

1 GOVERNMENT OF THE DISTRICT OF COLUMBIA
2 Office of Zoning
3 Board of Zoning Adjustment
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9 PUBLIC MEETING OF THE BOARD OF ZONING ADJUSTMENT
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13 9:42 a.m. to 10:13 a.m.
14 November 3, 2015
15
16 441 4th Street, N.W.
17 Jerrily R. Kress Memorial Room
18 Second Floor Hearing Room, Suite 220-South
19 Washington, D.C. 20001
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2 Board Members:

3 Marnique Y. Heath, Chairperson

4 Jeffrey L. Hinkle

5 Robert E. Miller

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8 Also Present:

9 CLIFFORD W. MOY, Secretary to the Board

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

2 CHAIRPERSON HEATH: This meeting will please come to
3 order. Good morning, Ladies and Gentleman. We are located in
4 the Jerrily R. Kress Memorial Hearing Room at 441 4th Street,
5 NW. Today is November 3, 2015, and we are here today for the
6 Public Meeting of the Board of Zoning Adjustment of the
7 District of Columbia.

8 My name is Marnique Heath, Chairperson. Joining me
9 today is Jeffrey Hinkle, Board Member, and Rob Miller, a Member
10 of the Zoning Commission sitting in as a Member of the Board
11 today. Please be advised that this proceeding is being
12 recorded by a court reporter and is also being Webcast live.
13 Accordingly, we will ask you to refrain from any disruptive
14 noises or actions in the Hearing Room. The Board's hearing
15 procedures and how we will process applications can be found on
16 the back table by the door. We shouldn't have any individuals
17 testifying today, so Mr. Moy, we will not need to give the
18 oath, so we can proceed to any preliminary matters that you
19 might have or our first meeting case.

20 MR. MOY: Good morning, Madam Chair, Members of the
21 Board. I don't have anything for the record for the Board, so
22 we can begin whenever you are ready, Madam Chair.

23 CHAIRPERSON HEATH: Okay, all right. So, you can
24 call our first application or our first case, Application

1 18938.

2 MR. MOY: Yes, thank you. That would be before the
3 Board for decision, Application No. 18938 of Gina Eppolito and
4 Frances Slakey. This application is - the motion before the
5 Board is a request for reconsideration, and I will leave it at
6 that, Madam Chair.

7 CHAIRPERSON HEATH: Okay, all right. So, we have
8 received documentation from the opposition party requesting a
9 reconsideration of the previously issued order and decision on
10 this case. At issue here is a request to waive the deadline
11 for filing their Motion for Reconsideration. So, we, as the
12 Board, will need to decide if we are willing to approve the
13 motion to waive the deadline.

14 Given the information that they have sent in as
15 recently as just yesterday, with their reasons for
16 reconsideration, I feel that there are issues significant
17 enough that I would recommend that we reconsider this case.
18 There were some discrepancies between documents that were
19 issued just prior to the Final Order being issued, and things
20 that were not - that it appears were added to the drawings, but
21 were not made clear to the Board prior to the issuance of those
22 drawings or during the hearing that those changes were going to
23 be made. So, my position on this is that we should grant the
24 Filing Deadline Waiver. Other comments?

1 MR. MILLER: Madam Chair, first let me say, I didn't
2 sit on the original case, but I did review the record and the
3 recent filings, and I would agree with you that we can waive
4 the deadline for filing the Motion to Reconsideration.

5 CHAIRPERSON HEATH: Okay.

6 MR. HINKLE: Yeah, Madam Chair, I have a little bit
7 of an issue with waiving the deadline, but I - it is a stretch
8 to say that we didn't meet the deadline because we were out of
9 town. I think it is incumbent on the parties to - while it's
10 difficult to know when these orders are coming out, it is
11 really incumbent on the parties, if they do have a concern, to
12 pay attention as to when these orders are released, and an
13 excuse of, "Well, I was out of town." in this age of
14 electronics is a little bit difficult. But, I do think that
15 they did bring up some issues, and so I am willing to go along
16 with the rest of the Board in terms of waiving the filing
17 requirement on this.

