

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 16412 of Florida Avenue Partnership, pursuant to 11 DCMR 3108.1, for a special exception under Section 2000.6 to allow the conversion of the property from a nonconforming office use to a restaurant use in the D/DCOD/R-5-B District at 2128 Florida Avenue, N.W., (Square 65, Lot 22).

HEARING DATES: January 20, 1999 and March 3, 1999
DECISION DATE: May 5, 1999

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

1. A property owner within the square and within the 200-foot radius of the site indicated that he did not receive notice of the public hearing and that his name was not on the list of addresses to be notified.

The Board determined that proper notice was given of the public hearing. The notice was published in the DC Register; it was sent and received by Advisory Neighborhood Commission 2B and 1D; and, the property was posted properly.

2. A hearing on the application was scheduled for January 20, 1999. Prior to the start of the hearing, counsel for nearby property owners indicated that relief being requested is erroneous because the Zoning Regulations require that any change in nonconforming use, in a residential district, be either a residential use or neighborhood facility. It was stated that a use variance is the correct form of zoning relief required, whereas the applicants' attorney incorrectly certified that a special exception is the correct relief. Counsel for the opposing parties stated that the restaurant's use of the site is an expansion of a nonconforming use into an adjacent structure, which is not permitted by the Zoning Regulations. Accordingly, the opposing parties asked that the application be dismissed. The Board requested that the Zoning Administrator's office clarify the correct form of zoning relief needed, and subsequently denied the motion to dismiss the case. The hearing on the application was rescheduled to March 3, 1999.

SUMMARY OF EVIDENCE:

1. The property which is the subject of this application is located at 2128 Florida Avenue, N.W., immediately adjacent to 2132 Florida Avenue, N.W., between R and 21st streets, N.W. The site, Lot 22 of Square 65, is located west of Connecticut Avenue and north of Dupont Circle.
2. The subject building contains two stories and abuts Restaurant Nora, which is located to the south. The restaurant is located in a large building that occupies 2132 Florida Avenue. In the past, the building that occupies the restaurant housed the R.W. Bolling Construction Company and a real estate office. The Bolling Company was a nonconforming use, one of several long-term commercial uses, which existed in the square. The applicants indicated that the restaurant is unique because it uses all organic ingredients in the preparation of its food, and is the first restaurant in America to be “certified organic”.
3. Thyme Inc. operates Restaurant Nora and is proposing to expand the restaurant into first floor of the subject building (approximately 660 square feet). The building’s second floor is used for nonconforming office use. The seating capacity of the restaurant would increase by 24, from 75 to 99. Approximately 10 to 12 additional vehicles would come to the site when restaurant Nora is filled to capacity. The sign for R.W. Bolling would remain.
4. The front door to the subject building would be sealed. There would be no entering or exiting from 2128 Florida Avenue (the site). All patrons would continue to use the main entrance to Restaurant Nora, which is located at the corner of Florida Avenue and R Street.
5. The site is zoned D/DCOD/R-5-B; it is included in both the Diplomatic and the Dupont Circle Overlay Districts. The R-5-B zone covers a diverse blend of residential housing types and permits development at a moderate height and density. The site is a through-lot, 100 percent developed and is located in the Dupont Circle Historic District. On-site parking cannot be accommodated.
6. Matter of right uses in the R-5-B District include residential development, embassies, churches or other places of worship, child development homes, child development centers for up to 15 individuals, home occupations, hospitals, clinic for humans, and museums. Uses permitted, with the approval of the Board of Zoning Adjustment, include art galleries, private schools and community centers. The Zoning Regulations define nonconforming use as any use of land or of a structure, or of a structure and land in combination, which does not conform to the use provisions for the district in which the use is located.
7. The Dupont Circle neighborhood has a mixture of uses. The northeastern portion of 21st Street is zoned DC/C-3-B, and contains an association headquarters. To the south, 21st Street has a number of businesses, including some nonconforming uses. The eastern portion of that block is zoned DC/C-3-B, and is a largely retail area along Connecticut Avenue. The western side of 21st Street is largely residential, but with some home occupations, including furniture sales. R Street has a number of galleries and doctor’s offices, as well as the home of Teatism, a tea shop.

