

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

NOVEMBER 17, 2009

+ + + + +

The Special Public Meeting
convened in Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 9:30 a.m., Marc G. Loud, Chairman,
presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC G. LOUD, Chairman
SHANE L. DETTMAN, Vice Chair (NCPC)
MERIDITH H. MOLDENHAUER, Board Member

ZONING COMMISSION MEMBER PRESENT:

MICHAEL TURNBULL, FAIA, Commissioner
(AOC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
BEVERLY BAILEY, Sr. Zoning Specialist
JOHN NYARKU, Zoning Specialist

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Board of Zoning Adjustment
District of Columbia
CASE NO. Transcript
EXHIBIT NO. null

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.
MARY NAGELHOUT, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

KAREN THOMAS

The transcript constitutes the minutes
from the Public Meeting held on November 16,
2009.

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

APPLICATION NO. 18027

Continued to Afternoon Decision Calendar .. 4

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

9:51 a.m.

1
2 CHAIRMAN LOUD: Welcome to the
3 November 17th Public Meeting of Board of
4 Zoning Adjustment of the District of Columbia.

5 My name is Marc Loud, Chairperson.

6 And joining me today are Vice Chair Shane
7 Dettman representing the National Capitol
8 Planning Commission; Mr. Michael Turnbull from
9 the Zoning Commission; to my left Mrs.
10 Meridith Moldenhauer, Mayoral Appointee to the
11 BZA; Mr. Clifford Moy, Secretary of BZA; Mary
12 Nagelhout, Office of the Attorney General; and
13 on my far left Ms. Beverly Bailey, Zoning
14 Specialist here in the Office of Zoning.

15 Today's first case which is Case
16 No. 18027 -- Mr. Moy, if you could call that
17 case for us, please.

18 MR. MOY: Yes, sir. Mr. Chairman,
19 that's the Applicant's Motion for a Stay of
20 Enforcement of the Revocation of the
21 Certificate of Occupancy to Appeal No. 18027

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1 of Mehmet Kocak and Philly Pizza & Grill, Inc,
2 pursuant to 11 DCMR 3100 and 3101, from the
3 October 14, 2009 decision of the Zoning
4 Administrator to revoke CFO Permit No. 0800124
5 and the Request for a Stay of Enforcement for
6 restaurant use, which is the Philly Pizza and
7 Grill Restaurant in the C-2-A District at
8 premises 1211 Potomac Street, N.W., Square
9 1207, Lot 124.

10 Staff notes for the Board that the
11 original request for the stay of enforcement
12 of the revocation of the CFO is part of the
13 statement of the appeal that was filed for
14 October 23, 2009, and scheduled for public
15 hearing on February 9, 2010.

16 CHAIRMAN LOUD: Thank you, Mr. Moy.

17 I appreciate that. And good morning to
18 parties and their representatives that have
19 joined us at the table.

20 The Board has made a decision after
21 reviewing the file and taking a look at this
22 morning's calendar that we would like to

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1 continue this decision -- this was placed on
2 our calendar as a decision, not a hearing --
3 but to continue it until 1:00 p.m. this
4 afternoon where we have a decision case
5 already calendared. And that would allow us
6 to proceed a little more effectively with this
7 morning's calendar while not impairing any of
8 what we would do with respect to the decision
9 this morning in this case.

10 I see that the parties look like
11 they want to say something. Is there a
12 particular formality to allowing parties to
13 speak at a decision?

14 MR. MOY: Well, as in the past, Mr.
15 Chairman, the Board, although we didn't quiet
16 officially open for a Special Public Meeting,
17 but I think flexibility is left to the Chair
18 of the BZA.

19 CHAIRMAN LOUD: All right. If you
20 have something that you'd like to share with
21 the Board by way of our decision to continue
22 it until 1:00 o'clock -- we're not going to go

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1 into the pros and cons of the relief requested
2 at this point -- this would be a very
3 appropriate time to do it.

4 MS. MADDOX-LEVINE: Chairman Loud,
5 T. Gail Maddox-Levine for the Department of
6 Consumer and Regulatory Affairs.

7 We do have a preliminary issue
8 about jurisdiction. And in addition,
9 regarding the point about continuing until
10 1:00 o'clock p.m., there are neighbors that
11 have come down to actually give testimony if
12 the Board is interested in hearing that or to
13 give their perspective on whether or not a
14 stay should be granted in this matter. And
15 they were under the impression that we would
16 begin this morning. So I don't know if they
17 would be able to also attend at 1:00 p.m. I
18 think if the Board would like to hear from
19 them, then they would not have an opportunity
20 to come back at 1:00.

21 CHAIRMAN LOUD: And these are
22 neighbors that were brought by the District?

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1 MS. MADDOX-LEVINE: On their own
2 accord, Your Honor, they did indicate that
3 they wanted to be present first thing this
4 morning, and that they wanted an opportunity
5 to be heard.

