

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Appeal No. 17677 of L. Napoleon Cooper**, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, to allow off-premises alcoholic beverage sales as an accessory use to a Harris-Teeter grocery store in the RC/C-2-B District, at premises 1631 Kalorama Road, N.W. (Square 2572, Lot 36).

**HEARING DATE:** November 6, 2007, December 18, 2007, January 29, 2008  
**DECISION DATE:** March 4, 2008

**ORDER**

On May 25, 2007, L. Napoleon Cooper (“Appellant”) filed this appeal alleging that the Zoning Administrator (“ZA”) had erred in concluding, in a letter dated March 21, 2007, that the prohibition of off-premises alcoholic beverage sales in 11 DCMR § 1401.1(b), applied to “principal uses only and not to accessory sales within a grocery store.” The ZA determined in that letter that “the subordinate sale of beer and wine for off-premises consumption is an allowable accessory use for a retail grocery store” in the Reed Cooke Overlay District. *See*, Exhibit No. 5.

The Board of Zoning Adjustment (“BZA” or “Board”) held a hearing on the appeal and, at its Public Decision Meeting on March 4, 2008, concurred with the Zoning Administrator and denied the appeal by a vote of 3-0-2.

**PRELIMINARY MATTERS**

Notice of Appeal and Notice of Hearing. By memoranda dated May 30, 2007, the Office of Zoning provided notice of the appeal to the D.C. Office of Planning, the Zoning Administrator, at the Department of Consumer and Regulatory Affairs (“DCRA”), the Councilmember for Ward 1, Advisory Neighborhood Commission (“ANC”) 1C, the ANC in which the subject property is located, and Single Member District/ANC 1C07. Pursuant to 11 DCMR § 3113.13, the Office of Zoning published notice of the hearing date in the *D.C. Register*, and sent such notice to the Appellant, the ZA, ANC 1C, and the owner of the property that is the subject of the appeal (“Property Owner”).

Party Status. The automatic parties in this proceeding were the Appellant, DCRA (the “Appellee”), the Property Owner, and ANC 1C. There were no requests for party status.

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Motions to Dismiss. As will be discussed later in the conclusions of law, both the Appellee and the Property Owner moved to dismiss the appeal as untimely. The Property Owner also moved to dismiss on the grounds of lack of standing, estoppel, and laches (Exhibits Nos. 30 and 31). The motions were denied because a majority of the Board did not vote in favor of granting or denying either. That being the case, this order will not include any findings of facts or conclusions of law relevant to the issues raised in the motions.

### **FINDINGS OF FACT**

#### **A. The Property**

1. The subject property is located at address 1631 Kalorama Road, N.W. (Square 2572, Lot 36), and is zoned C-2, but is also within the Reed-Cooke Overlay District (“Overlay”).
2. The Property Owner desires to redevelop the subject property with a mixed-use project that will include a grocery store, retail or service uses, and office space.
3. The new mixed-use project could not proceed under matter of right zoning, but required zoning relief, granted by this Board in Order No. 17395 of Jemal’s Citadel LLC, issued on June 12, 2006.
4. That order did not address the issues raised and resolved in this appeal.

#### **B. Events Leading to the Filing of this Appeal**

5. On September 11, 2006, the Property Owner and the operator of the grocery store (“store operator”) applied to DCRA for a building permit to construct the interior layout of the grocery store.
6. According to the plans submitted with the building permit application, the area to be devoted to the sale of beer and wine would comprise approximately 4% of the store’s total floor area and would be located within, and therefore on the same lot as, the grocery store.
7. On November 13, 2006, DCRA issued Building Permit No. 98040, permitting the construction of the interior of the grocery store.
8. The issuance of the permit has never been appealed.
9. On August 18, 2005, the store operator filed its application for a Class B Off-Premises Retail License with the D.C. Alcoholic Beverage Control Board.
10. An Off-Premises Retail License authorizes a licensee to sell alcoholic beverages “and to deliver the same in the barrel, keg, sealed bottle, or other closed container in which the same was received by the licensee.” D.C. Official Code § 25-112 (a). A Class B license authorizes the sale of wine and beer, but not “spirits.” D.C. Official Code § 25-112 (d).

