

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No 17906 of Se Y. Jeong, pursuant to 11 DCMR § 3104.1, for a special exception to change a nonconforming use from a grocery store to a grocery store with delicatessen under sections 2002 and 2003, in the R-4 District at premises 321 T Street, N.E. (Square 3567, Lot 804).

HEARING DATE: April 14, 2009

DECISION DATE: April 14, 2009

DISMISSAL ORDER

On October 30, 2008, Mr. Endale Terefa filed an application with the Board of Zoning Adjustment (“BZA” or “Board”) on behalf of, and with the permission of Mr. Se Y. Jeong, the owner of the property which is the subject of this application. Although Mr. Jeong owns the subject property, Mr. Terefa operates the grocery store for which the zoning relief was sought. Therefore, the term “Applicant” herein will refer to Mr. Terefa.

The self-certified application requested special exception relief to add the sale of prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs to a nonconforming grocery store use located in an R-4 zone district. The Board held a properly-noticed public hearing on the application on April 14, 2009, and, at the conclusion of the hearing, decided that zoning relief was not necessary and therefore, by a vote of 3-0-2, dismissed the case. The factual and legal bases for this decision follow.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated November 4, 2008, the Office of Zoning (“OZ”) gave notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation, the Council Member for Ward 5, Advisory Neighborhood Commission 5C (“ANC 5C”), and the Single Member District member for 5C05. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing in the *D.C. Register* and sent such notice to the Applicant, ANC 5C, and all owners of property within 200 feet of the subject property.

BZA APPLICATION NO. 17906

PAGE NO. 2

Requests for Party Status. ANC 5C was automatically a party to this application, but did not file a report with the Board or participate in the case in any way. There were no requests for party status.

Applicant's Case. The Applicant appeared before the Board and explained the nature of his grocery operation and his request for relief.

Government Reports. The Office of Planning filed a report with the Board on April 7, 2009, recommending approval of the application. OP reviewed the application as a request for a special exception to add an "accessory prepared food shop" to the existing grocery store. In its analysis, OP examined the impacts of the grocery store, both as it exists now, and with the requested addition of hot coffee, tea, and cooked hot dogs, and opined that "[t]he proposal would not change the present character or future development of the surrounding area" and "would not cause any substantial detriment to the public good or substantially impairing (sic) the intent, purpose and integrity of the Zoning Regulations and Map." Exhibit No. 20.

ANC Report. No ANC report was filed with the Board.

Persons in Support or Opposition. No persons appeared to testify in support or opposition, but the Board received one letter in opposition and a petition with approximately 55 names in support.

FINDINGS OF FACT

The property, the use, and the surrounding neighborhood

1. The subject property is located in an R-4 zone district at address 321 T Street, N.E. It is improved with a 2-story building constructed before May 12, 1958, the effective date of the current version of the Zoning Regulations. The building is mixed-use with commercial use on the ground floor and residential use on the upper floor, and apparently has been so used since its construction.
2. The neighborhood surrounding the subject property is predominantly developed with row dwellings, but directly adjacent to the property on the west is a two-story building with a ground floor commercial use and residential use above.
3. Immediately adjacent to the property to the east and south is a public alley. This alley is 10.5 feet wide along the property's eastern boundary and curves around behind (*i.e.*, south of) the property, where it widens to 15 feet.
4. To the east and south of the property, on the other side of the alley, is a three-story senior citizen apartment building.
5. For approximately the last five years, the Applicant has operated a nonconforming grocery store on the ground floor of the building on the subject property in which he offers for sale

traditional grocery items, such as bread, cheese, eggs, milk, soda, candy, paper towels, cleaning supplies, cigarettes, and over-the-counter medicines, as well as beer and wine.

6. Over approximately the last two years, the Applicant's grocery has experienced a downturn in grocery sales. Prior to this time, approximately 45% of all sales were of standard grocery items, approximately 15-20% were of cigarettes, and approximately 15-20% were of beer and wine. Hearing Transcript ("Trans.") at p. 41, lines 11-18.

