

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17589 of Salvatore Gorgone, pursuant to 11 DCMR § 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to deny the issuance of a Certificate of Occupancy permit for a Gourmet Shop because the prior delicatessen use had been discontinued for more than three years, pursuant to 11 DCMR § 2005.

HEARING DATE: April 10, 2007
DECISION DATE: May 1, 2007

DECISION AND ORDER

INTRODUCTION

Salvatore Gorgone (“Gorgone” or “Appellant”) filed this appeal with the Board of Zoning Adjustment (“BZA” or “Board”) on November 21, 2006, pursuant to 11 DCMR §§ 3100 and 3101, challenging the administrative decision of the Zoning Administrator (“ZA”), Department of Consumer and Regulatory Affairs (“DCRA”). The ZA denied the issuance of a Certificate of Occupancy (“C of O”) permit to Appellant’s lessee for a “gourmet shop,” a commercial use not permitted in the zone district where the property was located.

The ZA concluded that even though a nonconforming delicatessen use had previously existed on the property, that use been abandoned and therefore could not be reinstated. The ZA made this determination in reliance on 11 DCMR § 2005.1, which creates a presumption that a nonconforming use is abandoned if it is discontinued for a period of at least three years. In this instance, the ZA found those elements were met as a result of the establishment in 1998, and the continuation for at least three years thereafter, of a Chinese food carry out business.

The Zoning Administrator’s determination that the carryout was a new use was based, in part, upon Webster’s Unabridged Dictionary’s definition of “delicatessen.” Appellant alleges error in the reliance upon this definition, claiming instead that the ZA should have followed past Zoning Administrator’s interpretations, which, according to the Appellant, would have considered the Chinese food carry out operations to be a delicatessen.

A public hearing on the appeal was duly noticed and held on April 10, 2007. The Board closed the record on April 10, 2007, except for those additional filings that the Board specifically requested.

At its public meeting of May 1, 2007, the Board voted 5-0-0 to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Notice of Appeal was filed on November 21, 2006 by Salvatore Gorgone and a public hearing on the appeal was held on April 10, 2007. In accordance with 11 DCMR § 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, who is the property owner, and DCRA. The Office of Zoning advertised the hearing notice in the *D.C. Register* at 54 *D.C. Reg.* 1295 (February 9, 2007).

Parties

The automatic parties in this case were the owner of the subject property Salvatore Gorgone, (“Appellant”), DCRA (“Appellee”), and the affected Advisory Neighborhood Commission (“ANC”), ANC 2B. *See*, 11 DCMR § 3199.

ANC 2B designated Commissioner Mark Bjorge as its representative. At the hearing, Commissioner Bjorge requested party status both as the ANC’s duly authorized representative and for himself individually. Since the ANC is automatically a party, the first portion of his request was unnecessary. The second aspect of the request -- for individual party status -- was made because the ANC cannot petition the Court of Appeals to review an adverse Board decision. D.C. Official Code § 1-309.10 (g). Commissioner Bjorge believed that unless he was given party status, he could not file such a petition. Ms. Anne Marchand, a neighbor, also sought party status for the same reason. Both withdrew their requests after being informed that D.C. Official Code § 2-510 (a) provides that any “aggrieved person” can appeal an agency order regardless of whether they were a party in the proceeding below.

The Richmond Condominium Association also requested party status, but did not attend the hearing. The Board denied the request, not finding the requisite “good cause.” *See*, 11 DCMR § 3112.15. However, the Board noted that the ANC was amenable and would be able to present evidence on the Association’s behalf.

FINDINGS OF FACT

1. The property that is the subject of this appeal (“subject property”) is located at 1417 17th Street, N.W. (Lot 181, Square 149) in the R-5-E zone district and within the Dupont Circle Overlay District.
2. The subject property is improved with a three-story row dwelling constructed in 1890, with a basement unit that is reached by steps leading to a below-grade doorway. At some point before May 12, 1958, a retail food establishment selling uncooked, prepared food was lawfully established in the basement.