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11. Appellant filed a protest of the application on December 16, 2005, which was dismissed by the Alcoholic Beverage Control Board because that Board determined that the Appellant had solicited a monetary contribution from the store operator in exchange for withdrawal of his protest. (*See*, Exhibit No. 30, Attachments C and D).
12. Among other things, the Appellant argued that the sale of alcoholic beverages for off-premises consumption is prohibited at the subject property by 11 DCMR § 1401.1 (b).
13. The Property Owner asserted that § 1401.1 (b)'s prohibition of off-premises sales of alcoholic beverages only extended to the principal form of the use, and did not also prohibit such sales as were accessory to a permitted use, such as a grocery store.
14. Subsection § 1401.1 does not state whether its prohibitions apply only to the principal form of the uses listed or to accessory uses, as well.
15. On March 21, 2007, the ZA issued a letter to the representatives of the Property Owner stating that "the restrictions in § 1401.1 (b) applies [sic] to principal uses only and not to accessory sales within a grocery store".
16. The Appellant appealed the ZA's letter to this Board on May 25, 2007.

### **C. The Sale of Beer and Wine within Grocery Stores**

17. It has become a common practice for grocery stores to sell beer and wine as an incidental part of their business.
18. Sixty-four grocery stores in the District hold Class B liquor licenses, authorizing the sale of beer and wine for off-premises consumption. Exhibit No. 29.
19. When established as a principal use, the sale of alcoholic beverages for off-premises consumption takes the form of a liquor store, which historically has had some adverse external impacts, such as loitering, on a neighborhood.
20. The sale of alcoholic beverages for off-premises consumption by a large grocery store, such as is being constructed by the Property Owner, does not have a history of similar adverse effects.

## **CONCLUSIONS OF LAW**

### **Motions to Dismiss**

Both the Appellee and the Property Owner moved to dismiss the appeal as untimely. The Property Owner also moved to dismiss on the grounds of lack of standing, estoppel, and laches (Exhibits Nos. 30 and 31).

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Upon completion of the portion of the Board's hearing devoted to the motions arguments, the Board decided to vote on the motions. There were, however, only three Board members participating in this appeal, which affected the outcome of the vote. Chairperson Miller moved to deny the motions to dismiss, but her motion failed for lack of a majority, with a vote of two members to deny, and one member to grant. Board member Dettman then moved to grant the motions to dismiss, but his motion also failed for a lack of a majority, with a vote of one member to grant, and two members to deny.

This Board has previously held that:

A vote that fails to generate at least three affirmative votes operates to deny the relief that was the subject of the motion, unless the Board decides to defer consideration of the matter until a new vote can be taken at a later time. *See Hubbard v. District of Columbia Bd. of Zoning Adjustment*, 366 A.2d 427, 428 (D.C. 1976) (failure to achieve number of votes required by Board rule operated as denial of motion for rehearing). See also Webster's New World Robert's Rules of Order: Simplified and Applied 62-65, 278-82 (1999) (majority vote, motions to reconsider the vote).

*Application No. 16566-B of the President and Directors of Georgetown College*, 49 DCR 834, 835 (2002).

The Board did not defer consideration of the motion following the two votes. Therefore, the motions to dismiss were deemed denied and the Board heard the merits of the appeal.

**The Merits of the Appeal**

The subject property is zoned RC\C-2-B, which means that it is located in both the C-2-B zone district and the Reed-Cooke Overlay district. The regulations that govern the districts constitute the zoning regulations for the geographic area where their boundaries overlap. 11 DCMR § 1400.3. Any inconsistency between the two sets of provisions is resolved in favor of the most restrictive. 11 DCMR § 1400.4.