The Applicant's Proposal

7. The Applicant proposes to add to his grocery store the sale of prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs in order to better serve the local community and improve his business.
8. In order to accommodate the addition of prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs, the Applicant will need to install a coffee machine and a "hot dog machine" to warm and turn the hot dogs. These machines will be placed on an existing food display case.
9. No other changes will be made to the interior or the exterior of either the grocery store or the building on the subject property to enable the Applicant to sell prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs.
10. Nothing else will be added to the grocery use as it already exists and no cooking, other than the minimal cooking necessary for coffee, tea, and hot dogs, will take place in the store.

Whether zoning relief is needed

11. The Applicant, on his self-certification form, checked the boxes for both use variance relief and special exception relief, noting under the latter §§ 2002.1 and 2003. Exhibit No 4.
12. The application was advertised for special exception relief to "change a nonconforming use from a grocery store to a grocery store with delicatessen" pursuant to 11 DCMR §§ 2002 and 2003.
13. "Delicatessen" is not a use recognized in the Zoning Regulations.
14. Apparently on the advice of the Zoning Administrator, the Office of Planning reviewed the application as one for a special exception pursuant to § 2003 to permit the addition of "an accessory prepared food shop" to the already-existing grocery store use. Exhibit No. 20, at 1.
15. A "prepared food shop" is defined by the Zoning Regulations as "a *place of business* that offers seating or carry-out service, or both, and which is *principally* devoted to the sale of prepared food, non-alcoholic beverages, or cold refreshments. This term includes an establishment known as a sandwich shop, coffee shop, or an ice cream parlor." 11 DCMR § 199.1 (Emphasis added.)

16. An “accessory use” is a use that is not permitted as a matter of right in the zone district where a principal use is located, but which is “customarily incidental and subordinate to the principal use.” 11 DCMR § 199.1.

CONCLUSIONS OF LAW

The Applicant currently operates a grocery store. Neither “grocer” nor “grocery store” is defined in the Zoning Regulations, but “grocer” is defined in Webster’s Unabridged Dictionary as “a dealer in staple foodstuffs (as coffee, sugar, flour) and usually meats and other foods (as fruits, vegetables, dairy products) and many household supplies (as soap, matches, paper napkins).” Similarly, Webster’s defines “grocery store” as “the place of business of a retail grocer.” *See*, 11 DCMR § 199.2(g).

Grocery stores today also sell a multiplicity of items that might not be traditionally categorized as “groceries,” such as periodicals, flowers, and DVDs. They also often provide services which would be considered outside the traditional ambit of a grocery store, such as banking services via ATM machines, preparing hot coffee or tea or even hot dogs or other simple food items. *See, e.g., Sevilla v. Sweat*, 450 P.2d 424 (Ariz. App. 1969). *See also, Purity Stores v. Linda Mar Shopping Center, Inc.*, 177 Cal. App. 2d 568, 572-573 (Cal. App. Div. 1 1960); Board of Zoning Adjustment Order No. 17675 of the Reed-Cooke Neighborhood Ass’n. (2008).

An accessory use is, as defined, a use that is customarily incidental and subordinate to a principal use. A use can only be “accessory,” however, if it is a use otherwise not allowed in the zone in which the principal use is allowed. In this way, a zone allows principal uses and can allow other uses, which would otherwise be disallowed, as “accessory uses” to the principal use. As long as the “accessory uses” remain “incidental and subordinate” to the principal use, and therefore, do not in and of themselves rise to the level of separate principal uses, they are allowed as well.

On the other hand, if something is already allowed in a zone, it can never be termed an “accessory use” – it is either a part of a principal use or a stand-alone principal use, depending on its magnitude. In this case, although the grocery is nonconforming in its R-4 zone, a grocery is first allowed in a C-1 zone, where a prepared food shop is also allowed, therefore, the prepared food shop can never be “accessory” to the grocery.

A prepared food shop, as defined by the Zoning Regulations (*see*, Finding of Fact No. 15) is not a true grocery store, although it too may sell “traditional” grocery items such as pre-packaged ground coffee. Conversely, grocery stores may sell prepared foods. Unless the extent to which the sale of prepared food rises to the level where it might be considered a separate principal use, there is no “other” use and no requirement for a grocery to obtain an additional certificate of occupancy for that use. Because a prepared food shop is permitted in the same zone district as a grocery and it must consist of a “place of business,” the incidental sale of prepared food by a grocery can never be characterized as an accessory use. Instead, it is merely a part of the principal grocery use.