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3. The current version of the Zoning Regulations became effective on May 12, 1958. As a result of the adoption of the regulations and the associated zoning map, the subject property was zoned R-5-D.
4. Both then and now, no type of food sales were/are permitted as principal uses in either an R-5-D District or in the current R-5-E District.
5. However, because the use was lawfully established prior to May 12, 1958, it is considered “nonconforming.” 11 DCMR § 199.1 (definition of “Nonconforming use”).
6. Subject to an exception not applicable here, a nonconforming use may continue in existence until it is abandoned. A nonconforming use is presumptively deemed abandoned if discontinued for a period of at least three years. 11 DCMR § 2005.1.
7. The earliest extant C of O issued for use of the basement space was issued on November 21, 1958 for a “Retail Delicatessen (Non-Conforming).” See, Exhibit (“Ex.”) 17, Attachment No. 1.
8. A “delicatessen” is not among the uses recognized and defined in the Zoning Regulations as they existed on the date of the ZA’s decision.¹
9. Words not defined in section 199.1 have the meaning given to them in Webster’s Unabridged Dictionary. 11 DCMR 199.2 (g).
10. Webster’s Third New International Dictionary (Merriam-Webster, 1986) defines “delicatessen” to mean: “1. ready-to-eat food products (as cooked or processed meats, cheeses, prepared salads, canned foods, preserves, and relishes); 2. a store where delicatessen are sold either to be taken out or to be eaten on the premises (as in sandwiches).”
11. There is no dispute that between May 12, 1958 and 1998 the use of the basement space was consistent with this definition. Specifically, at no time during this period was there any large-scale cooking of food done on the premise.
12. As a result of changes in ownership of the retail food business, seven C of O’s were issued between December 6, 1979 and April 17, 1995 for a delicatessen use. See, Hearing Transcript (“Tr.”) at 303-304.
13. Appellant purchased the property in 1994, at which time the basement was occupied by a retail food business operating as a “delicatessen with no seating,” as per its C of O.

¹ The term has since been entirely eliminated from the Regulations by Zoning Commission Order No. 06-23, published at 54 DCR 9393 (September 28, 2007) and corrected at 54 DCR 11720 (December 7, 2007).

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14. On June 4, 1998, DCRA issued C of O #B00180991 to Mr. Ming Jin Zhang, operating as “Chef’s Express.” The C of O authorized Chef’s Express to use the subject property as a “Delicatessen (No Seats).” See, Ex. 16.
15. In 1998, Chef’s Express’ owner began to renovate the basement of Appellant’s property, introducing a commercial-style kitchen with cooking equipment, exhaust fans, and vents.
16. Once the renovation was complete, Chef’s Express expanded its menu to include cooked items and started to receive large bulk food deliveries of raw foods, such as 50-pound bags of rice and bags of onions.
17. The raw food was prepared – chopped, diced, etc. – and cooked on the premise.
18. There is no dispute that this change in operation, from a retail food establishment that sold only prepared food to one that prepared and cooked the food on the premise, continued for at least three years, lasting from late 1998 through November of 2005, when Chef’s Express ceased operating.
19. The continuing nature of these activities is corroborated by the actions of District officials taken during this period and by the conduct of the business owner.
20. As to the former, observations made by investigators from DCRA and the D.C. Department of Health resulted in the issuance of:
 - (a) Notices of Infraction on October 28, 1999, March 7 2003, and August 21, 2003 alleging that the food preparation activities being carried out on the premises were not within the scope of the delicatessen use authorized by the C of O and that the operation was actually a carry-out.. Exs. 22, 24 and 25;
 - (b) A Notice of Intent to Deny License Renewal for delicatessens on October 17, 2005. Ex. 17, Attachment No. 3; and
 - (c) A Notice of Revocation, dated November 4, 2005, of Chef’s Express’ Certificate of Occupancy #B00180991. The Notice states that Chef’s Express is engaging in “activities that do not conform to the location and use permitted in the existing C of O,” and directs Chef’s Express to discontinue its unauthorized activities within 10 days of issuance of the Notice. See, Ex. 17, Attachment No. 3.
21. The business owner confirmed the nature of the activities occurring on the premises by requesting:
 - (a) A carry-out permit, denied by letter issued on April 21, 2003. Ex. 23.