The particular Overlay provision that the Board is called upon to interpret is 11 DCMR § 1401.1 (b), which provides:

The following uses shall be prohibited in the RC Overlay District:

...

(b) Off-premises alcoholic beverage sales.

The questions on appeal are: (1) whether the sale of beer and wine is accessory to a grocery store use and, if so; (2) whether the prohibition of § 1401.1 (b) extends to that accessory use.

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1. The Sale of Beer and Wine for Off-Premises Consumption is Accessory to a Grocery Store Use.

An accessory use is one that is not permitted as of right within a zone district as a principal use, but is “so necessary or commonly to be expected [in relation to a principal use] that it cannot be supposed that the ordinance was intended to prevent it.” *Zahn v. Board of Adjustment of City of Newark*, 45 N.J. Super. 516, 133 A.2d 358 (App. Div. 1957). The Zoning Regulations define “accessory use” as “a use customarily incidental and subordinate to the principal use, located on the same lot with the principal use.” 11 DCMR §199.1, definition of “Use, accessory.”

Because an accessory use must be “incidental and subordinate” to the principal use, the magnitude of the principal use must be greater than that of the accessory use. The principal use must be proportionally larger, or more important, or more functionally central, than the accessory use. There is no “bright line” standard as to when an accessory use becomes so large or so important as to veer into the territory of “principal uses.” *See, National Cathedral Neighborhood Ass’n. v. D.C. Board of Zoning Adjustment*, 753 A.2d 984, 986 (D.C. 2000). However, in this case the D.C. Council has essentially recognized that up to 15% of a grocery store’s gross sales receipts may come from sales of alcoholic beverages without such sales losing their character as “incidental” to the primary purpose of selling groceries. *See, D. C. Official Code § 25-332 (2001)* (moratorium on class B liquor licenses inapplicable to new or newly renovated full service grocery stores if, among other things, sale of alcoholic beverages constitutes no more than 15% of the total volume of gross receipts).

The fact that this incidental use is “customarily” incidental is supported by the evidence in the record that sixty-four grocery stores in the District of Columbia hold Class B liquor licenses, authorizing the sale of beer and wine for off-premises consumption. Exhibit No. 29. *See also, Sevilla and Board of Adjustment II of the City of Pheonix, Arizona v. Sweat*, 450 P. 2d 424, 426-427 (Ariz. App. 1969). (“[C]ontrary to historical usage, the ordinary understanding of present day business practices is that package beer and wine are included in the term ‘groceries ‘ and that grocery stores normally sell package beer and wine along with other groceries.”)

The grocery store use in this case is clearly a principal use on the subject property. It will be operated as a large supermarket, part of a nationally recognized chain, and will occupy the entire main floor of the building on the subject property. The store will sell a full line of grocery items, with only approximately 4% of the store’s total floor area used for displays of beer and wine and sales of alcoholic beverages limited to no more than 15% of the total volume of gross receipts on an annual basis.

The Board therefore readily concludes that the sale of alcoholic beverages for off-premises consumption is customarily incidental and subordinate to the grocery store use, and is therefore an accessory use.

2. Off-Premises Sale of Alcoholic Beverages as an accessory use is not prohibited within the RC Overlay.

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Title 11 DCMR §1400.3 provides that “[t]he RC Overlay district and the underlying commercial and residential districts shall together constitute the zoning for the geographic area identified in §1400.1 [the Reed-Cooke Overlay].” 11 DCMR §1400.4 provides that “[w]here there are conflicts between this chapter and the underlying zone district, the more restrictive regulations shall govern. “

Appellant argues that because the prohibition against off-premises alcoholic beverages sales set forth at §1401.1(b) does not distinguish between principal and accessory uses that its “plain language” prohibits all sales of alcoholic beverages for off-premises consumption. However, this provision is not to be read in isolation, but in conjunction with the regulations underlying the C-2 commercial zone. 11 DCMR § 1400.3. Moreover, it is a basic tenet of statutory construction that the plain language of a statute (and similarly a regulation) must be determined in the context of the regulations as a whole. *See, K Mart Corp. v Cartier, Inc.*, 486 U.S. 281, 291 (1988) (courts should look “to the particular statutory language at issue, as well as the language and design of the statute as a whole” to ascertain statute’s “plain meaning.”).

