

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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VIRTUAL PUBLIC HEARING

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WEDNESDAY

APRIL 12, 2023

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The Public Hearing of the District of Columbia Board of Zoning Adjustment convened via videoconference, pursuant to notice at 9:37 a.m. EDT, Lorna L. John, Vice Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS:

FREDERICK L. HILL, Chairperson Appointee
LORNA JOHN, District Resident Appointee
CARL H. BLAKE, District Resident Appointee
CHRISHAUN SMITH, National Capital Planning Commission
Designee
ROBERT MILLER, Zoning Commission Member
JOE IMAMURA, Zoning Commission Member

OFFICE OF ZONING ADJUSTMENT STAFF:

CLIFFORD MOY, Secretary
PAUL YOUNG, Zoning Data Specialist

OFFICE OF ZONING LEGAL DIVISION STAFF:

MARY NAGELHOUT, Esquire
CARISSA DEMARE
COMETRA COOPER

The transcript constitutes the minutes from the Regular Public Hearing held on April 12, 2023

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T-A-B-L-E O-F C-O-N-T-E-N-T-S

Case No. 17963A

4975 South Dakota Associates, LTD 8

Case No. 20877

Tyrone White 11

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

(9:37 a.m.)

VICE CHAIRPERSON JOHN: Okay. Good morning, ladies and gentlemen. The Board of Zoning Adjustment's May 12th public hearing would please come to order. My name is Lorna John, Vice Chairperson of the District of Columbia Board of Zoning Adjustment. Joining me today is Board Member Crishaun Smith and Zoning Commissioners Robert Miller and Dr. Imamura.

Today's meeting and hearing agendas are available on the Office of Zoning's website. Please be advised that this proceeding is being recorded by a court reporter and is also webcast live via Webex and YouTube Live. The video of the webcast will be available on the Office of Zoning's website after today's hearing. Accordingly, everyone who is listening on Webex or by telephone would be muted during the hearing. Also, please be advised that we do not take any public testimony or the -- at our decision meeting.

If you experience difficulty accessing Webex or with your telephone call-in, then please call our OZ hotline at 202-727-5471 to receive Webex login or call-in instructions.

At the conclusion of the decision meeting session, I shall, in consultation with the Office of Zoning, determine whether a full or a summary order may issue. A full order is required when the decision it contains is adverse to a party, including an affected ANC. A full order may also be needed if

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1 the Board's decision differs from the Office of Planning's
2 recommendation. Although the Board favors the use of summary
3 orders whenever possible, an advocate may not request the Board
4 to issue such an order.

5 In today's hearing session, everyone who is listening
6 on Webex or by telephone will be muted during the hearing, and
7 only the persons who have signed up to participate or testify
8 will be unmuted at the appropriate time. Please state your name
9 and home address before providing oral testimony or your
10 presentation. Oral presentations should be limited to a summary
11 of your most important points. When you are finished speaking,
12 please mute your audio so that your microphone is no longer
13 picking up sound or background noise.

14 Once again, if you experience difficulty accessing
15 Webex or with your telephone call-in, or if you have forgotten
16 to sign up 24 hours prior to this hearing, then please call our
17 OZ hotline number at 202-727-5471 to sign up to testify and to
18 receive Webex login or call-in Instructions.

19 All persons planning to testify, either in favor or in
20 opposition, should have signed up in advance. They would be
21 called by name to testify. If this is an appeal, only parties
22 are allowed to testify. By signing up to testify, all parties
23 completed the oath or affirmation as required by Subtitle Y,
24 Section 408.7. Requests to enter evidence at the time of an
25 online virtual hearing, such as written testimony or additional

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1 supporting documents other than live video, which may not be
2 presented as part of the testimony, may be allowed pursuant to
3 Subtitle Y, Section 103.13, provided that the person making the
4 request to enter an exhibit explains how the proposed exhibit is
5 relevant, the good cause that justifies allowing the exhibit into
6 the record, including an explanation of why the requester did not
7 file the exhibits prior to the hearing, pursuant to Subtitle Y,
8 Section 206, and how the proposed exhibit would not unreasonably
9 prejudice any party.