6 Of course, they're not the
7 District's witnesses at this point because we
8 would be talking about the motion to stay.
9 However, since they are present, I wanted to
10 make the Board aware of that should that
11 factor into your decision about whether or not
12 to continue.

13 From the District's perspective,
14 the only issue that I would like to raise is a
15 jurisdictional one should you be interested in
16 hearing that at this time.

17 CHAIRMAN LOUD: Thank you. This is
18 not a hearing. And so even if we were to go
19 forward this morning, I can't imagine what the
20 testimony would be on the jurisdictional
21 issue.

22 Again, a) this is not a hearing at

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1 all. This is a decision. And b) if it were a
2 hearing, it's not a hearing on the appeal.
3 The appeal is scheduled I think for February
4 2010. So I understand your point. But let's
5 see what Mr. Brown has to say.

6 MR. BROWN: Patrick Brown from
7 Greenstein Delorem & Luchs for the Appellant.

8 Given the importance of this matter
9 to my client, we'll make ourselves available
10 at the Board's pleasure.

11 I would like to point out though
12 that we had several witnesses who are also
13 here prepared to testify. And I think there
14 is given the posture of this matter and the
15 Board's need to hear some evidence, those
16 witnesses pro and con are important because
17 you've got to basically incorporate a
18 temporary restraining order standard which
19 requires some preliminary weighing of
20 information for the likelihood of success.

21 I would specifically like to point
22 out that I have a Metropolitan Police Officer

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1 who's beat is in fact this area, and serves
2 during the later hours. And he is here of his
3 own accord to testify about the neighborhood
4 environment, and in particular Philly Pizza
5 and how they go out of their way to be good
6 citizens.

7 Officer Culp is here on his day
8 off. And I don't know his schedule. But it
9 may pose a hardship on him because he does do
10 the overnight shift. So this may be his
11 sleeping time. So I just want to alert you to
12 that. Otherwise, we're here at the Board's
13 pleasure.

14 CHAIRMAN LOUD: But Mr. Brown, this
15 is not a request for an expedited hearing
16 which the rules allow, and as to which
17 everyone would have had notice to bring in
18 their witnesses and an expectation that the
19 witnesses would testify.

20 MR. BROWN: Well, and I think --

21 CHAIRMAN LOUD: This is a request -

22 -

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1 MR. BROWN: For a stay of
2 enforcement of the notice to revoke --

3 CHAIRMAN LOUD: -- for a decision
4 from the Board.

5 MR. BROWN: -- which I put in my
6 filing, which requires a four-part test which
7 is essentially in another context the
8 temporary restraining order standard. And the
9 Board has used that standard in previous
10 situations where a stay had been requested
11 either pre-decision or post-decision.

12 So there is some element of fact-
13 finding required because the test requires the
14 Board to determine likelihood of success.

15 CHAIRMAN LOUD: But is there a
16 reason why you did not request an expedited
17 hearing which would have at least let the
18 Board know that we were going to be in for a
19 hearing this morning with witnesses -- a full
20 complement of witnesses -- as opposed to the
21 manner in which the relief was requested as a
22 decision?

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1 MR. BROWN: I requested a stay of
2 enforcement because today's the deadline. And
3 DCRA to date as indicated that at the end of
4 the ten business day period, they're going to
5 move to close my client's business. So I've
6 got to act now, not wait for even an expedited
7 hearing which couldn't be expedited in any
8 kind of meaning timeframe for today.

9 DCRA has indicated that the notice
10 to revoke is effective today, and they will
11 take steps today to shut his operations down.

12 If he closes -- and I put this in my brief --
13 if he closes, he will probably never re-open
14 because given the Board --

15 CHAIRMAN LOUD: We don't
16 necessarily want to get into the merits of --

17 MR. BROWN: But I'm --

18 CHAIRMAN LOUD: I understand
19 because it's in your pleading.

20 MR. BROWN: I'm trying to explain
21 why I proceeded. I here on a narrow issue.

22 Now if DCRA -- and I've asked

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1 repeated for DCRA to voluntarily stay
2 enforcement of their notice to revoke --

3 CHAIRMAN LOUD: Mr. Brown, I see
4 that in your pleadings that you requested that
5 from DCRA.

6 What we're discussing right now is
7 simply continuing what had been calendared as
8 a decision to the 1:00 p.m. calendar. And
9 part of it was to allow us to manage our
10 calendar more effectively this morning, which
11 becomes even more apparent given the number of
12 witnesses that the Board was not aware that
13 are potentially available for testimony in the
14 stay matter, if it's deemed that their
15 testimony would be relevant to the stay
16 request.

17 MR. BROWN: Well -- and I've just
18 checked with Officer Culp, and he will be
19 available at 1:00 o'clock.

20 So we're here at the Board's
21 pleasure. And we'll be here at 1:00 o'clock.

22 CHAIRMAN LOUD: All right. Thank

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1 you, sir.