The Phillips Collection is located along 21st Street, south of R Street. To the west, extending along Florida Avenue, there is the Cosmos Club, and numerous embassies.

8. The applicants indicated that the site was previously used as office space and that the proposed restaurant use would represent a change in nonconforming use. The conversion of an existing nonconforming use to another nonconforming use is permitted in § 2000 of the Zoning Regulations. The applicants stated that both the restaurant and office uses are permitted in the C-1 District.

9. BZA Order No. 11452 permitted the nonconforming use in the adjacent building to be used as a restaurant and delicatessen in 1973. Order 11452 indicates that the Board first approved the nonconforming use in 1963. The building was previously used for the retail sales of Spanish imports.

10. The applicants testified that his original expectation, when he purchased the site and began construction work, was to use it for office space. However, once work commenced, the extent of termite damage and other required repairs were more extensive than originally anticipated, and they determined to use it for an additional dining room for Restaurant Nora. The applicants indicated that since they were converting from one commercial use to another, they did not believe zoning relief would be required.

11. The applicants testified that they only became aware of the need for zoning relief when, in response to a liquor license renewal challenge, they consulted counsel who advised him of the necessity of seeking a special exception. The applicants testified that building inspectors and inspectors of the Alcoholic Beverage Control (ABC) Board regularly inspected the subject site, and no infractions of any District regulations were found.

12. The applicants indicated that Restaurant Nora prides itself on being a good neighbor, so they visited those who signed a petition opposing Nora's liquor license renewal, and secured the support of most of the signatories. The applicants referenced a map, which had been submitted as part of the pre-hearing statement, showing support from all neighbors whose property abuts Restaurant Nora.

13. The applicants testified that after they became aware of the community's concerns about traffic and parking, extensive measures were taken to mitigate any potential adverse impacts. Initiatives taken included: obtaining an agreement from the owner of one commercial lot in the area for its use by valets; obtaining permission from the embassies of Brazil and Pakistan to use their excess off-street parking, when needed; and, executing an agreement with ANC 2B, which contains the following conditions:

- The applicants would not use residentially-zoned streets for valet parking spaces, instead, limit its parking, in accordance with posting parking restrictions, to Florida Avenue, N.W., between Massachusetts Avenue and Connecticut Avenue, N.W. and areas zoned for diplomatic use;

- Arrange to park overflow parking at either the Brazilian Embassy, or at the Universal North Building at Florida and Connecticut Avenue, N.W.;
- Place valet stickers on each car parked by valets;
- Assist neighbors who reside along 21st and R streets, N.W., with complementary valet parking if they are unable to locate parking;
- All deliveries and valet drop off will not block passing traffic on R Street, or Florida Avenue, N.W.; and,
- Meet with the Commission periodically to review compliance with the Agreement.

14. The applicants testified that Restaurant Nora has taken many steps over the years to be a good neighbor, including abandoning plans for an outdoor café, beautifying the vicinity with an herb garden and a tree, playing a significant role in rallying neighborhood support for the institution of the FreshFarm Market at Dupont Circle, and being active in other charitable work with schools and organizations assisting the homeless.

15. The United States Department of State submitted a letter to the record concerning the applicants' proposed arrangement to use the premises of a foreign diplomatic mission for valet parking. The letter stated that should an embassy or chancery located in a residential zone wish to permit the use of its premises for non-diplomatic parking, an issue is raised whether such use is considered accessory parking by the non-diplomatic user. If the use were significant enough to fall within the provisions of the Zoning Regulations, a District of Columbia permit would be required. As such, BZA approval would be necessary.

16. Residents of the neighborhood testified in support of Restaurant Nora, stressing that they considered the proposed and existing restaurant use a neighborhood facility and an asset to the area. George Constantinople, a ten-year resident of the neighborhood, testified as to the neighborhood character of the restaurant, and submitted a letter from his sister. Richard Wich, a retired diplomat and national security specialist, spoke of how he visits the restaurant every Thursday evening, and has a regular table close to the door. George Sprigg, a long-time resident and real estate agent, mentioned the willingness of Nora to deal immediately with problems. Mr. Sprigg viewed Nora as having a positive effect on property values in the neighborhood. Judith Brody described how Nora had helped organize the neighbors and paid a substantial portion of the costs to have a tree trimmed and cared for. Bruce Seichuk testified that the presence of valets parking cars on neighborhood streets contributed to safety and helped create a sense of security for those who lived and walked in the neighborhood. The American Farmland Trust submitted a letter of support. Other neighbors signed petitions.