10 The order of procedure for special exceptions and
11 variances, pursuant to Subtitle Y, Section 409 will be as follows:
12 preliminary in procedural matters, statement of the Applicant and
13 the Applicant's witnesses, report and recommendation from the
14 D.C. Office of Planning, reports and recommendations from other
15 public agencies, reports and recommendations from the affected
16 Advisory Neighborhood Commission, and the ANC's witnesses, if
17 any, for the area within which the property is located, parties
18 in support of the application, individuals and organization
19 representatives in support of the applications, parties in
20 opposition to the application, individuals and organization
21 representatives in opposition to the application, individuals and
22 organization representatives who are undeclared with respect to
23 the application, rebuttal and closing statements by the
24 Applicant.

25 Pursuant to Subtitle Y, Section 408.2 and 408.3, the
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1 following times and streams shall be maintained: the Applicant,
2 Appellant and all parties, except an affected ANC in support,
3 including witnesses, exclusive of cross-examination, maximum of
4 60 minutes collectively, the Appellee, persons and parties,
5 except an affected ANC in opposition, including witnesses,
6 collectively have an amount of time equal to that of the Applicant
7 and parties in support, but in no case, more than 60 minutes
8 collectively. Individuals, maximum of three minutes,
9 organization representatives, maximum of five minutes.

10 These time constraints do not include cross-examination
11 or questions from the Board. Cross-examination of witnesses by
12 the Applicant or parties, including the ANC is permitted. The
13 ANC within which the property is located is automatically a party
14 in a special exception or variance case. Nothing prohibits the
15 Board from placing reasonable restrictions on cross-examination,
16 including time limits and limitations on the scope of cross-
17 examination, pursuant to Subtitle Y, Section 408.5.

18 At the conclusion of each case, an individual who was
19 unable to testify because of technical issues may file a request
20 relief to file a written version of the planned testimony to the
21 record within 24 hours following the conclusion of public
22 testimony in the hearing. If additional written testimony is
23 accepted, then parties will be allowed a reasonable time to
24 respond as determined by the Board. The Board will then make
25 its decision at its next meeting session, but no earlier than 48

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1 hours after the hearing. Moreover, the Board may request
2 additional specific information to complete the record. The
3 Board and the staff would specify at the end of the hearing
4 exactly what is expected and the date when persons must submit
5 the evidence to the Office of Zoning. No other information shall
6 be accepted by the Board.

7 Once again, after the Board adjourns the hearing, the
8 Office of Zoning, in consultation with me, will determine whether
9 a full or summary order may issue. A full order is required when
10 the decision it contains is adverse to a party, including an
11 affected ANC. A full order may also be needed if the Board's
12 decision differs from the Office of Planning's recommendation.
13 Although the Board favors the use of summary orders whenever
14 possible, an Applicant may not request the Board to issue such
15 an order.

16 Finally, the District of Columbia Administrative
17 Procedure Act requires that the public hearing on each case be
18 held in the open before the public. However, pursuant to Sections
19 405(b) and 406 of that Act, excuse me, the Board may, consistent
20 with its Rules of Procedure and the Act, enter into a closed
21 meeting on a case for purposes of seeking legal counsel on a
22 case, pursuant to D.C. Official Code, Section 2575(b)(4) and/or
23 deliberating on a case, pursuant to D.C. Official Code,
24 Section 2575(b)(13), but only after providing the necessary
25 public notice and in the case of an emergency closed meeting

1 after taking a roll call vote.

2 Mr. Secretary, do you have any preliminary matters? If
3 not, let's proceed with the agenda.

4 MR. MOY: Good morning, Madam Vice --

5 VICE CHAIRPERSON JOHN: Good morning.

6 MR. MOY: -- Chairman -- Chairperson, members of the
7 Board and also Zoning Commissioners with the Board today.

8 I do have a short announcement related to today's
9 docket. There are two cases that have been withdrawn: one by
10 the Applicant, one by the Appellant. Application number 20760
11 of SC Holdings, Peabody, LLC, withdrawn by the Applicant. Appeal
12 number 20800 of Ayehu Berhe, withdrawn by the Appellant. Finally,
13 there are two case applications postponed and rescheduled to
14 October 25th, 2023. And these two cases are application numbers
15 20768 of District-Properties.com, Inc., application number 20769
16 of District-Properties.com, Inc. And other than that, Madam Vice
17 Chair, we have a preliminary matter to the hearing case today.
18 But I'll bring that to your attention when I call the case.

