

Before the Board of Zoning Adjustment, D.C.

PUBLIC HEARING - September 17, 1969

Appeal NO. 10150 Citizens Association of Georgetown, appellant.

THE ZONING ADMINISTRATOR OF THE DISTRICT OF COLUMBIA, appellee.

On motion duly made, seconded and unanimously carried, the following Order of the Board was entered at the meeting of September 23, 1969.

ORDERED:

That the appeal from a decision of the Zoning Administrator given June 17, 1969 approving a proposed retail record shop-restaurant, seating 183 persons, at 2813 M Street, NW., lot 836, Square 1212, be granted and the decision of the Zoning Administrator reversed.

FINDINGS OF FACT:

1. The subject property is located in a C-2-A District.
2. The property is improved with a brick structure currently used as a retail record shop and restaurant seating 183 persons which is operated by Emergency, Inc. under Certificate of Occupancy No. B69858 issued August 4, 1969.
3. An admission charge of \$2.00 or \$3.00 is levied at the door and is credited against the cost of food or drink obtained by patrons. Live music for dancing is also provided.
4. The Citizens Association of Georgetown appeals from a decision of the Zoning Administrator given June 17, 1969 approving the proposed retail record shop-restaurant.
5. Appellant contends that the use of the subject premises is a public hall and restaurant and that Emergency, Inc. is required to provide parking spaces for such uses, in accordance with the requirements of the Zoning Regulations.
6. The Zoning Administrator has ruled that it is the admitted intent of Emergency, Inc. to serve food and non-alcoholic beverages under the certificate of occupancy and that the establishment operates as a restaurant and therefore "the present certificate held properly issued."

7. It is additionally alleged by the Zoning Administrator that the immediate previously issued Certificate of Occupancy (No. B63354 issued November 7, 1967) which was used as a basis for the issuance of the certificate now in effect listed the use as a restaurant seating 260 persons. Since parking facilities were not required as a prerequisite to the previous certificate, **they** are not required of the one now in effect.

8. Appellant alleges that Emergency, Inc. has made continual efforts to secure a public hall certificate of occupancy and license, but without success as no off-street parking is provided as is required for public halls under the Zoning Regulations.

9. Appellant further alleges that the \$2.00 or \$3.00 admission charge collected at the door is a clear indication that this is a building where "dances . . . or entertainments . . . are conducted for profit and gain" under the meaning of 47-2320(c) of the D.C. Code which requires that a license fee be paid by the owners or managers of such buildings.

10. The license required by D.C. Code 47-2320(c) is called a "public hall" license.

11. D.C. Commissioners' Orders provides "that no license required by the License Act of 1932 [now D.C. Code 47-2320(c)], . . . shall be issued unless the applicant has obtained a certificate of occupancy. . ."

12. A license for a public hall cannot issue where the certificate of occupancy reads "restaurant."

13. Appellant alleges that the purpose of the admission charge is to pay for "dances and musical entertainments" rather than the food and drink, which is only provided on request.

14. As additional evidence, appellant points to Emergency's continual efforts to obtain a public hall certificate of occupancy and license which cannot be accomplished without first complying with off-street parking requirements.

15. Section 7202.1 requires a public hall to have one off-street parking place "for each ten seats of occupancy capacity . . . provided that where seats are not fixed, each seven square feet of gross floor area usable for seating shall be considered one seat."

16. It is additionally alleged by appellant that the subject building is under a continuing requirement for off-street parking arising from a change in the use of the structure to another use which required more parking spaces. (From drapery retail sales and interior decorating shop to restaurant and public hall).

17. Emergency, Inc. contends that the premises are used as a record shop and restaurant, neither of which utilizes more than 2,000 square feet of gross floor area and that it is therefore not required to provide off-street parking.

18. Emergency, Inc. concurs that it has live entertainment after 8:30 p.m. and charges a minimum at the door to be applied against the restaurant bill after 8:30 p.m.