The regulations underlying the C-2 commercial zone are set forth in pertinent part at 11 DCMR §§ 701.4 (l) & (u), §§ 721.1 and 722.3. A grocery store and the off-premises sale of alcoholic beverages are both permitted as of right in a C-2 zone by virtue of §§ 701.4 (l) & (u) and 721.1. Uses not permitted as of right are nevertheless allowed as “accessory uses customarily incidental and subordinate to the uses permitted in C-2 Districts.” 11 DCMR § 722.3. Since both uses are permitted as of right within a C-2 district, neither use falls under the purview of § 722.3. However, even if the sale of alcoholic beverages for off-premises consumption were not permitted as a matter of right use in a C-2 zone, it would be permitted as an accessory use to a grocery store because it is “customarily incidental and subordinate” to that principal use.

As directed by §1400.3, the Board must read Chapter 14 together with the regulations governing the underlying commercial and residential districts. Accordingly, in interpreting §1401.1’s prohibition of off-premises sale of alcoholic beverages, the Board looks at the prohibition in the context of what is allowed in the underlying commercial district, set forth in relevant part, at §§ 701.4 and 721.1.

Section 721.1 provides that “[a]ny use permitted in C-1 Districts under § 701 shall be permitted in a C-2 District as a matter of law.” Section 701.4 sets forth uses allowed as a matter of right in the C-1 District that by the above provision apply as well to the C-2 District, including both (l) food and grocery store and (u) Off-premises alcoholic beverage sales.

By virtue of the fact that both sets of regulations are to be read together, those uses permitted under § 701 remain permitted in the Reed-Cooke Overlay unless prohibited under Chapter 14. Neither the use as a grocery store permitted under § 701.4(l) nor “other accessory uses customarily incidental and subordinate to the uses permitted in the C-2 Districts,” permitted under § 722.3, are prohibited by §1401.1 or any other provision in Chapter 14. Accordingly, the Board concludes that the sale of alcoholic beverages for off-premises consumption as an

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accessory use to a grocery store is not prohibited under § 1401.1 or any other regulation under Chapter 14.

The Board also finds significant that § 701.4 characterizes all the uses listed under this provision as “retail establishments.” This description leads to the conclusion that “off-premises alcoholic beverages sales” under § 701.4 refers to a stand-alone liquor store, reinforcing the conclusion that the same words used in §1401.1, but under the category of prohibited uses, is intended to apply to the principal use as a liquor store and not to accessory uses to a matter of right use.

For guidance in interpreting the prohibited uses provision set forth in §1401.1, the Board has also examined “prohibited uses” in other chapters of the Zoning Regulations, and finds that there is no uniform manner in which prohibited uses in the various chapters address accessory uses. The Board notes that in some instances in the Zoning Regulations a list of prohibited uses does specifically distinguish principal uses. *See e.g.* § 602.1 (Commercial Residential Districts) in which five prohibited uses are specifically limited to principal uses and § 902.1 (Waterfront Districts) where two prohibited uses are specifically limited to principal uses. However, there is no pattern of this format throughout the regulations that would lead to the conclusion that if the regulations are silent, that accessory uses are to be determined to be prohibited as well. Notably, the regulations governing overlays do expressly identify accessory uses when they are intended to be prohibited. *See e.g.* § 806.4(b) regarding the Langdon Overlay District, which expressly prohibits outdoor materials storage or outdoor processing, fabricating, or repair “whether a principal or accessory use” (emphasis added), and §§ 1303.1, 1505.1 and 1901.3, specifically prohibiting a drive-through accessory to any use permitted in the Overlay.