19 VICE CHAIRPERSON JOHN: Thank you. Mr. Moy, I think I
20 should proceed with the hearing case in order to accommodate
21 Commissioner Miller, who appears to be on a tight schedule today.
22 So let's go ahead and do the hearing case now.

23 MR. MOY: Very well. Thank you.

24 So this would be Case Application No. 17963A of 4975
25 South Dakota Associates, Ltd. This is an application that was

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1 advertised pursuant to Subtitle X, Section 901.2 for special
2 exception under Subtitle U, Section 511.1(f)(1) to allow use as
3 a gasoline service station. The property is located in the MU-
4 3A zone at 4975 South Dakota Avenue, Northeast, Square 3899, Lot
5 76. And this application has a preliminary matter filed by the
6 Applicant under Exhibit 25, which is his motion for a continuance
7 that was filed into the case record on Friday, April the 7th.
8 Thank you.

9 VICE CHAIRPERSON JOHN: Okay. Thank you.

10 Is the Applicant here? Mr. Young, could you let the
11 Applicant in please?

12 MR. PRAKASH: Yes. On my end, can you -- can I be
13 heard?

14 VICE CHAIRPERSON JOHN: I can hear you, but are you
15 choosing not to use your video?

16 MR. PRAKASH: Oh. Oh, sorry. Yeah, I can. I didn't
17 choose.

18 VICE CHAIRPERSON JOHN: Okay. Thank you. Good morning.
19 Please introduce yourself for the record, and give your home
20 address.

21 MR. PRAKASH: Good morning, Madam Chairman and members
22 -- esteemed members of this Board. My name is Bhoopendra Prakash.
23 I represent the Applicant. We work at The Plan Source, civil
24 engineers, and we are based here at -- in Fairfax, Virginia.

25 VICE CHAIRPERSON JOHN: Thank you. And can you tell

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1 the Board why you need this continuance?

2 MR. PRAKASH: Well, Madam Chairman, we need a
3 continuance on the basis that, in terms of brief context, we were
4 advised earlier in the planning process that this will be a
5 modification of significance to continue on the basis of a
6 previous approval, dated July 9th, 2010. But recently, that has
7 changed on the basis that we only need to apply for a new special
8 exception for the gasoline component of the site. And because,
9 at this time, we do not have full reviews from various agencies,
10 it is necessary for us to continue so that we can get full
11 feedback from staff.

12 VICE CHAIRPERSON JOHN: Okay. Thank you, Mr. Prakash.

13 Does the Board have any questions? Okay. So Mr. Young
14 (sic), what's our timeline looking? When can we see them again?

15 MR. MOY: Madam Vice Chair, I think, given the
16 requirements for this new application. And I'm assuming also
17 renoticing of the application and the requirements for additional
18 information, which I believe also includes materials requested
19 by DDOT, my suggestion would be to -- and of course, the Board
20 has its August recess, so my suggestion would be to set this for
21 a hearing on September the 27th.

22 VICE CHAIRPERSON JOHN: Okay.

23 Mr. Miller, does that work for you?

24 VICE CHAIR MILLER: Yes. That date works for me. I
25 just had a -- I do have a question. And maybe just to clarify

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1 if it's a new application, it's going to have a new number,
2 Mr. Moy, or Mary Nagle? How did our counsel -- I mean, is it
3 really a continuance if it's a new application, or -- I'm just --
4 -- I just -- it may be a semantic difference, but September 27th,
5 to answer your question, is fine.

6 VICE CHAIRPERSON JOHN: Yes. Okay. That --

7 MR. MOY: Your other question, I would leave to the
8 Chair and Ms. Naglehout.

9 VICE CHAIRPERSON JOHN: Yeah. I assume that would be
10 worked out during the process.

11 VICE CHAIR MILLER: Okay. Thank you.

12 VICE CHAIRPERSON JOHN: Thank you. So, Mr. Prakash,
13 we will continue this case to September 27th. And you have heard
14 Commissioner Miller's question. So the case, as I understand it,
15 will have to be re-noticed --

16 MR. PRAKASH: Yes.

17 VICE CHAIRPERSON JOHN: -- and amended to seek the
18 request that you're -- you should be asked -- seek the relief
19 you should be asking for, which is not an amendment. So I'm sure
20 the Office of Zoning can help you as you work through that
21 process. Okay?