19. Emergency further alleges that if it is determined that an admission fee is charged, it would be required to acquire a public hall license, but that it would not be required to provide off-street parking.

20. The restaurant is separated from the record shop by steps leading from one area to the other. There is no substantial physical division.

21. Patrons come into the premises and sit in chairs located around the room in random fashion.

22. Emergency, Inc. declines to concede that patrons enter the premises primarily to obtain meals or refreshments. Emergency does not analyze reasons for patrons entering the premises.

23. Numerous letters in support of Emergency, Inc. are contained in BZA File No. 10150.

OPINION:

The only questions presented to this Board for determination in this appeal are whether or not the Zoning Administrator erred in concluding that a public hall use does not exist in the proposed use of the premises, and whether or not the issuance of a certificate of occupancy for a record-shop and restaurant upon the subject premises was in error.

The question of license requirements has been brought into the appeal by reason of use. Such arguments are not for determination by this Board. The Zoning Regulations do not regulate licenses, nor is this appeal based on license. Licensing requirements are properly a subject before the Board of Appeals and Review. Considerations by this Board in determining this appeal have been restricted to facts presented with regard to the nature and character of the mode of operation which are germane in answering the issues stated at the outset of this opinion.

In the absence of a definition in the Zoning Regulations, the Board is directed to Webster's Unabridged Dictionary (1201.2). The following definitions are found therein:

- [a] Restaurant - an establishment where refreshments or meals may be procured by the public; a public eating house.
  - [b] Public - open to common or general use, participation, enjoyment, etc.
  - [c] Hall - a large imposing building used for public or semi-public purposes; the assembly room of a hall; hence any large room for assembly; as a lecture hall; dance hall.
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OPINION Cont'd:

The subject property is used as a record shop-restaurant which charges a \$2.00 or \$3.00 fee upon entry which is credited against the cost of food and drink if patrons desire to obtain the same.

We therefore find that a restaurant use exists. As music for dancing is provided, the seating capacity of 183 persons is in random fashion, and the reasons for persons entering the premises is not able to be defined by Emergency, Inc., we hold that patrons enter to dance and to be entertained, as occurs in public halls, in addition to the purpose of obtaining refreshments or meals as in restaurants.

The record shop and restaurant uses are not physically divided by walls (as wall is defined in Webster's), the record shop being separated from the restaurant by three steps and a riser. It is the opinion of the Board that the total space of the two uses must be computed in determining the number of parking spaces to be provided in accordance with Section 7202 of the Zoning Regulations as the space used is the same. Parking requirements for the subject property have not been modified by this Board with regard to any previous use.

We further conclude that the nature of the activities and mode of operation of the subject premises are a public hall and a restaurant, requiring both certificates of occupancy.

The Zoning Administrator's decision is reversed.

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED:

By:



CHARLES E. MORGAN  
Secretary of the Board

Before the Board of Zoning Adjustment, D.C.

PUBLIC HEARING - September 17, 1969

Appeal No. 10150 Citizens Association of Georgetown, appellant.

THE ZONING ADMINISTRATOR OF THE DISTRICT OF COLUMBIA, appellee.

Preparation and approval of the following SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF THE BOARD has been deferred pending the Board's consideration and disposition of the appeal of Emergency, Incorporated, in BZA Case No. 10565, for permission to provide accessory parking on Lot 33, Square 1192 at 1034-42 - 29th Street, NW., pursuant to the provisions of Section 7205.33 of the Zoning Regulations. After public hearing on October 14, 1970, and a subsequent on-site inspection of the subject area, the Board, by motion duly made, seconded and unanimously carried at the meeting of November 24, 1970, denied Emergency's appeal on the ground that the proposed accessory parking spaces will not furnish reasonable and convenient parking for the patrons of Emergency, which such spaces are designed to serve, and also on the ground that the requirement under Section 7205.33, supra, that such parking be within 800 feet of the subject premises has not been met - the Board construing that provision to mean 800 feet walking distance and not, as was contended by Emergency, 800 feet as the crow flies.