17. Ellen McCarthy, an expert in land use and urban planning, testified on behalf of the applicants. Ms. McCarthy indicated that:

- The proposed use is consistent with the Dupont Circle Overlay District, which is designated to protect the character of the area. The Zoning Regulations state that the Dupont Circle area is a unique resource to the city, which must be preserved and enhanced. Strong protections are needed to retain the area's low-scale predominately residential character; its independent small retail businesses; its human scale streetscapes; and its historic character, given the high-density development pressure caused by the proximity of the Central Employment Area and the Dupont Circle Metrorail Station.
- The application is consistent with the purpose of the overlay, and the protections to be accorded to independent small retail businesses such as Nora's, which are adaptively reusing and preserving low-scale, historic buildings.
- The proposed use is consistent with the "Mixed-Use Diplomatic District" and the R-5-B District, since those districts sanction non-residential uses for the area.
- Restaurant Nora qualifies as a neighborhood facility based on the standard established by the Zoning Commission in Order No. 403, Case No. 81-17.
- The Lewis Plan brought modern zoning to the District in 1957 and sets out an early precedent for neighborhood facilities. The Plan created four classes of nonconforming uses. This distinction has persisted in various forms until today. It distinguishes between C-1 uses and all other commercial uses in terms of their compatibility with residential districts.
- The C-1 zone district definition states that C-1 zones are Neighborhood Shopping Districts. Uses permitted in C-1 zones, including restaurants, are typically those which provide services to the neighborhood. Specifically, the C-1 District is designed to provide convenient retail and personal service establishments for the day-to-day needs of small tributary areas, with a minimum impact upon surrounding residential development.
- Numerous BZA precedents exist which have permitted the conversion of other nonconforming uses to restaurants.
- The restaurant has several characteristics, which typify neighborhood restaurants in that it does not have a dress code; it encourages families; and, it has no minimum charge.
- Since the Zoning Regulations were amended in 1982, the Zoning Administrator has determined that a nonconforming restaurant use could be established in a residential district as a change from a prior nonconforming use.
- The proposed change in use at the site would have no impact on the existing structure in terms of visual intrusion. No external changes are proposed. There would be no

entrance or exit from the site; egress and ingress would be at the corner of Florida Avenue and R Street, where the current entrance is located.

- Nora is located in a neighborhood in which parking spaces are at a premium. However, expansion into the abutting building would not have adverse impact on the community due to a number of factors:
 - (a) The proposed increase in restaurant use is minimal. The existing office use is quite small (approximately 660 square feet). The overall increase in traffic is expected to be minimal.
 - (b) Restaurant Nora has concluded agreements with the Brazilian and Pakistani offices in the immediate vicinity which will make an additional 29 parking spaces available to Nora.
 - (c) There is a large supply of on-street parking spaces available on Florida Avenue in the evening. The restaurant is located along a portion of Florida Avenue, which restricts parking during rush hours. That makes any parking in front of the restaurant highly undesirable to the neighbors, who do not wish to have to move their cars to a side street when the restrictions go into effect at 7:00 a.m. There are approximately 70 parking spaces along Florida Avenue in the vicinity of the site.
 - (d) The restaurant does not serve lunch, and it begins serving dinner at 6:00 p.m.; and the evening rush-hour parking restrictions are lifted at 6:30 p.m., creating a large supply of spaces in time for the main arrival of dinner patrons. On Saturday nights, when the rush-hour restrictions are less of a drawback for neighborhood parkers, the diplomatic facilities in the immediate vicinity are, for the most part, empty. In addition, Restaurant Nora has secured an agreement with the Universal North Building that it may park overflow cars in that garage, if there is a need.

18. The applicants have directed their suppliers and trash haulers not to use 21st Street to access or exit the site. Valet parking for patrons of the restaurant are prohibited from spaces along 21st Street, or in spaces which are zoned for residential parking. Nora has doubled the number of valets, and restricted mini-bus parking to reduce congestion caused by loading or unloading passengers. The restaurant has arranged with neighbors that, on nights when they are unable to find parking, valets from the restaurant would park their vehicles at no charge and provide for the return of the keys.

