

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

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TUESDAY
FEBRUARY 25th, 2014
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The Regular Public Meeting convened in the Jerrily R. Kress Memorial Hearing Room, Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:30 a.m., Lloyd J. Jordan, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LLOYD J. JORDAN, Chairperson
MARNIQUE HEATH, Board Member
JEFF HINKLE, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

PETER MAY, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
JOHN NYARKU, Zoning Specialist
STEPHEN VARGA, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.
MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from the Public Meeting held on February 25th, 2014.

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P-R-O-C-E-E-D-I-N-G-S

(9:40 a.m.)

BZA CHAIR JORDAN: Okay. If we would please come to order. Good morning, ladies and gentlemen. We're located at the Jerrily R. Kress Memorial Hearing Room at 441 4th Street, N.W. And we're here for the meeting and hearing of the Board of Public, Board of Zoning Adjustment in the District of Columbia.

My name is Lloyd Jordan, Chairperson. To my right is Jeffrey Hinkle, a member of the Board. Over to the left, Peter May, a member of the Zoning Commission sitting in today as a member of the Board of Zoning Adjustment.

And immediately to my left is our new board member, which we want to welcome, Marnique Heath is a new member of the Board of Zoning Adjustment and this is her initial hearing, so be kind. And we're glad to have her, really glad to have her bringing a wealth

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of knowledge and an architect by profession. So we're very glad to have her here.

Please be advised that these proceedings are being webcast live and also being recorded by a court reporter who is sitting to my right. So therefore I'm going to ask you to refrain from any disruptive noises here in the hearing room.

That means silence the telephones and anything else that makes the noises. And this is a good time to do it to make that check. Now if you're here to testify or provide any statements on any case on our docket today I need you to do two things.

If you're here to provide testimony or to make a statement to the Board, I'm going to need you to do two things. The first of which I need you to complete two witness cards per person, that's two witness cards per person and prior to your testimony giving those witness cards to the court reporter who is sitting to my right.

So that's two witness cards per person prior to testifying or giving your statement give it to the court reporter sitting to my right. The second thing I'm going to need you to do is to now stand if you're going to give testimony or a statement to the Board, I need you to know stand and take the oath or affirmation which will be rendered by Mr. Moy, the Board Secretary.

MR. MOY: Good morning.

(All witnesses sworn)

MR. MOY: Ladies and gentlemen, you may consider yourselves under oath.

BZA CHAIR JORDAN: All right.
Thank you. Mr. Moy, do we have some announcements for today's docket?

MR. MOY: Yes, sir. Good morning, Mr. Chairman and Members of the Board. My announcements, for the record, are brief this morning. The first is the, one of the three cases for a decision this morning, which is 18638 of Rosebusch, has been rescheduled to

April 1st for reasons of lack of a quorum, Mr. Chairman.

My other, my only other announcement is Application Number 18628 of William Green, that application has also been rescheduled to April 1st. Other than that the line up of the cases for the docket is your own, Mr. Chairman.

BZA CHAIR JORDAN: All right. Thank you. One second, let me catch up. Okay. So let's handle our decision cases for the day, Mr. Moy. Let's call 18669.

MR. MOY: All right. The first --
BZA CHAIR JORDAN: There is no one needed to be at the witness table. It's the Board's decision, deliberation and decision being made. The hearing has already been concluded on the matter.

MR. MOY: Okay. The first case for a decision before the Board is Application Number 18669. This is the application of Shiau Feng Chen. If you'll recall, Mr. Chairman,

this is before the Board for special exception relief to establish a dog boarding establishment under Section 735 at 4824 MacArthur Boulevard.

This application was heard, completed public testimony, closed to record on December 18th, scheduled for a decision for today, February 25th. The Board requested filings from the applicant as well as the opportunity to respond to the filings.

In your case folders, Mr. Chairman, is the applicant's filing under Exhibit 40. Responses from the Party in Opposition is Exhibit Number 41 and in the record, just for the Board's notation that there is an ANC 3D letter under Exhibit 39. And that completes the staff's briefing, Mr. Chairman.

BZA CHAIR JORDAN: Thank you, Mr. Moy. Is the Board ready to deliberate on this case? Mr. May and Mr. Hinkle will be deliberating on this, Ms. Heath didn't sit on this particular case.

This is a case which we've had a lot of testimony on and had a lot of debate. But this is one which I would offer to the Board to deny for the mere fact that, well for a couple of reasons, one it's clear that the property abuts a residential neighborhood and therefore doesn't meet the requirements of the regulations.

Abutting, it's very clear that this property abuts as defined by the regulations Section 107.5, that this clearly abuts in the middle line alleys, the middle line of the alley becomes the dividing line of districts. This property does abut a residential neighborhood.