On motion duly made, seconded, and unanimously carried, the Board submits the following SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS for the Court's consideration.

24. Emergency is presently operating on a four day a week (Thursday-Sunday) schedule. The record shop area is open from 3:30 p.m. to 1:30 a.m. on Thursday and Friday, and noon to 1:30 a.m. on Saturday and Sunday; the entertainment area is open from 8:30 p.m. to 1:30 a.m. Thursday through Sunday.

25. Although the record shop area remains open until 1:30 a.m., no merchandise is sold in this area after 8:30 p.m. At 8:30 a.m. live musical entertainment is furnished and Emergency commences to collect the \$2.00 or \$3.00 entrance fee at the door leading from the street into the record shop area, through which patrons pass in order to enter into the entertainment area which is connected to the record shop area by three steps and a riser.

An on-site inspection of the premises during the evening hours reveals that after 8:30 p.m. patrons are admitted through the doorway on M Street, NW. Once inside the doorway patrons are assessed an admission fee at a ticket booth. Upon payment of the admission fee patrons are given a ticket which can be redeemed for a sandwich and soft drink (The purchase power of the ticket is dependent on the price of various items and whether a \$2.00 or \$3.00 admission fee is being charged on a given evening). Patrons then proceed through the record shop area, and walk up three steps into the middle area of the premises which measures approximately 27 feet by 19 feet. This area contains implaced theatre-type chairs where patrons may sit and listen to the musical entertainment. Patrons may also move further back into the premises by walking down several steps into the rear area which is an "L" shaped room, measuring approximately 40 feet by 32 feet at its widest point. The rear area contains the entertainment stage, a bar at which sandwiches are prepared and served along with soft drinks, and implaced theatre-type chairs for patron seating. The investigation revealed no restrictions on patrons' use of the record shop area during the evening hours. It was noted that prior to the commencement of the live musical entertainment and during intermissions patrons freely congregated in the record shop area to stand around and hold conversations with one another. Food and soft drinks are obtained by patrons going to the aforesaid bar either redeeming their tickets or paying cash therefor.

26. The admission fee is not refundable regardless of whether a patron uses it as a credit for the purchase of food and drinks.

27. Patrons are permitted to dance in the entertainment area.

28. Sample advertising circulars submitted to the Board by Emergency clearly show that Emergency is advertised as a place where persons may come to hear live musical entertainment. These circulars occasionally make incidental mention that food and non-alcoholic beverages are available for purchase.

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29. Statistical information provided by Emergency shows that for the period August 9, 1969, to June 30, 1970, the entertainment area had direct operating expenses of \$69,060.60. A breakdown of the operating expenses shows costs of \$9,702.00 for purchases for resale (Although Emergency gives no further breakdown for this figure, the Board finds from other evidence presented that this cost is mainly attributable to the purchase of food and non-alcoholic beverages), \$50,299.00 for band costs, \$1,777.60 for salaries, and \$7,582.00 for advertizing.

30. The statistical information also shows salary costs attributable to the combined entertainment area-record shop operation in the amount of \$7,973.40. From other evidence presented, the Board finds that this figure represents the salaries for employees who alternate their employment time between the entertainment area and the record shop.

31. The combined operating revenue for the entertainment area-record shop was \$131,123.00 for the period August 9, 1969, to June 30, 1970: \$100,313.00, or approximately 77% is attributable to the entertainment area, and \$30,810.00, or approximately 23% is attributable to the record shop.

32. The Board takes note of the fact that the Certificate and Articles of Incorporation of Emergency, Inc. which is a public record on file in the Office of the Recorder of Deeds, D.C. (Document #690,389), states that among the purposes for which Emergency is organized is "(a) To operate a dance hall providing both live and recorded music to which patrons may dance." The document makes no mention of an intention to operate a restaurant.