19. The applicants provided signed copies of agreements with the Universal North Building, located at the corner of Florida Avenue and S Street, NW, and the Church of the Pilgrims, located at 2201 P Street, N.W. Both agreements indicate that Restaurant Nora can use the parking garage and lot for its overflow parking needs.

20. The applicants testified that Restaurant Nora meets the tests provided in the Zoning Regulations for obtaining a special exception. The proposed use would be in harmony with the Zoning Regulations and map, would not alter the character of the existing neighborhood or future development, and would not cause any adverse impacts from visual intrusion, noise, traffic or parking.

21. The site is located in Advisory Neighborhood Commission (ANC) 2B. The Commission at its December 9, 1998 public meeting voted to support the application on the condition that the restaurant's owners and the ANC execute a parking agreement. The ANC noted that several complaints were received from nearby residents about parking at the site; also, the Commission was disappointed that the expansion was completed prior to ANC approval.

22. The southernmost boundary of ANC 1D is located in proximity to the site. As such, the application was forwarded to ANC 1D for review. The Chairperson of ANC 1D, Commissioner Linda Bumbalo, submitted a letter in opposition to the application. Commissioner Bumbalo indicated that Restaurant Nora was not providing adequate parking for patrons. She indicated that if the restaurant has to provide valet parking because parking in the neighborhood is already difficult, it only follows that expansion of the restaurant would only exacerbate an already inadequate parking situation.

Other issues identified by ANC 1D were: (1) congestion at the intersection of Florida Avenue and R Streets, NW, caused by the valet parkers employed by the applicants; (2) the breaking of traffic laws and hazardous driving by the valet parkers; and, (3) the illegal parking of cars by the valet parkers. Commissioner Bumbalo questioned the portion of the parking agreement between ANC 2B and the applicants, which states that the applicants will provide nine parking spaces at the Brazilian Embassy Annex parking lot at 22nd and R streets.

23. David Hattis indicated that any zoning variance that would enlarge the operation of Restaurant Nora is objectionable. Mr. Hattis indicated that the building where restaurant Nora is located was previously used as Café Lovcon, a family-oriented neighborhood restaurant. Initially, when restaurant Nora took over, it was a similar small-scale neighborhood operation. Over the years, restaurant Nora has grown and prospered. The restaurant has initiated valet parking within the past several years. This has become an irritant to the neighborhood. The attendants, while polite, are aggressive at chasing down parking spots, and every evening they occupy many of the legal and illegal parking spaces on the 1700 block of 21st Street, 2100 block of R Street, the 2100 block of Florida Avenue, and Phelps Street.

The vehicles of the restaurant's patrons are overburdening an already tight residential parking situation. In addition, supply trucks servicing Restaurant Nora double park on R Street during the morning rush hour, causing major traffic jams. Mr. Hattis indicated that the restaurant's valet parking should only be permitted in the neighborhood's commercial parking garages, and not on the streets.

24. Pamela Keating, a property owner within the subject square, testified in opposition to the application. Dr. Keating indicated that the applicants need to bring the existing restaurant into compliance with zoning, and that further expansion is unwarranted and an undesirable

encroachment on the residential neighborhood. She requested that the Board deny the application for the following reasons:

- There is nothing in the Zoning Regulations that support the requested relief.
- The applicants have already expanded restaurant Nora, more than doubling its size, without having obtained the proper Certificate of Occupancy.
- The applicants are responsible for significant loss of residential housing, and with the request for expansion of the restaurant in an existing duplex, the residential housing stock would be further reduced.

Dr. Keating stated that granting the relief would be an expansion of a commercial use in a residential block, thus resulting in encroachment on the neighborhood. Also, residential property converted to commercial use is difficult to reclaim for single and multi-family living. In addition, there are issues associated with bulk and siting.