18 CHAIRPERSON HEATH: I would agree with you. I had
19 some issues initially with them saying that their reason for
20 needing the deadline to be waived was because they were out of
21 town and that their counsel was out of town; but, again, the
22 issues seemed significant enough that I was willing to waive
23 the deadline. So, I will make a motion then that we waive the
24 deadline for reconsideration of this hearing.

1 MR. MILLER: I will second it.

2 CHAIRPERSON HEATH: All right. Motion has been made
3 and seconded. Any further discussion? All those in favor?

4 (A chorus of ayes)

5 CHAIRPERSON HEATH: Anyone opposed? All right, the
6 motion carries. Mr. Moy.

7 MR. MOY: Thank you, Madam Chair. The staff would
8 record the vote as 3-0-2 on Motion of Chairperson Heath to
9 waive deadline for filing. Seconding the motion is Mr. Robert
10 Miller, and also in support Mr. Hinkle, 2 members not
11 participating, or actually 1 member not participating, 1 seat
12 vacant.

13 So, Madam Chair, I would suggest, if the Board
14 agrees, that we schedule this for hearing or meeting for
15 November 24, 2015.

16 CHAIRPERSON HEATH: Okay. Yeah, I think we could do
17 a meeting on November 24th. We want to set a deadline for
18 parties to send in any, well, for the applicant to send a
19 response to the opposition's most recent filing.

20 MR. MOY: Yes, we can, and that would be, let's see,
21 the 24th, let's make that Friday, November 20th, or rather,
22 let's make it Thursday, November 19th.

23 CHAIRPERSON HEATH: Okay. That is good.

24 MR. HINKLE: Madam Chair, I would suggest that you

1 make it clear whether or not you want an additional filing from
2 the party that has requested the reconsideration. Sometimes
3 you get back and forth responses, and it should be clear in the
4 direction.

5 CHAIRPERSON HEATH: Sure. I'm tempted to have a
6 limited hearing on this simply because of that, rather than
7 have lots of documents circulating back and forth. If both
8 parties are here, they can speak to the issues presented by the
9 opposition in addition to the applicant submitting a response.
10 You're not going to be here, so...

11 MR. MILLER: I would agree, Madam Chair, and I think
12 Mr. Moy, I guess, would notify the Office of Planning and the
13 ANC, so if they wanted to - well, I think we would invite them
14 to participate.

15 CHAIRPERSON HEATH: Okay, all right. So, a limited
16 hearing, Mr. Moy, rather than a meeting date.

17 MR. MOY: Okay, very good.

18 CHAIRPERSON HEATH: The applicant's response should
19 still be filed by November 19th.

20 MR. MOY: 19th.

21 CHAIRPERSON HEATH: Right. So, a limited hearing to
22 speak to the issues most recently presented by the opposition
23 party.

24 MR. MOY: Okay, so recorded.

1 CHAIRPERSON HEATH: Okay. All right. So, our next
2 meeting case.

3 MR. MOY: Okay, the next one, I believe, would be
4 Application No. 18502 of Jemal's Gram, LLC. There has been a
5 Request for a Minor Modification.

6 CHAIRPERSON HEATH: Okay.

7 MR. MOY: I didn't mean to cut you off.

8 CHAIRPERSON HEATH: Go ahead.

9 MR. MOY: They have also requested a waiver of the
10 time requirements, because it is beyond the 2-year filing
11 deadline.

12 CHAIRPERSON HEATH: Okay, all right. That is
13 correct, the Order was issued February 6, 2015, so we are well
14 beyond the 2-year deadline, but this Special Exception was to
15 permit the C-2-C Regulations applicable to the Eastern portion
16 of, let's see, yeah - no, the new portion is the Eastern
17 portion. Okay, so the original Special Exception was for the
18 Western portion of the site.

19 In looking at this, the drawings that were submitted
20 as a part of the modification, I completely understand what
21 they are doing. As a result of this modification, the
22 applicant has also noted that they no longer need the roof
23 structure setback requirements previously requested as a part
24 of the Special Exception, and so the Special Exception request

1 has been reduced.