It fits within the definition as a back up even as we don't have the clear word abut defined in zoning regulations. However, it does fit under if you look up in the Webster's Dictionary, the definition of what abutting means.

If you look at a line of cases, not necessarily in our jurisdictions but other

jurisdictions it clearly abuts. We've had expert testimony, not in this particular case, but we've actually had other findings and renderings and discussions, which is very consistent with what I'm suggesting that the Board decide on this particular case.

Further I do not find persuasive, in addition to the abutting issue, I do not find persuasive or credible the noise study evidence that was presented in this matter. The record appears to be suspect in regards to the presentation and how it was done and the subsequent document that was submitted.

The name of the expert didn't match up with the name of the company. In fact, the expert is with another company. And more importantly even regarding the test that the expert allegedly used, the maximum number of dogs that are going to be in this spot was asserted to be six.

The expert ran that test upon the noise on one dog. I didn't understand why you

wouldn't use it for, measure what it's going to be for the maximum ability to have noise with six dogs. But some kind of way this expert said we're just going to test what one dog was going to do.

Not sufficient enough basis for me to be persuaded and I didn't find that to be credible. So those would be the reasons why I would offer that this Board deny this application. Anyone else? Mr. May.

COMMISSIONER MAY: Mr. Chairman, I'm curious about your conclusion that the property clearly abuts the residential zone, not that I necessarily agree with the zoning administrator because the zoning administrator said exactly the opposite. And this Board in essence confirmed that judgment by originally allowing the dog grooming facility in this location. So I'm just, I'm interested in hearing your logic.

BZA CHAIR JORDAN: Let's talk about that because someone raised the issue of

whether or not the Board was stopped from even dealing with the issue of abutting. And that enters in a whole, another discussion whether or not the Board would be a stop by issue on the Summary Order where the Board never addressed the issue directly and the stopper would not be in the place before the fact that it was not an issue actually raised, litigated and decided with any consciousness by the Board on the Summary Order, so therefore would not be necessarily precedence.

And we didn't have any discussion in a Summary Order discussing that particular issue. The regs, under 107.5, clearly defines where the dividing lines are for districts. And the argument was made to this Board by OP and I believe also by the ZA, that the alley is not zoned. The alleys are not zoned.

That's absolutely not correct. Under the regulations, under 107.5, it carries the district and the alley is divided in the middle of the two zones. I mean we're clear

about that. We've had other testimony and we've also acted in other cases where we talk about the word abutting and where it lies.

So it's consistent with what this Board has done in the past. It's consistent and in light of what the regulations requires that's where any issue about the prior approval that was done.

COMMISSIONER MAY: Thanks, that was very helpful. I mean I, it always troubled me the issue of this, whether this property abutted a residential zone because in the plain language it seems that it clearly does.

So, you know, I was troubled by that from the beginning and I'm very happy to hear you state it that way. And I agree with you on that point. I mean I will say for what it's worth, not that it really has any meaning, but I frankly think that the case was made that there won't be significant noise coming from the property and there is no reason why we wouldn't grant it if it weren't for the abutting

issue.

But there's no reason to even bother arguing that. I concur on the abutting issue.

BZA CHAIR JORDAN: Anything else, Mr. Hinkle?

MEMBER HINKLE: No, I tend to agree with you assessment in terms of the abutting. I know we've looked at this in other cases and carefully, but maybe not specifically related to the alley. And, you know, as you did mention we did approve a grooming use at this site, which had the same requirement but we didn't necessarily look at that specific issue when we approved that.

I disagree a little bit with Mr. May. I'm not convinced that the applicant has made a case that there would not be noise late at night that would be objectionable to the neighbors. And I think that's one of the criteria in 735.3 that we need to consider as well.

But, you know, simply because it

does not meet the criteria of 735.2, which is the abutting issue, I am inclined to deny this application as well.

BZA CHAIR JORDAN: Then I would move that the Board deny the application, the request of the applicant in 18669.

MEMBER HINKLE: I will second.

BZA CHAIR JORDAN: Motion made and seconded. Any further discussion? All those in favor signify by saying aye.

(Chorus of ayes)

BZA CHAIR JORDAN: Those opposed, nay. The motion carries. Mr. Moy.

MR. MOY: Staff would record the vote as 3-0. This is on the motion of Chairman Jordan to deny the application for the relief requested. Seconding the motion, Mr. Hinkle, also in support Mr. Peter May.

We have at that time a member seat vacant. And we have a member not present and not voting. So again, the motion carries to deny on the vote of 3-0.

BZA CHAIR JORDAN: Thank you. And that's a full order.

MR. MOY: Yes, sir. The next application for a decision is Application Number 18701. This is an application of 1247 ESE, LLC.

This is for, a request for a variance relief from the use provisions to operate a coffee shop, advertised at the time for a coffee shop/caf , which I believe and the Board can correct me, has been perhaps amended to restaurant use on the first floor space with an existing apartment house under Section, Subsection 330.5 in the R-4 District, 1247 E Street, S.E.