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- (b) A C of O as a “Chinese Food Carry-Out” (Application No. 51341), denied on July 11, 2003. The denial, from which no appeal was taken, cited the need for Chef’s Express to obtain variance relief from the Board of Zoning Adjustment, (See, Ex. 28); and
 - (c) A variance to operate a Chinese carry-out, the application for which was withdrawn. See, Transcript of BZA No. 17075, May 11, 2004.
22. Following the revocation of its C of O, Chef’s Express ceased operations during November of 2005.
 23. On February 4, 2006, Appellant entered into a lease agreement with a new tenant, a Mr. Luna, who proposed operating a “gourmet shop” in the basement of the subject property. See, Ex. 11, Attachment No. 9.
 24. At some point in February, 2006, the tenant, Mr. Luna, applied to DCRA for a C of O to operate a delicatessen.
 25. In a March 1, 2006 letter, Mr. Luna told Appellant that the ZA had informed Mr. Luna that the subject property is not zoned for commercial use. See, Ex. 11, Attachment No. 9
 26. The ZA further informed Mr. Luna, in a June 11, 2006 e-mail that he was preparing a letter for the property owner, stating his determination that the nonconforming use as a delicatessen had been discontinued. See, Ex. 11, Attachment No. 13
 27. Mr. Luna thereafter applied for a C of O again, this time to operate a gourmet shop on the property.
 28. On September 22, 2006, the ZA formally denied Mr. Luna’s request for a C of O for a gourmet shop, based on the rationale that the “grandfathered” nonconforming delicatessen use had been discontinued for at least three years after it had been improperly changed to a different use – a Chinese carry-out -- and therefore had been abandoned. See, Ex. 27.
 29. On November 21, 2006, Appellant filed this appeal of the ZA’s September 22, 2006 denial of the application for a C of O for a gourmet shop.

CONCLUSIONS OF LAW

Motion to Dismiss Appeal as Untimely

DCRA moved to dismiss the appeal as untimely. The Board’s Rules of Practice and Procedure

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require that all appeals be filed within 60 days after the date the person filing the appeal had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier. 11 DCMR § 3112.2.

Although this appeal was filed within 60 days of the Zoning Administrator's September 22, 2006 decision denying the February 2006 C of O application to operate a gourmet shop, DCRA claims that the Appellant is, in essence, barred from appealing that decision because he failed to appeal the July 11, 2003 denial by the ZA of Mr. Ming Jin Zhang's application for a C of O for a "Chinese food – carry-out."

The Board disagrees. While it is true that the Appellant could have appealed the July 11, 2003 denial of a C of O for a "Chinese food – carry-out," he did not have to. The denial of the gourmet shop C of O is a separate decision made by an administrative officer in the administration of the Zoning Regulations which the Appellant also has the right to appeal. See, 11 DCMR § 3100.2. Since the business still had an existing C of O, the 2003 denial had no effect upon the operations, which continued until the C of O was at last revoked in November 2005. Now that there is no C of O in place and a request for a new one has been denied, Mr. Gorgone has chosen to appeal that decision. The appeal was filed on November 21, 2006, within 60 days of the denial of the application for the C of O for use of the property as a gourmet shop, and is therefore timely.

The Merits of the Appeal

Both the Appellant and the Appellee agree that the retail food establishment in the basement was lawfully established prior to the property's rezoning to R-5-D in 1958. As a result of the rezoning, the establishment became a nonconforming use, which is defined, in relevant part, as "any use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective, that does not conform to the use provisions for the district in which the use is located." 11 DCMR § 199.1. The first post-rezoning C of O issued for the basement space was for a "Retail Delicatessen (Non-Conforming)" (emphasis added).

There are three important distinctions between the treatment of nonconforming uses and matter-of-right uses. First, a nonconforming use cannot be expanded without zoning relief. See, 11 DCMR § 2002. Second, a nonconforming use cannot be changed to another nonconforming use, except pursuant to the provisions of 11 DCMR § 2003. Third, a nonconforming use is presumed permanently abandoned if it is discontinued for at least three years. See, 11 DCMR § 2005.