BZA APPLICATION NO. 17906
PAGE NO. 5

Even with the added sales of prepared sandwiches, donuts, hot coffee, tea, and hot dogs, the Applicant's grocery store is not principally devoted to the sale of prepared food. Because the sale of prepared food is part of the principal use, no new C of O or amendment to the existing C of O is required. The fact that the grocery is a non-conforming use does not change this analysis. The analysis of whether a use is accessory is based upon the zone district where the non-conforming use is first permitted.

For this same reason, the Board does not view the proposed sale of prepared food to constitute an expansion disallowed by 11 DCMR § 2000.2. The Board concludes that the addition of the sale of prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs is not an "expansion" of the grocery use, but an inherent part of that use. Therefore, the Board concludes that the addition of those five items – and nothing more – to the Applicant's grocery store does not require zoning relief. *Cf. Sevilla*, at 427. ("We cannot say as a matter of law that the ordinary operation of a grocery store does not include package beer and wine sales and that to add these sales to a [nonconforming] grocery store business would constitute a new or extended use.")

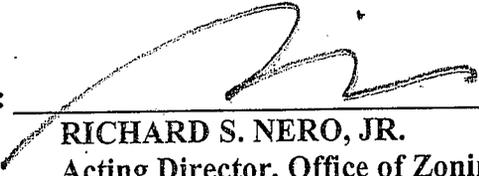
The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. ANC 2C did not file a report with the Board, so there is nothing to which the Board can accord "great weight."

The Office of Planning recommended approval of a special exception for an "accessory prepared food shop," as the name for the use which most closely approximated the Applicant's proposal and also corresponded with a definition in the Zoning Regulations. During the hearing, however, the OP representative made clear that OP was uncertain whether relief was needed, and was persuaded it was needed largely by the "authority of the Zoning Administrator" in sending the Applicant for zoning relief. Trans. at p. 55, lines 2-12. When questioned whether, in the absence of a referral from the Zoning Administrator, OP would have determined that the Applicant needed relief, the OP representative replied that without such a referral, the Applicant "didn't need an application. He already operated a grocery store and that what he's proposing was just part of what's usually in a grocery store." Trans. at p. 56, lines 12-19 and 57, lines 1-3. OP and the Board are therefore in agreement that the proposal does not amount to any sort of new use, but is an inherent part of a grocery store use.

Accordingly, it is **ORDERED** that Applicant's request for zoning relief is **DISMISSED**.

VOTE: **3-0-2** (Marc D. Loud, Shane L. Dettman, and Michael G. Turnbull
to DISMISS; the other two seats being vacant, no other Board member
participating or voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approve the issuance of this order.

ATTESTED BY: 
RICHARD S. NERO, JR.
Acting Director, Office of Zoning

FINAL DATE OF ORDER: AUG 11 2009

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.

LM

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17906

As Director of the Office of Zoning, I hereby certify and attest that on AUG 11 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:

Se Y. Jeong
321 T Street, N.E.
Washington, D.C. 20002-1507

Endale Terefa
201 Taurus Drive
Fort Washington, Maryland 20744

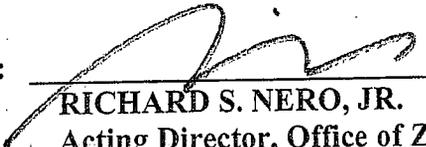
Chairperson
Advisory Neighborhood Commission 5C
P.O. Box 77761
Washington, DC 20013

Single Member District Commissioner 5C05
Advisory Neighborhood Commission 5C
P.O. Box 77761
Washington, DC 20013

Bennett Rushkoff, Esquire
Acting General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

Harry Thomas, Councilmember
Ward Five
1350 Pennsylvania Avenue, N.W., Suite 107
Washington, D.C. 20004

ATTESTED BY:


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

TWR

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov