

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 15889 of Woodrow D. Malone, pursuant to 11 DCMR 3107.2, for a variance from the use provisions (Subsection 332.1) to allow a carryout/delicatessen - no seating on the first floor and basement in an R-4 District at premises 1000 O Street, N.W. (Square 339, Lot 803).

HEARING DATE: February 16, 1994
DECISION DATE: July 6, 1994

ORDER

SUMMARY OF EVIDENCE:

1. The subject site, known as premises 1000 O Street, N.W., is located on the southwest corner of the intersection of O and 10th Streets, N.W. and comprises one lot containing 1,575.3 square feet of land area.

2. The site is improved with a three-story plus basement brick structure built in the early 1900s for first floor commercial and upper floor residential purposes. The second and third floors contain four residential units with separate entrance on 10th Street, N.W. The basement serves as a storage space for the first floor commercial use. The structure occupies 100 percent of the lot and does not abut a public alley.

3. The area surrounding the site is characterized by row dwellings, flats, small apartments, small stores and surface parking lots. Logan Circle is located approximately three blocks to the northwest of the subject site.

4. The applicant proposes to use the first floor and basement of the subject structure as a carryout/delicatessen with no seating.

5. The subject site is located in an R-4 zone district. This zone district permits matter of right development of residential uses (including detached, semi-detached, and row single-family dwellings, and flats) with a minimum lot area of 1,800 square feet, a minimum lot width of 18 feet, a maximum lot occupancy of 60 percent, and a maximum height of 3 stories/40 feet. A carryout/delicatessen is not a permitted use in an R-4 zone district.

6. The applicant is requesting a use variance from Subsection 332.1 of 11 DCMR to allow the operation of a carryout/delicatessen with no seating in an R-4 zone district.

7. The hours of operation would be from 8:00 a.m. to 12:00 noon on Monday through Thursday, from 8:00 a.m. to 2:00 a.m. on Friday and Saturday, and from 8:00 a.m. to 12:00 a.m. on Sunday.

8. The delicatessen would be operated by four employees in two shifts. Various kinds of food would be prepared in the deli kitchen at the rear of the building and would be sold in the store. Trash would be removed daily from the premises by the deli's owner.

9. The applicant through his counsel testified that he had been granted a certificate of occupancy (C of O) No. B-164998, on March 12, 1993, by the Department of Consumer and Regulatory Affairs (DCRA) to operate a carryout/delicatessen, no seating at 1000 O Street, N.W.

10. On May 28, 1993, the applicant opened for business and operated as "Lile's Deli," until July 6, 1993, when the C of O was seized by the Zoning Division of DCRA.

11. The Zoning Division of DCRA, by a letter to the applicant, with a copy to the Office of Zoning received on August 27, 1993, stated that the C of O issued to the applicant had been done in error; the error being that the property is located in an R-4 residential zone which does not allow a carryout/delicatessen unless a variance from the use provisions, Section 335.5, 11 DCMR, is obtained through a public hearing before the Board.

12. DCRA contended that the prior use of the premises as a delicatessen was a nonconforming use; however, the operation of the delicatessen by one Ms. Tally, between 1988 and 1992 had been closed for at least three years, causing the business to be subjected to Section 2005.1, 11 DCMR, relating to discontinuance of a nonconforming use, which reads as follows:

"Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for a period of more than three (3) years, shall be constructed as *prima facie* evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located."

The DCRA, accordingly, revoked the applicant's C of O under provisions of Section 1406, 14 DCMR.

13. Three residents, namely; Jack T. Stover, Willie Michael, Jr., and Mattie J. Hawkins testified in support of the application, stating that the applicant operated his business in an efficient manner.

14. The Blagden Alley Association, represented by Greg Melcher, opposed the application since the variance would adversely affect the R-4 zone in which the property is situated.

15. Advisory Neighborhood Commission (ANC) 2F, represented by Merle L. Sykes, opposed the application, stating that there had been no decrease in illegal drug use in the surrounding streets, nor any decrease in prostitution and littering since the applicant's business existed.

16. Five neighborhood residents; namely Stephen P. Gorman, Melvin F. Brown, Kevin L. Reed, Andrew K. Meeder, and Lynda Wright testified in opposition to the application on the grounds that they were bothered by noise, litter, and loitering by prostitutes as a result of the operation of the carryout/delicatessen business at the corner of 10th and O Streets, N.W.

17. The Office of Planning (OP), by its report dated February 9, 1994, and through testimony at the public hearing, recommended denial of the application. The OP stated that the applicant had not met the burden of proof relative to the zoning relief sought in this case. The OP noted that the first floor of the property had been used in the past for residential purposes and could be reverted to such. The OP could not find an undue hardship in this case that was inherent in the property.

18. The OP also noted that the premises had not been used for commercial purposes for over three years and could therefore be classified as discontinued as specified in Section 2005.1 of 11 DCMR (Discontinuance). Accordingly, any subsequent use of the premises must conform to the R-4 zone district regulations.

