

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No 17860-A of Jemal’s KFC, LLC, pursuant to 11 DCMR § 3101.2, for a variance from floor area ratio requirements under section 771, a variance from the rear yard requirements under section 774, and a variance from the parking requirements under subsection 2101.1, to permit the development of a two-story commercial building in the C-2-A District at premises 1442 Pennsylvania Avenue, S.E. (Square 1065-NE, Lot 49).

HEARING DATE: January 6, 2009
DECISION DATE: January 6, 2009
DATE OF ISSUANCE OF ORDER: January 8, 2009
DATE OF DECISION ON RECONSIDERATION: March 3, 2009

ORDER DENYING RECONSIDERATION

Background

By letter dated January 21, and filed with the Office of Zoning on January 26, 2009, Advisory Neighborhood Commission (“ANC”) 6B, the ANC within which the subject property is located, and a party to the case, moved for reconsideration of the Board of Zoning Adjustment’s (“BZA” or “Board”) January 8, 2009 order in this case.

During the proceedings in this case, the ANC submitted a letter to the Board dated December 10, 2008 stating that the ANC’s decision to support the application was “conditioned on the attachment of items 1 through 5 of the Neighbors’ MOU” with the Applicant. Exhibit No. 21. (*See also*, Exhibit No. 22, ANC letter of December 18, 2008). The Board was therefore aware that the ANC wanted the Board to include “items 1 through 5” as conditions in its order.¹

¹Items one through five read as follows:

1. The following uses, even though permitted within the C-2-A District as a matter of right or with special exception approval by the BZA, will not be permitted on the Subject Property: a liquor store, the sale of any pornographic material, a check-cashing establishment, a pawnbroker, a night club, and a convenience

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The Board, in its January 8, 2009 summary order, did not include the requested items one through five. Instead, the order stated that these matters “are not relevant to the variance relief requested ... and ... that the ANC did not intend its support of the application to be contingent upon” their inclusion in the Board’s order. Board Order No. 17860, *Jemal’s KFC, LLC* (January 8, 2009), at 2. Therefore, ANC 6B moved for reconsideration and requested that the Board “agree to require that the terms of the MOU be attached to the variance.” Exhibit No. 35, letter requesting reconsideration.

At its public meeting on March 3, 2009, the Board addressed the ANC’s request for reconsideration, and denied it.

Discussion

During the hearing, and again at the conclusion of the hearing, in the deliberations on the application, the Board gave great weight to the requested items/conditions one through five by considering them seriatim. As to proffered items/conditions one and three, the Board found that there was no evidence of adverse impact which these conditions would mitigate. Hearing Transcript of January 6, 2009 (“Trans.”), at 165, lines 10-22 and 166, lines 1-10; and 167-169. Further, for item three, the Board also found that the proffered condition had nothing to do with the variance relief that was granted. Trans. at 168, lines 1-5. Item number two is duplicative of the regulation found at 11 DCMR § 3125.7. Trans. at 166, lines 11-22 and 167, lines 1-7. Item four, relating to construction activities, is not within the Board’s jurisdiction. Trans. at 124, lines 12-17 and 169, lines 9-11. The Board found that item number five was vague and would be difficult to enforce. Trans. at 125, lines 21-22 and 126, lines 1-20.

The Board determined that the proposed conditions were either not within the Board’s jurisdiction, not supported by substantial evidence in the record, not related to the specific relief sought, or unnecessary because already required by the Zoning Regulations. Based on these determinations, the Board did not include items one through five in its order. Nothing has

store such as 7-eleven; provided, however, that a drug store such as CVS or Walgreens shall be permitted. Furthermore, a wine and cheese shop or other similar use shall be permitted.

2. The Subject Property will be developed substantially in accordance with the architectural plans and elevations dated July 11, 2008 and attached hereto as Exhibit A.
3. Douglas, its tenants, and contractors will not use the loading berth on the Subject Property between the hours of 8:00 p.m. and 7:00 a.m. on Monday through Saturday. Douglas, its tenants, and contractors may use the loading berth only between the hours of 9:00 a.m. and 1:00 p.m. on Sunday.
4. Douglas and its contractors will not engage in any construction activities, other than emergency repairs, between the hours of 8:00 p.m. and 7:00 a.m. from Monday through Saturday. Douglas and its contractors will not engage in any construction work other than repairs, on Sunday.
5. Douglas, or its tenants, will promptly remove all trash and debris from the public space located between the property line and the adjacent curb.

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occurred to undermine the Board's determinations, and the Board declines to reconsider its decision not to include items one through five in its order.

The ANC claims, in its request for reconsideration, that if the MOU "is to endure, it is important that the variance be qualified by inclusion of terms of the MOU." Exhibit No. 35. This is not true. The Board's order and the MOU between the ANC and the Applicant are separate legal documents, separately enforceable through different enforcement mechanisms. Items one through five are included in the MOU and can be enforced in the context of the MOU, whether or not they are included in the Board's order. Going to this point, the Board also found credible the Applicant's claim that it would comply with the conditions of the MOU.

Moreover, 11 DCMR § 3126.4 states that a motion for reconsideration must set forth the respects in which the decision is claimed to be erroneous, the grounds of the motion, and the relief sought. The ANC's motion does not claim that the Board's decision to grant the variance relief is erroneous in any way nor does it request that the Board reconsider this decision. The only relief sought by the ANC is inclusion of items one through five as conditions in the order, which, as explained above, the Board is unable to grant.

The Board recognizes that the neighbors "invested considerable time and energy in arriving at the terms of the MOU with the applicant," but this cannot compel inclusion of those terms in the Board's order. The ANC desires only that the mandates in items one through five be complied with, which it appears will occur, and is separately enforceable if it does not occur. Therefore, even without inclusion of items one through five in the Board's order, the ANC is in the position in which it desires to be.

For all the above reasons, it is hereby **ORDERED** that ANC 6B's request for reconsideration is **DENIED**.

VOTE: 3-0-2 (Ruthanne G. Miller, Gregory N. Jeffries, and Mary Oates Walker to deny; two members not present, not participating.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of Board members approved issuance of this Order.

ATTESTED BY:


RICHARD S. NERO, JR.
Acting Director, Office of Zoning

FINAL DATE OF ORDER: MAY 28 2009

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PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

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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 MAY 28 2009, 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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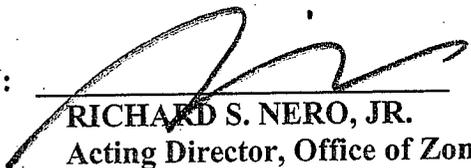
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ATTESTED BY:


RICHARD S. NERO, JR.
Acting Director, Office of Zoning

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