22 MR. PRAKASH: Yes, Madam Chairman. We understand, and
23 we accept the conditions.

24 VICE CHAIRPERSON JOHN: Okay. Thank you. There's not
25 a condition, just the -- that the case will be re-noticed, because

1 you're seeking a different type of relief. You're seeking relief
2 for the gas station, not the existing structure that's there now.

3 MR. PRAKASH: That is well said. Thank you.

4 VICE CHAIRPERSON JOHN: Okay. All right. Thank you.

5 Thank you, Mr. Miller. We'll see you soon.

6 VICE CHAIR MILLER: Okay. Enjoy the rest of your
7 meeting and day.

8 VICE CHAIRPERSON JOHN: Okay. Thank you.

9 VICE CHAIR MILLER: Okay. Bye-bye.

10 VICE CHAIRPERSON JOHN: Okay, Mr. Moy, please call our
11 first hearing case when you're ready. Oh, decision case when
12 you're ready.

13 MR. MOY: The decision-making case before the Board is
14 application number 20877 of Tyrone White. This application is
15 pursuant to Subtitle X, Section 1002 for a use variance to allow
16 a fast-food establishment. The property is located in the MU-3A
17 zone at 4505 Sherriff Road, Northeast, Square 4126 (sic), Lot
18 849. The -- as the Board will recall, the Board last heard this
19 case at its hearing on March 8th, 2023, and afterwards the Board
20 scheduled the case for a decision making on April 12th.
21 Participating in this decision is Vice Chair John, Mr. Smith, and
22 Dr. Imamura. Thank you.

23 VICE CHAIRPERSON JOHN: Thank you. So are we ready to
24 deliberate? Oh, let's wait for Dr. Imamura.

25 COMMISSIONER IMAMURA: I'm here, Madam Vice Chair.

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1 Thank you.

2 VICE CHAIRPERSON JOHN: Thank you. So are we ready to
3 deliberate? Yes. Okay.

4 So I have a few thoughts, and I will start the
5 discussion. And please feel free to, you know, give your
6 thoughts. So we had quite a bit of discussion on this case when
7 it was first presented, and the Board was most concerned about
8 how the Applicant met the criteria for showing that the Applicant
9 would experience undue hardship if the Applicant were to comply
10 with the regulations, because of the existence of a special --
11 of an exceptional condition on the property.

12 So I thought that the Applicant did show that there was
13 an exceptional condition, because the Applicant and his family
14 have operated the business since -- at least for over 60 years.
15 And the Applicant submitted additional information to show that
16 that they have been using the establishment as a fast-food
17 operation for some time. So in -- with respect to the exceptional
18 -- the the undue hardship, which is a higher test than an area
19 variance, I believe the Applicant showed that there would be
20 significant financial hardship if the Applicant were to try to
21 comply with the conditions for a use that's permitted as a matter
22 of right or by special exception. And I believe the Applicant
23 included exhibits -- information at Exhibits 33 and 39, and also
24 provided a statement showing -- in -- and provided information
25 in those exhibits showing that the cost to buildout the property

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1 as a restaurant would be quite extensive and that, in addition,
2 the Applicant would lost -- would lose significant income if the
3 Applicant were to operate as a prepared food shop.

4 So I think that, with the supplemental information, the
5 Applicant has met its burden of proof. And I would give great
6 weight to OP's analysis and recommendation, both the initial
7 analysis and the supplemental analysis. And so I'm in support
8 of the application. Does anyone else want to -- Mr. -- Board
9 Member Smith?

10 MR. SMITH: Sure. I'll go next. I, by and large,
11 agree with your assessment of this particular case,
12 Vice Chair John. I'll take a look at it from the angle of, you
13 know, this is a use variance, and it is important that the
14 hardship needs to be shown by the property owner. And I believe
15 that the additional information that we received from the
16 property owner helps to make the case that the additional cost
17 that it would take to expand a very, very small building that
18 was purpose built for what they are requesting now. This is a
19 use variance for, you know, the type of carry out, type of
20 establishment would -- I do believe they had met the criteria
21 through that -- the cost would cause this to be an undue hardship
22 on the property owner.