It bears noting that a list of prohibited uses is but one of two ways that the Zoning Regulations disallow uses. The other (and most common) means is to exclude a particular use from a list of uses permitted within a zone district. As noted, the disallowance of a principal use through exclusion does not act to disallow the accessory form of the use. Yet, Appellant argues that when a use is disallowed through express prohibition, the accessory form of the use is forbidden as well. Appellant’s position is contrary to the generally accepted rule that when an ordinance disallows uses through express prohibition “accessory uses not specifically prohibited may be engaged in.” Vol. 2 § 33:2 (4th ed.) *Rathkopf’s The Law of Zoning and Planning* and cases cited therein.

Finally, interpreting § 1401.1(b) – “off-premises alcoholic beverage sales” as applying only to a liquor store – a stand-alone principal use – is consistent with the Zoning Commission’s intent as set forth in 11 DCMR § 1400.2(c), to “[p]rotect adjacent and nearby residences from damaging traffic, parking, environmental, social, and aesthetic impacts.” The impact of a liquor store on a residential neighborhood is different from that of a full-service, national-chain supermarket selling beer and wine as an accessory use. While liquor stores have historically been accompanied by such adverse impacts as loitering, full-service grocery stores selling beer and wine as an accessory use have not.

*Great Weight*

The Board is required to give "great weight" to issues and concerns raised by the affected ANC. D.C. Official Code § 1-309.10(d) (2001). Great weight means acknowledgement of the ANC's issues and concerns and an explanation of why the Board did or did not find its views persuasive. Although ANC 1C was automatically a party to this appeal, it decided not to participate in the proceedings, as memorialized in its letter to the Board dated February 8, 2008. Exhibit No. 45.<sup>1</sup> Therefore, there is no ANC document to which the Board can accord great weight.

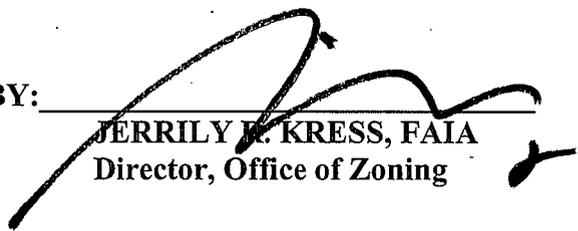
For the reasons set forth above, the Board does not find a conflict between § 1401.1(b) and the regulations of the underlying C-2 District. Because the Board finds that the sale of alcoholic beverages for off-premises consumption as an accessory use is not prohibited by § 1401.1(b) and is therefore allowed as a matter of right, no relief is required

For the reasons stated, the Board concludes that the Zoning Administrator did not err in permitting the store operator/Property Owner to engage in the sale of alcoholic beverages for off-premises consumption as a matter-of-right accessory use to a matter-of-right grocery store use, notwithstanding the prohibition stated in 11 DCMR § 1401.1(b). Therefore, it is hereby **ORDERED** that this appeal is **DENIED**.

**VOTE:** 3-0-2 (Ruthanne G. Miller, Marc D. Loud, Shane L. Dettman, to deny. Mary Oates Walker not participating or voting. No Zoning Commission member participating or voting.)

Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: \_\_\_\_\_

  
JERRILY K. KRESS, FAIA  
Director, Office of Zoning

**FINAL DATE OF ORDER: DEC 09 2008**

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.

<sup>1</sup>During the hearing on this appeal, on January 29, 2008, it was still unclear whether ANC 1C was participating in this appeal, or was only participating in the companion appeal of the Reed-Cooke Neighborhood Association, Board Case No. 17675. The February 8, 2008 ANC letter (Exhibit No. 45) makes clear that the ANC declined to participate in this appeal, No. 17677, irrespective of its decision with regard to participation in Appeal No. 17675.

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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 **DECEMBER 9, 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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