OPINION:

On the basis of the facts presented to the Board, the Board concludes that between the hours of 8:30 p.m. and 1:30 a.m. Emergency operates as a "public hall" as that term is defined in Webster's Unabridged Dictionary, notwithstanding the fact that food and soft drinks are served on the premises during those hours.

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The Board further concludes that the public hall use is the primary use of the premises during the aforesaid hours by the fact that less than 10% of the gross receipts of the operation from August 9, 1969 to June 30, 1970, were used for purchases for resale (food and soft drinks), whereas, approximately 50% of receipts were used to hire bands; that a significant portion of the receipts (\$7,582.00) were expended on advertizing, which was mainly devoted to inform the public of the offered live musical entertainment, and only occasionally and incidentally to inform the public that food was served on the premises; that the \$2.00 or \$3.00 admission fee is collected in such a manner as to assure sufficient income for operating purposes regardless of whether patrons purchase food and soft drinks; that there are neither waiters nor tables for patrons' use in connection with the consumption of food and soft drinks, which the Board considers to be normal characteristics of a restaurant operation; and that the Certificate and Articles of Incorporation of Emergency, Inc., on file with the Office of the Recorder of Deeds, D.C., states that Emergency is organized to operate a dance hall, but makes no mention of the operation of a restaurant.

The Board also concludes that the record shop certificate of occupancy was properly issued by the Zoning Administrator because the record shop operates at different hours than the entertainment area.

The Board further concludes that because food is both prepared and served on the premises that Emergency also be required to hold a restaurant certificate of occupancy. This conclusion is in accordance with the usual Board requirement that a commercial facility be classified as having a restaurant use regardless of the facility's primary use because of the obvious public health considerations.

Lastly, the Board concludes that because patrons are given access to the record shop area between the hours of 8:30 p.m. and 1:30 a.m., when the record shop is not open for business,

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that that area constitutes part of the public hall operation, therefore, must be included by the Zoning Administrator in determining the amount of accessory parking required by Emergency.

The Board therefore affirms its Order of September 23, 1969, which requires that Emergency obtain both a public hall certificate of occupancy and a restaurant certificate of occupancy in order to continue in operation.

With regard to the Court's inquiry as to how the Board distinguishes the operation of Emergency from the operation or other similar-type establishments in Georgetown, at the outset it is important to note that appeals are addressed to the Board only where either an applicant for a certificate of occupancy or an affected member of the public is dissatisfied with the Zoning Administrator's decision whether to issue such certificate. Absent such an appeal, the Board has no occasion, or authority, to review the Zoning Administrator's decision. Furthermore, once a certificate of occupancy has issued and no appeal has been taken, an applicant need not apply for another certificate unless he desires to change the use of his premises or increase the capacity of the existing use by at least 25%. Knowledge of this procedure is important when one also considers that prior to the May 12, 1958 amendment to Section 7201 of the Zoning Regulations, no commercial facility was required to provide accessory parking. Prior to that date, only residential uses were obliged to comply with off-street parking requirements. Consequently, only in post May 12, 1958 decisions of the Zoning Administrator regarding commercial uses which were appealed to the Board could the matter of accessory parking requirements of commercial uses be considered.

A review of the Board's records regarding the eleven similar-type establishments listed by Emergency at proceedings before the Board (Apple Pie; The Bayou; Blues Monkey; The Cellar Door; Chadwick's; Clyde's; Crazy Horse; Mack's; Monkey Business;

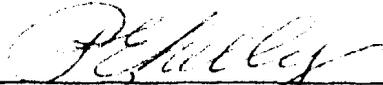
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The Silver Dollar; and Whiskey A-Go-Go) reveals that only the Whiskey A-Go-Go, now known as Fat City, has been before the Board on appeal. That appeal, BZA Case No. 10657, which involves an appeal for a special exception, pursuant to Section 7205.33 of the Zoning Regulations to permit accessory parking within 800 feet of said premises is now pending decision of the Board.

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED:

By: \_\_\_\_\_

  
PATRICK E. KELLY  
Secretary of the Board