The Board completed the public testimony, closed the record and scheduled its decision on December 25th. The Board requested additional information from the applicant. That document is in your case folders, that post hearing document under Exhibit 36. And with that the Board is to act

on the merits of the request.

BZA CHAIR JORDAN: All right.

This is one which I think we want to take a step off the unusual. Mr. Sullivan, is he here today? Would you come forward please, Mr. Sullivan?

MR. SULLIVAN: Good morning, Mr. Chairman.

BZA CHAIR JORDAN: If you would just identify yourself.

MR. SULLIVAN: My name is Marty Sullivan with the law firm of Sullivan & Barros.

BZA CHAIR JORDAN: Mr. Sullivan, we've, this is an issue where it's given us some concern. So I'm going to give you an option of how we should proceed with this, whether we're going to need to reschedule it for a hearing or whether or not you want to amend your relief.

As you know, the criteria we have for food establishments here is basically three criteria how food establishments fall within the regulations. And this clearly falls

within the food preparation, a fast food restaurant because you're prepaying for the food, et cetera and it meets the definition.

It's the Board's concern or my concern and also counsel, being advised by counsel, that's not a provision which we can waive. You have made a request, yes, that we give the use of restaurant, but that we waive the criteria to allow them to be prepaid food.

It's either, fits within the guidelines of the regulation and that we don't have the authority to waive that particular provision that's been argued to us. So what I wanted to present to you was one, that you respond to that.

And then the second part of that would be whether or not you want to alter your practice at the establishment if we were to grant it, meaning that you would, you know, pay afterwards or we can come back and deal with the issue of you making a case for the fast food because it's a fast food establishment.

MR. SULLIVAN: I think the way to handle it since, because I think what you're saying is that if you give us approval as a restaurant but then we have one aspect of a fast food establishment that you can't give in effect a positive condition.

But with the understanding that what we presented won't change and that will be the use, can we address it, can I amend the application to be, to include fast food establishment but then have the negative conditions, including the other two requirements, that make it clear that the use in effect will be what we have represented to be the use.

And it will be conditioned anyway, regardless of what you call it. So in effect we're giving the different overall designation but then you're pulling it back with the conditions. So we don't, we cannot, we're restricted from having the benefit of the other two conditions in the three conditions of a fast

food establishment.

BZA CHAIR JORDAN: That's again changing the definition that's provided in 199. That's what I'm hearing you ask us to do.

MR. SULLIVAN: Well it's conditioning it as you would condition a use variance, in any event.

BZA CHAIR JORDAN: That's what I just said, okay. She was going to say to me what I just said to you.

MR. SULLIVAN: And if we did another hearing it wouldn't be any different because we're still representing that we have the same use. We're still proposing the same use.

It's just what you call it on the Certificate of Occupancy. On the Certificate of Occupancy it would be fast food establishment subject to the conditions in BZA Order 18701. And among those conditions would be that we don't receive the benefit of two of the three conditions.

The only thing that makes us a fast food establishment is the payment. I mean the other option is that we take the approval, we don't call ourselves a fast food establishment. We could come back with a modification when he eventually gets a tenant and they say that this is really important to us.

But I don't, in any use variance, I believe, you, the Board is able to put restrictions.

BZA CHAIR JORDAN: And what restriction are you asking, you would ask us to under restaurant?

MR. SULLIVAN: Well it would be under fast food establishment. If there's three conditions that make something a fast food establishment, drive thru, I think it's the type of silverware and dishes that you use, that in those two instances we're not to have a drive thru, obviously and we're not to have paper plates and plastic silverware.

So we don't, I think that if the

Board approves something up here and then pulls it back with conditions, I think that the Board typically can do that in a use variance case.

BZA CHAIR JORDAN: Excuse me one second. Let me take a look at this a second. Let me also ask counsel.

MR. SULLIVAN: Mr. Chairman, the applicant is here and maybe a discussion with him might --

BZA CHAIR JORDAN: We're not about to have a full hearing.

MR. SULLIVAN: No.

BZA CHAIR JORDAN: I'm really in posture of thinking of what I'm going to do is roll this and put this on for another date for us to really sink our teeth in. I don't like to, these decisions are certainly important decisions and modifying in such a way, it's not, it's the responsibility of the applicant to come here with the request of relief that fits within and asks for the proper relief.

And that's kind of what I'm leaning

to. Just give me one second.

MR. SULLIVAN: Mr. Chairman, I have additional information that might make this easier.

BZA CHAIR JORDAN: One second please. I'm trying to clean up what was presented to us. Just bear with me trying to help you.

(Off microphone comments)

BZA CHAIR JORDAN: Mr. Sullivan, please.