2 I also feel that based on the information submitted
3 that this really does qualify as a minor modification. What
4 the applicant is doing is still within the intent of the relief
5 that was requested. So, I would be inclined to approve this as
6 a minor modification and to waive the deadline, the 2-year
7 deadline for filing. Does anyone have any issues with either
8 part of this request?

9 MR. HINKLE: No, I tend to agree with you, Madam
10 Chair. I think it is pretty straightforward. I certainly
11 understand the issue regarding the waiver, and I agree that
12 while it's a huge building, it is a minor modification in terms
13 of what they are requesting from this Board.

14 CHAIRPERSON HEATH: Okay.

15 MR. MILLER: And, I too would agree, Madam Chair, as
16 the applicant stated in their filing, the timing of the request
17 relates to the recent acquisition by the applicant of the
18 property in the Eastern portion of Square 450 to allow for the
19 proposed expansion and to accommodate an important anchor
20 tenant. But, I agree that relief is less than what was
21 originally requested.

22 CHAIRPERSON HEATH: Okay.

23 MR. MILLER: And, again, I didn't sit on the original
24 case, I don't know if you did either, you did? In any event,

1 we've all reviewed the record. I am sure Mr. Hinkle...

2 MR. HINKLE: I did sit on this case, yes.

3 MR MILLER: We have reviewed the record, and I think
4 the approved and modification drawings that the applicant
5 submitted were very helpful. I wanted to note that.

6 CHAIRPERSON HEATH: They were. They were very clear.
7 So, having reviewed the record and as it appears all of us are
8 in agreement, I would move that we accept the Request for Minor
9 Modification as a part of Application No. 18502A.

10 MR. HINKLE: As well as the waiver?

11 CHAIRPERSON HEATH: As well as the waiver for the 2-
12 year deadline.

13 MR. HINKLEY: I'll second that.

14 CHAIRPERSON HEATH: Okay. The motion has been made
15 and seconded. Any further discussion? All those in favor?

16 (A chorus of ayes.)

17 CHAIRPERSON HEATH: Anyone opposed? The motion
18 carries.

19 MR. MOY: Staff would record the vote as 3-0-2. I
20 didn't catch who seconded the motion. Did I miss that? Okay.
21 I saw that hand raising. So, this is on the motion of
22 Chairperson Heath to approve or grant the Request for Minor
23 Modification as well as waiving the 2-year time deadline for
24 filing, seconding the motion by Mr. Hinkle, also in support Mr.

1 Robert Miller, Board seat vacant, member not participating with
2 us today. The motion carries, Madam Chair.

3 CHAIRPERSON HEATH: Okay. Do we need a Summary Order
4 on this one?

5 MR. MOY: I believe we can, yes.

6 CHAIRPERSON HEATH: Okay, so Summary Order.

7 MR. MOY: Okay, done.

8 CHAIRPERSON HEATH: All right. So, our next case,
9 Mr. Moy.

10 MR. MOY: Okay, I believe it would be Application No.
11 18866 of Planned Parenthood Association of DC, and, again, this
12 is another application where there was a Motion for
13 Reconsideration.

14 CHAIRPERSON HEATH: Okay. I would like to request
15 that we continue this case until next week when we have
16 Commissioner May with us. I think there is a need for further
17 deliberation beyond just a simple vote, so I would like to put
18 this on the docket for next week.

19 MR. MOY: Okay, so that would be November 10th, which
20 is next Tuesday.

21 CHAIRPERSON HEATH: Okay.

22 MR. MOY: Very good.

23 CHAIRPERSON HEALTH: All right.

24 MR. MOY: Okay, with that then, the next and last

1 application for decision before the Board is Application No.
2 18881 of Nando's of Woodley Park, LLC.

3 CHAIRPERSON HEATH: Okay. So, this is a case that
4 the Board previously voted on on February 10th of this year to
5 grant the application subject to several conditions including
6 limiting the approval to a term of 5 years from the date of the
7 Order. The applicant subsequently filed a Motion for
8 Reconsideration, stating that the 5-year term conflicted with
9 its lease agreement for the property, which is for 10 years,
10 with 2 options to renew for 5 years each. The applicant
11 requested a 20-year term at that time, or in the alternative,
12 no term subject to additional conditions.