23 The property owner stated that it will cost about
24 200,000 -- roughly \$200,000 to transition a building into a full-
25 service restaurant. And that is something that, you know, it is

1 a high-cost burden for such a small building. The Applicant did
2 provide that financial breakdown in -- that shows how much it
3 would cost to expand this small building. And you know,
4 separating the loss of revenue related to the food items, I don't
5 think that that, you know, merits an analysis for the variance,
6 because you can continue to sell those food items. We're not,
7 you know, we're not parsing food items that -- what is being
8 sold. It's more of a function of how those food items are sold.

9 So I think that the loss of revenue related to types
10 of food is fairly irrelevant to the conversation. But I do
11 believe that some of the costs, especially this \$200,000 cost,
12 has -- is shown -- has -- sufficiently demonstrated the hardship.
13 I will also say that the Applicant, to me, has shown that the
14 project is unmarketable or infeasible without this variance
15 because this is the purpose-built building for a carryout
16 establishment. So I do believe that they have met the criteria
17 for -- fully the criteria for -- of the grant -- this is variance.
18 So I give great weight to OP's staff report and will support the
19 requested variance.

20 VICE CHAIRPERSON JOHN: Okay.

21 Thank you, Board Member Smith.

22 Commissioner Imamura?

23 COMMISSIONER IMAMURA: Thank you, Madam Vice Chair.

24 I'm not sure that I have much more to add. Both you and
25 Board Member Smith, I think, provided a succinct summary. I,

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1 too, am prepared to vote in support of this. I think there are
2 exceptional circumstances here and an undue hardship, a
3 significant financial hardship by the property owner, as they
4 describe and laid out in the supplemental submission.

5 I also want to thank the Applicant for the additional
6 homework. We sent them back to provide us with additional
7 information. I realize that that took additional time,
8 additional money, but it was worth the added effort here to
9 demonstrate, I think, where the record is complete, that there
10 is an undue hardship that is defensible, and that they do meet
11 the (inaudible) for this use variance. And I, too, give great
12 weight to OP's report and align myself with your comments, Madam
13 Vice Chair and Board Member Smith. Thank you.

14 VICE CHAIRPERSON JOHN: Thank you, Commissioner.

15 So I will then make a motion to approve application
16 Number 2877, as captioned and read by the secretary, and ask for
17 a second.

18 Board Member Smith?

19 BOARD MEMBER SMITH: Second.

20 VICE CHAIRPERSON JOHN: Mr. Moy, would you please take
21 the roll call?

22 MR. MOY: Thank you, Madam Vice Chair.

23 When I call your name, if you'll please respond to the
24 motion made by Vice Chair John to approve the application for the
25 relief requested. The motion to approve was second by Mr. Smith.

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1 Zoning commissioner, Dr. Imamura?

2 COMMISSIONER IMAMURA: Yes.

3 MR. MOY: Mr. Smith?

4 BOARD MEMBER SMITH: Yes.

5 MR. MOY: Vice Chair John?

6 BOARD MEMBER SMITH: Yes.

7 MR. MOY: And we have two board members not present,
8 not voting. Staff would record the vote as three to zero to two.
9 And this is on the motion made by Vice Chair John to approve.
10 The motion to approve was seconded by Mr. Smith, who is also in
11 support of the motion to approve, as well as in favor to approve
12 from Zoning Commissioner Dr. Imamura. And again, of course, Mr.
13 Smith and Vice Chair John. And the motion carries on the vote
14 of three to zero to two.

15 VICE CHAIRPERSON JOHN: Thank you, Mr. Moy.

16 So is there anything else before the Board today?

17 MR. MOY: Nothing from the staff, ma'am.

18 VICE CHAIRPERSON JOHN: Okay. In that case, the Board
19 is adjourned. I think this is a record today. So you all -- I
20 think it's two weeks.

21 Right, Mr. Moy?

22 MR. MOY: Yes, ma'am.

23 VICE CHAIRPERSON JOHN: Okay. Have a great two weeks.

24 Bye.

25 (Whereupon, the entitled matter adjourned.)

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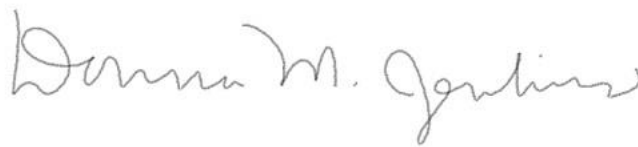
In the matter of: Public Hearing

Before: BZA

Date: 04-12-23

Place: Videoconference

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