The C of O application that is the subject of this application was for a gourmet shop. The ZA did not deny the application on the ground that it sought a change from one nonconforming use to another. Instead, the ZA found that the nonconforming delicatessen use could not be resumed because it had been abandoned within the meaning of 11 DCMR § 2005. That subsection provides in relevant part:

Discontinuance for any reason of a nonconforming use of a structure or of land ... for a period of more than three (3) years, shall be construed 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 ZA based his determination that the elements of abandonment were met in this case upon the establishment of a Chinese food carry-out use in 1998 and the continuation of that use for a period of at least three years. Appellant does not contest that a Chinese food carry-out operation existed on the premise during that period, but argues that the ZA erred in concluding that a delicatessen use did not encompass this activity. The Board concludes no error was made.

Neither “delicatessen” nor “Chinese carry-out” was defined in the Zoning Regulations in effect at the time of the appeal, but it is clear to the Board that they are not the same thing. Both may cater to “take-out” customers and off-premise consumption, but delicatessens do not usually provide food that is cooked on the premise. Delicatessens also usually offer a substantial array of pre-packaged foods, such as snack items, which would not be offered by a Chinese carry-out. In contrast, a Chinese carry-out cooks foods to order on the premise. Such cooking results in a Chinese carry-out being a much more intense use than a delicatessen, with greater impacts on the surrounding neighborhood in the way of odors, trash, and vermin. The less-intense nature of a delicatessen is borne out by its definition in Webster’s Dictionary, set forth in Finding of Fact No. 10, which mentions only the sale of “ready-to-eat food products,” and does not mention any cooking at all.

Applying this analysis to the facts in the record, it is clear that the use which commenced in late 1998, and which continued for at least three years thereafter, was not a delicatessen. After the June 4, 1998 issuance of a C of O for a “Delicatessen (No Seats),” Mr. Ming Jin Zhang undertook a substantial renovation of the basement area and installed a commercial-style kitchen with cooking equipment, exhaust fans, and vents. Such a commercial kitchen is not necessary to, or even necessarily compatible with, a delicatessen use. Chef’s Express expanded the scope of food offerings beyond those available for approximately the preceding 40 years by including cooked items. It began to receive bulk deliveries of unprocessed food to be cooked, and engaged in substantial cooking operations of Chinese dishes. Such bulk deliveries and substantial cooking are wholly incompatible with a delicatessen use and, no matter what the use stated on the C of O, changed the true nature of the use into a Chinese carry-out restaurant.

Appellant argues that the ZA’s reliance on, and application of, the definition of “delicatessen” from Webster’s Dictionary amounts to a rulemaking, as, he claims, it somehow changes prior ZA interpretations that a “delicatessen” use encompasses a “carry-out.” In fact, it is the Appellant who is treating prior ZA interpretations as if they were rulemakings. While the ZA may adhere to past ZA interpretations of non-defined terms, he or she cannot ignore the specific direction of 11 DCMR § 199.2 (g) to use Webster’s Unabridged Dictionary to determine the meaning of undefined words. Moreover, there is evidence in the record that, at least one prior ZA had also determined that there is a difference between a “delicatessen” and a “carry-out” use.

Although Appellant does not challenge the ZA's finding that the Chinese food carry-out operated for a continuous period of at least three years, the Board notes that there is also ample evidence to support that conclusion. The ZA based his conclusion on all that had transpired between 1998 and 2005, including his investigation of the property, the NOI's issued to Chef's Express, and the failure to bring the use into conformance with the delicatessen C of O.

Since the nonconforming delicatessen use was not re-established within three years from its discontinuance, it was properly deemed presumptively abandoned by the ZA pursuant to 11 DCMR § 2005. The ZA did not err in denying Mr. Luna's application for a C of O for a gourmet shop.

For the reasons stated above, the Board concludes that the Appellant did not meet his burden of demonstrating that DCRA erred in denying the application for a C of O to operate a gourmet shop on the subject property. Accordingly, it is ORDERED that the appeal is DENIED.

Vote taken on May 1, 2007

VOTE: 5-0-0 (Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II, Marc D. Loud and Anthony J. Hood in support of the motion).

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

Each concurring member has approved the issuance of this Order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 04 2008

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on **MARCH 4, 2008**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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