residents; 3) would destroy the cultivated nature and character of the immediate area (without compensating neighborhood improvements); and 4) would inure to the private financial benefit of Mr. Jemal and his tenant's new, almost 40,000 square feet, business operation, in contradiction of existing District of Columbia zoning law, Appellants disapprove most vigorously.

Accordingly, while Appellants will speak further in opposition to the Owner's motion when the matter is taken up by the Board, on December 18, Appellants here assert that this appeal should proceed as scheduled, and that the

Owner's letter-motion to effectively cancel the December 18, 2007 and January 8, 2008 public hearings of the Board of Zoning Adjustment, should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Hereby Certify that a copy of the forgoing Opposition to Intervenor Property-Owner's Motion to Postpone Further Public Hearings, in the matter of BZA Appeal No. 17677, was served this 17th day of December, 2007, via first-class mail, postage prepaid or via overnight hand delivery, upon the following:

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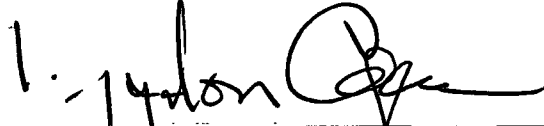
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District of Columbia City Council

Chair and Ranking Member
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Committee on Oversight and Government Reform

Chair and Ranking Member
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