MR. SULLIVAN: Okay. The applicant is fine with going forward as restaurant and requiring the eventual operator to follow all the guidelines that apply to restaurants and not be a fast food establishment.

If need be they can come back and request a modification at that time.

BZA CHAIR JORDAN: That was one of the options I gave you initially. I appreciate that. We kind of went all around the block.

Is the Board comfortable and ready to proceed with this?

All right. It's not like this document is not bad enough already today. Okay. So we'll look at it that way. In that case is the Board ready to deliberate on this case as a restaurant as opposed to any other particular use being requested?

MEMBER HINKLE: Yes, Mr. Chair.

BZA CHAIR JORDAN: This is, well as a restaurant this is an application which I could give support to. I think what was very helpful that we got the additional information from the neighboring property which you now have by agreement is going to allow you to be served by the other property, you can use the other property for your refuse, et cetera.

Before that was a stumbling block for the Board. I believe that you've made a case based upon the economic cost of the conversion of the property and also historic preservation concerns of the property. And

then even if you're trying to use it within the regulations, the zoning regulations, you still had to come back to the Board with some type of zoning relief.

And I think those things were very persuasive. Again, our concern was about how you actually were going to operate. So you have to make sure that your tenant would do so properly. The cellar space is not, based upon the evidence, is not really adaptable for residential use.

So I could support this application. Anyone else?

MEMBER HINKLE: Yes, thank you, Mr. Chair. I just wanted to state that I think the applicant has made a case for the relief requested.

I especially appreciate the supplemental information in terms of the difficulty to convert the space to residential use. I think the applicant made, through, you know, the financial information that they

provided us enough proof to convince me that it would be difficult to both create a residential unit at the site as well as market it.

So I support the application. I just wanted to clarify, Mr. Chair, I don't think the first issue that you noted as related to this case in terms of the refuse. Yes, I think it's another case that had that issue. But that's all I have.

BZA CHAIR JORDAN: Mr. May. We have a proxy good. Okay, great. I thought we had another point. This is one where conditions were set up for this particular one and those conditions that were offered I've made some changes to this proposal at issue so that they flow a bit better. And I think there were seven conditions that had been previously offered in this case.

OP made their, Office of Planning made their support conditioned upon the condition. I also want to make note that the ANC 6B voted 10-0 to support this application.

And we certainly give that great weight and we do take that into consideration in our decision.

So the conditions would be, I have altered them some so I want to make sure that the applicant and that the, our minutes and notes reflect the changes being made in the conditions. We've had some difficulty in understanding some of the conditions when they have been changed.

The first one, the operating time shall not exceed 7:30 a.m. to 8:00 p.m., Monday through Friday and 9:00 a.m. to 8:00 p.m., Saturday and Sunday. Subject to any conditions imposed by the Public Safety Committee, excuse me, Public Space Committee and Historic Preservation Review Board, trash cans shall be concealed and not visible from the street.

Delivery shall only be allowed between 8:30 a.m. to 5:00 p.m., Monday through Friday and 9:30 to 2:00 p.m., Saturday only.

Outdoor seating shall be permitted if approved by Public Space Committee. Outdoor seating is not permitted between the entry door on E Street and the fence line of 1245 E Street, S.E.

Outdoor music is not allowed, subject to conditions imposed by HPO, Historic Preservation Order, the door facing 13th Street shall be reopened. So that would be the conditions that I would impose.

MEMBER HINKLE: I agree with those.

BZA CHAIR JORDAN: With that then I would move the relief requested with these conditions.

MEMBER HINKLE: I'll second that.

BZA CHAIR JORDAN: All those in favor of the motion signify by saying aye.

(Chorus of ayes)

BZA CHAIR JORDAN: Those opposed, nay. And we do have an absentee ballot, Mr. Moy.

MR. MOY: Yes, sir. The absentee ballot is from another participant on this

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application, Mr. Hood. And per his instructions his absentee ballot vote is to, given the fact that this has been and that's what I was alluding to is to approve the application with conditions as imposed by the Board.

So that would give a final vote of 3-0 on the motion of Mr. Chairman, seconded by Mr. Hinkle and of course in support of Mr. Hood. At the time a seat vacant and a member not present, not voting.

BZA CHAIR JORDAN: That's a mouthful.

MR. MOY: Yes.

BZA CHAIR JORDAN: Fine. And I think we can do this by summary.

MR. MOY: Yes, sir.

BZA CHAIR JORDAN: Very good. Thank you. Appreciate it. Yes, opposition.

MR. MOY: No, not in this case.

BZA CHAIR JORDAN: Okay, that's all right. I had a dog and cat I was mixed up with.

Very good. Thank you very much. We're going to do a trade off.

(Whereupon, the meeting in the above-entitled matter was concluded at 10:08 a.m.)