2 Do excuse us. Again, having not
3 come fully mindful of a full blown hearing on
4 this issue, we're trying to manage it in the
5 best way that we can.

6 I think where the Board is -- and
7 I'll open it up to my colleagues to weigh in
8 as appropriate -- is that this is a case that
9 should still be continued to 1:00 p.m.

10 The threshold question would be the
11 jurisdictional question which sounds like
12 legal arguments and would not involve
13 witnesses. To the extent we make it past the
14 threshold question and there is a need for
15 witnesses, those persons who are currently in
16 the audience whose testimony would be relevant
17 to the TRO Standard which would involve
18 likelihood of success on the merits, balancing
19 of the equities, irreparable or allegations of
20 irreparable harm and so forth should remain
21 and be prepared to offer that testimony at
22 that time.

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1 But again, this is not a case that
2 was advertised for witnesses or for a hearing
3 this morning. And to the extent I think that
4 there are witnesses who are eligible because
5 even with respect to appeals -- and this is an
6 appeal matter -- certain testimony is not even
7 eligible from the general public, that is
8 appellants provide testimony, appellees
9 provide testimony, the affected agency, the
10 Zoning Administrator's Office would provide
11 testimony. Even those who are qualified to be
12 witnesses later today if we get to that point
13 may have discussions among yourselves and
14 designate one person that can provide the
15 testimony on the issues of relevance to a TRO.

16 In other words, if we get to that
17 point, we don't need five witnesses that would
18 offer testimony on balancing the equities and
19 damage in the community and so forth. I think
20 given the nature of the pleadings on the
21 record and some of the allegations that
22 there's one witness out there that has

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1 personal knowledge of that information that
2 one witness would suffice for the purposes of
3 an affected TRO hearing.

4 So again, our decision would be to
5 continue this case to 1:00 p.m. today, have
6 the Appellant and Appellee come back, and we
7 can take it up at that time.

8 Let me just ask Board Members, was
9 there anything you wanted to add to what I've
10 just shared? Okay.

11 MS. MADDOX-LEVINE: Thank you.

12 CHAIRMAN LOUD: I'm sorry. Yes,
13 please. Why don't you identify yourself for
14 the record?

15 MS. SCHUBERT: I'm Lynn Schubert,
16 and I'm here representing myself and about 16
17 of the neighbors, many of whom have written a
18 letter, and I've actually filed a pleading.

19 Mr. Starrels is a Commissioner --
20 an ANC Commissioner. Would we both be
21 entitled to testify this afternoon? I need to
22 go back and change some meetings that I have

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1 with other D.C. officials this afternoon.

2 CHAIRMAN LOUD: I think the ANC has
3 not submitted -- as I understand it, the ANC
4 has not submitted a position. The single-
5 member district representative has. But as I
6 recall from reading the single-member
7 district's submission, the ANC either did not
8 have an opportunity to meet or has not met yet
9 on it.

10 Under our rules, it's the ANC
11 Commission, not the single-member district,
12 that would be an automatic party. So that the
13 long-winded answer to your question is I think
14 if this is something that's important enough
15 to the community to remain here in the event
16 that we end up needing some testimony
17 regarding balancing of the equities from the
18 community standpoint, you may want to arrange
19 your calendar -- your personal schedule --
20 this afternoon accordingly.

21 However, the ANC is the only party.

22 And if there's a representative from the ANC

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1 here and the ANC -- again not being the
2 single-member district member -- certainly you
3 would want to come back.

4 Mr. Lewis, why don't you step up to
5 the microphone? And good morning to you.
6 Nice to see you again.

7 MR. LEWIS: Good morning, sir.

8 I Chair the ANC-2E, but this came
9 up so fast. It came up after our last monthly
10 meeting. And the hearing is today before our
11 next monthly meeting. So the best we could do
12 was that the Commissioner who represents the
13 district did make a filing, and would be
14 prepared to speak on his behalf from personal
15 experience as well as representational. But
16 we couldn't have an ANC resolution or we would
17 have.

18 CHAIRMAN LOUD: Thank you, Mr.
19 Lewis.

20 And that came across in the
21 submissions that are part of our file. And
22 again, that's why I'm saying that we're going

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1 to proceed in accordance with what was laid
2 out earlier about going through the
3 jurisdictional question first if there's still
4 a case after that, then going through the TRO
5 standard. If we make it through jurisdiction,
6 it could be relevant to hear some testimony
7 from the community.

8 Thank you.

9 Mr. Moy, is there anything further
10 in this case?

11 MR. MOY: No, sir.

12 CHAIRMAN LOUD: All right.

13 Then the morning decision meeting
14 is adjourned. And very shortly we'll call
15 this morning's hearing calendar.

16 (Whereupon, at 10:11 a.m., the
17 hearing was adjourned.)

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