FINDINGS OF FACT:

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

1. The Board finds that the correct zoning relief required for the application is a special exception, not a use variance. The site was used for a nonconforming use and the applicants are proposing to change the existing nonconforming use.
2. The applicants' proposal would change the use of the first floor of the building from office use to restaurant use. In residential districts, a nonconforming use can only be changed to another nonconforming use if the proposed use is a dwelling, flat, apartment house or neighborhood facility. The evidence of record and testimony indicate that the proposed nonconforming use would be a neighborhood facility.
3. Characteristics that define a neighborhood facility include: that it is patronized by people who live and work close-by; the facility is not used to any one group, it is utilized by all members of the community; it is not exclusive; and, it is accessible by walking. The proposed restaurant meets all of these characteristics. In addition, the applicants indicate that the restaurant encourages family solidarity; it participates in community affairs, and it provides a unique service (it is the first certified organic restaurant in the country).
4. The proposed use does not adversely affect the present character or future development of the surrounding area. The Dupont Circle neighborhood is a mixed-use community. The uses that are located in proximity to the site are embassies, art galleries, restaurants and other eateries, medical and commercial office space, grocery and drug stores, variety shops, in addition to residential development. The restaurant's use of the first floor of the building would be in character with other nearby uses.

5. Traffic and parking at the site and in the neighborhood are major concerns of the area's residents. The restaurant's expansion would add approximately 12 vehicles on a regular basis to the neighborhood; however, there are existing severe parking constraints in the area surrounding the site. The applicants have proffered to provide parking in a nearby garage and on a parking lot. In addition, the applicants have entered into an agreement with Advisory Neighborhood Commission 2B to regulate traffic and parking at the site. When these measures are implemented, the proposed use of the 660 square foot area will not create deleterious traffic, parking and loading impacts. The Board did not receive testimony that the proposed use of the site would cause adverse noise, illumination, vibration and odor impacts.

6. The site is located in ANC 2B, and in proximity to ANC 1D. The Board considered the views of both ANCs. ANC 2B recommended approval of the application with conditions. The Order will be conditioned to reflect the conditions of ANC 2B, as contained in a signed Voluntary Agreement between the ANC and the applicants. ANC 1D recommended denial of the application. The issues identified by ANC 1D were: congestion at Florida Avenue and R Streets, NW, caused by the valet parkers; the breaking of traffic laws and hazardous driving by the valet parkers; illegal parking of vehicles; and, the written Agreement with ANC 2B. The Board finds that the concerns of ANC 1D were adequately addressed during the hearing process and is covered by the Voluntary Parking Agreement.

CONCLUSIONS OF LAW AND OPINION:

Based on the findings of fact and evidence of record, the Board concludes that the applicants are seeking a special exception under Section 2000.6 of the Zoning Regulations to allow the first floor of the premises to be converted from a nonconforming office use to a restaurant use. The special exception must meet the criteria set forth in Section 3108.1 of the Zoning Regulations which requires that the application be in harmony with the general purpose and intent of the Zoning Regulations and Map, and not tend to adversely affect the use of neighboring property.

The Board finds that the proposed use would be a neighborhood facility; that the applicants are proposing to change the use of the first floor of the building from one nonconforming use to another; that the Dupont Circle neighborhood is a mixed-use area where a variety of uses are located in close proximity to each other; that the proposed use would add minimal traffic to the area; that nearby, off-street parking would be provided; and, the proposed use adds to the vitality and unique characteristics of the area. The Board concludes that the applicants have met the burden of proof, and as conditioned below, the proposed use will not cause objectionable impacts because of noise, traffic, parking, and congestion.

The Board accorded ANC 2B the "great weight" to which it is entitled.

It is hereby **ORDERED** that the application be **GRANTED**, and the Voluntary Agreement (Exhibit 57 of the record) between ANC 2B and the applicants be enforced. The **CONDITIONS** accompanying approval of this application are:

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 16412

As Director of the Office of Zoning, I hereby certify and attest that on AUG 10 1999 a copy of the order entered on that date in this matter before the Board of Zoning Adjustment was mailed first class, postage prepaid, to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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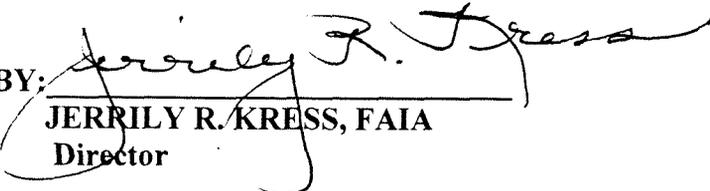
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ATTESTED BY:



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