13 On June 9th, the Board voted to deny the Motion for
14 Reconsideration. A full Order for that vote has not yet been
15 issued, and 2 ANC Commissioners have since filed a letter
16 requesting that the Board revisit the matter.

17 The Board did revisit this in October and determined
18 that we would reconsider this based on new information being
19 presented to us. Because this was not -- the Order on the
20 reconsideration was not closed, the Board of our own deciding
21 voted to reopen this case.

22 As the Board, we are able to determine that we can
23 reconsider this and change the terms of the approval if we find
24 that there is -- was an error on the part of the Board in our

1 previous deliberations or considerations of this application.

2 And, so I would like to open this discussion for the
3 Board to begin to deliberate on whether or not we feel that
4 there is reason or cause for us to reconsider either the
5 conditions or the approval previously granted here based on a
6 cause of potential error on our part in the way we viewed this
7 case. Is there anyone who wants to start this discussion?

8 MR. MILLER: I guess I'll start, Madam Chair. Well,
9 one of the facts that we then have in front of us when we voted
10 as a Board not to reconsider, while I was not on the prevailing
11 side of that motion, that's why I was hesitating to jump into
12 this.

13 But, one of the facts is we didn't have an ANC
14 position on the reconsideration motion, and that is what has
15 come - that is what has led to our reopening of the case at
16 this point is the ANC's filing that as it stands now, it would
17 be a crushing blow to the community from the ANC Commissioner's
18 viewpoint, and that was - because Nando's wouldn't be able to
19 be there, and the landlord is in negotiation for another
20 tenant, which would be less attractive to the community; a
21 convenience store, a mattress store, I think, is what the
22 applicant is filing in response to what the ANC letter said.

23 So, that's one thing, a major fact that we did not
24 have in front of us. We didn't have the ANC's position on the

1 reconsideration, which I think they make a compelling case, and
2 I think with the 10-year limit, and with the additional
3 conditions that the applicant has suggested, which try to
4 tailor this to the type of fast casual restaurant that Nando's
5 is in terms of the wait service being provided and that type of
6 thing. I think, with the other conditions that address trash
7 and other concerns of the community, that can be handled
8 through DCRA Enforcement Process, I think that this is an
9 appropriate matter to reconsider.

10 CHAIRPERSON HEATH: Okay.

11 MR. HINKLE: Yeah, thank you, Madam Chair. I, you
12 know, having re-read the Order a few times, it certainly is
13 clear that the Board is supportive of a restaurant in this
14 location, and I think the issue that we were struggling with
15 was whether it would exacerbate the apparent rodent problem
16 there, and what we were trying to do with the conditions was
17 address that issue, not necessarily whether or not the
18 operations of the restaurant itself was appropriate for this
19 location.

20 Personally, I don't think a 10-year term limit does
21 anything, because, you know, that's 10 years away, and if there
22 is a rodent problem next year, you know, how do we address
23 that? However, I think that the list of conditions that we
24 have is sufficient enough to try to ensure that problem is

1 addressed one way or the other for the life of this restaurant
2 at this location. So, if the Board wants to move forward with
3 a 10-year term limit, I'm fine supporting that, but I think the
4 conditions as proposed themselves are probably sufficient
5 enough to address the issue that the Board was having a problem
6 with in terms of this application. So, we will see what the
7 motion is, but I think I'm okay with where we're heading at
8 this point - where I think we're heading at this point.

9 CHAIRPERSON HEATH: Okay. I'm also - I completely
10 agree with you. I agree that the Board generally wanted to see
11 this restaurant happen. We didn't want to restrict them from
12 being able to move forward with their plans to move in and
13 carry forth their lease. I agree that the conditions put
14 forward address the Woodley Park Community Association's issue
15 about trash and rodents, specifically Condition No. 2 that the
16 applicant shall use the existing trash compactor at the site,
17 and Condition No. 4 that trash service at the site shall occur
18 at least 5 times per week. I believe that the other
19 conditions, as Commissioner Miller has stated, really make this
20 not so typical of your usual fast-food restaurant that make it
21 a little bit more sort of up-scale fast food. So, Condition
22 No. 5 that all food and drinks consumed on the premises shall
23 be served on or in nondisposable table wear with no exceptions.
24 I believe there was additional language added to Condition No.