19. The OP was of the opinion that the proposed use of the first floor of the building as a carryout/delicatessen would adversely affect surrounding residential properties.

20. The Metropolitan Police Department, by its memorandum dated September 23, 1993, stated that the use proposed by the applicant would not affect the public safety in the immediate area nor generate an increase in the level on police services already being provided.

FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. It is possible to make reasonable use of the property for a purpose permitted in an R-4 District. The interior configuration of the property includes a kitchen which appears to have

been installed when the space was used as a residence. Therefore, the owner would not face a hardship in using the property consistent with the Zoning Regulations.

2. The subject property was originally built in the early 1900s for first floor commercial and upper floor residential purposes. Prior to 1966, the first floor was apparently used as a dwelling unit for a number of years.
3. The first floor and basement of the property were used to operate a carryout/delicatessen by one Eunice Talley starting in 1988, as a nonconforming use, until she was evicted by the owner, Woodrow Malone, in 1990.
4. Lack of business activity at 1000 O Street, N.W. for at least three years caused the nonconforming use of the premises to revert to its R-4 District status.
5. A Certificate of Occupancy No. B-164998, which was granted the applicant on April 24, 1992, to operate a carryout/delicatessen at the premises (and which, in fact, enabled the applicant to operate the said business from May 28, 1993 to July 6, 1993) was later discovered by the issuer, the Zoning Administrator of DCRA, to be in error, and was accordingly revoked in August 1993, causing the premises to revert to the R-4 District regulations.

CONCLUSIONS OF LAW AND OPINION:

Based on the evidence of record, the Board concludes that the applicant is seeking a variance from the use provisions of Subsection 332.1 of 11 DCMR to allow a carryout/delicatessen, no seating, on the first floor and basement in an R-4 District. Granting such a variance requires a showing through substantial evidence that the strict compliance with the Zoning Regulations will create an undue hardship upon the owner in his/her efforts to make reasonable use of the property. This hardship must arise out of some unique or exceptional condition of the property such as exceptional narrowness, shallowness, shape or topographical condition. The applicant must demonstrate that the property cannot be used for any purpose for which it is zoned due to some physical or other extraordinary condition related to the property itself. In addition, the Board must find that granting the application will not be of substantial detriment to the public good and will not substantially impair the intent, purpose, and integrity of the zone plan.

The Board concludes that the applicant has not met this burden of proof. The Board notes that the non-use of the first floor and basement of the subject property for at least three years caused said premises to be subjected to Section 2005.1 of 11 DCMR, relating to discontinuance of a nonconforming use, causing the property to revert to the R-4 District.

The Board concludes that it has accorded ANC-2F the "great weight" to which it is entitled.

The Board further concludes that the requested variance to use the first floor and basement of the subject premises as a carryout/delicatessen cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.

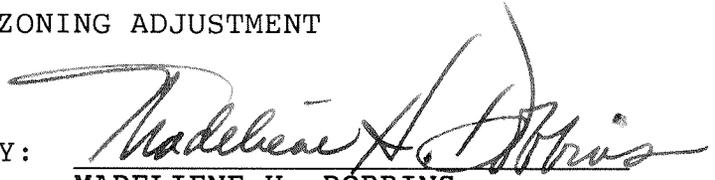
Based on the analysis above, the Board hereby **ORDERS** that the application be **DENIED**.

VOTE: 4-0 (Laura M. Richards, Maybelle Taylor Bennett, George Evans and Craig Ellis to deny; Angel F. Clarens not voting, not having heard the case).

THIS ORDER WAS ISSUED AS A PROPOSED ORDER PURSUANT TO THE PROVISIONS OF D.C. CODE SECTION 1-1509(d). THE PROPOSED ORDER WAS SENT TO ALL PARTIES ON APRIL 22, 1997. THE FILING DEADLINE FOR EXCEPTIONS AND ARGUMENTS WAS MAY 27, 1997. NO PARTY TO THIS APPLICATION FILED EXCEPTIONS OR ARGUMENTS RELATING TO THE PROPOSED ORDER, THEREFORE, THE BOARD OF ZONING ADJUSTMENT ADOPTS AND ISSUES THIS ORDER AS ITS FINAL ORDER IN THIS CASE.

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

ATTESTED BY:


MADELIENE H. DOBBINS
Director

FINAL DATE OF ORDER: _____

JUN 9 1997

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15889

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on JUN 9 1997 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each person who appeared and participated in the public hearing concerning this matter, and who is listed below:

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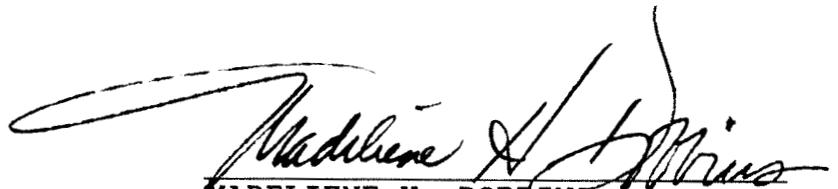
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MADELIENE H. DOBBINS
Director

DATE: JUN 9 1997