1 5 referring to wait staff, which states that wait staff shall
2 serve all food and alcoholic beverages to patrons, and wait
3 staff will clear and clean the tables after patrons finish
4 their meals. Carryout service shall be clearly subordinate to
5 the principle on-premises use. I would be in support of adding
6 that additional language to this condition, because I think it
7 goes along with what we all are supporting with respect to this
8 being not your typical fast-food restaurant.

9 So, I am in support of making the change to both
10 Condition No. 1 where we change the term limit from 5 years to
11 10 years from the date of their Certificate of Occupancy rather
12 than the issuance of the Order, which is more in line with the
13 lease term and allows this establishment to exist throughout
14 its full lease term. I think that should they not comply with
15 any of the conditions listed here, including No. 6 to
16 communicate with the ANC in Woodley Park on a quarterly basis,
17 that we do have an enforcement issue, which can be brought back
18 and addressed at that time. So, I think that rather than
19 having to have the applicant come back in 5 years, that there
20 is this provision of enforcement that can address issues that
21 might come up over the 10-year span of this term limit. So, I
22 am in support of the modifications that I have stated. Any
23 other discussion or any other points that anybody wants to
24 bring up?

1 Then, I will make a motion that we make a
2 modification to the previous conditions as a part of this
3 approval and that we specifically modify Condition No. 1, now
4 stating that the Board's approval shall be valid for a period
5 of 10 years, beginning on the date the Certificate of Occupancy
6 was issued, and Condition No. 5, all foods and drinks consumed
7 on the premises shall be served on or in nondisposable table
8 wear with no exceptions. Wait staff shall serve all food and
9 alcoholic beverages to patrons, and wait staff will clear and
10 clean the tables after patrons finish their meals. Carryout
11 service shall be clearly subordinate to the principle on-
12 premises use.

13 Before we do that procedurally, we will need to
14 rescind our prior vote to deny the reconsideration, so I will
15 move that we rescind that vote to deny the reconsideration.

16 MR. HINKLE: I'll second.

17 CHAIRPERSON HEATH: Any further discussion? All
18 those in favor?

19 (A chorus of ayes.)

20 CHAIRPERSON HEATH: Anyone opposed? All right. So,
21 then we will move forward with the second motion, which, as
22 I've just stated is to move forward with the 10-year term limit
23 and that is beginning on the date of the Certificate of
24 Occupancy with the conditions modifying No. 5 as I've just

1 stated. The other conditions are still in place.

2 MR. HINKLE: I'll second.

3 CHAIRPERSON HEATH: All right. The motion has been
4 made and seconded. Any further discussion on that? All right,
5 so all those in favor?

6 (A chorus of ayes.)

7 CHAIRPERSON HEATH: Anyone opposed? All right, so,
8 Mr. Moy, the motion carries.

9 MR. MOY: Yes, on that second motion voted by the
10 Board, staff would record as 3-0-2, on the motion by
11 Chairperson Heath, to Condition No. 1 for a 10-year time period
12 as well as revising or modifying the language to Condition No.
13 5, seconding the motion is Mr. Hinkle, also in support
14 Mr. Robert Miller, Board member not present today, Board seat
15 vacant, motion carries 3-0.

16 CHAIRPERSON HEATH: Thank you.

17 MR. MOY: We can write that as a Summary Order.

18 CHAIRPERSON HEATH: Summary, yes, please.

19 MR. MOY: No, full Order.

20 CHAIRPERSON HEATH: Full order?

21 MR. MOY: It's a full Order from before.

22 CHAIRPERSON HEATH: Okay, so we'll do a full Order.
23 All right. Any other matters coming before the Board today?

24 MR. MOY: Not from the staff, and not today, Madam

1 Chair.

2 CHAIRPERSON HEATH: Okay, all right. Then, this
3 meeting is adjourned. Thank you.

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5 (Whereupon, at 10:13 a.m., the meeting was
6 concluded.)

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