GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 18027-A of Mehmet Kocak and Philly Pizza & Grill, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made October 14, 2009, to issue a Notice to Revoke Certificate of Occupancy No. CO0800124 ("Restaurant 7 Seat – Prepared Food Shop," dated September 11, 2008), and the administrative decision of the Zoning Administrator, made November 2, 2009, to issue a Notice to Revoke Certificate of Occupancy No. CO0903354 (2-Floor 13-Seat Restaurant," dated September 21, 2009) for a restaurant use on property located in the C-2-A District at premises 1211 Potomac Street, N.W. (Square 1207, Lot 124).[1]

STAY DECISION DATE: November 17, 2009

STAY ORDER DATE: November 25, 2009

APPEAL HEARING DATES: January 12, 2010 and February 16, 2010

APPEAL DECISION AND STAY EXPIRATION DATE: February 16, 2010

DECISION AND ORDER

This appeal was submitted on October 23, 2009 by Mehmet Kocak and Philly Pizza & Grill, Inc. (together, the "Appellant") to challenge decisions made by the Zoning Administrator ("ZA") on October 14, 2009 and November 2, 2009 to issue notices to revoke two certificates of occupancy ("C of Os") concerning property leased by the Appellant in a C-2-A District at 1211 Potomac Street, N.W. (Square 1207, Lot 124).[2] The Appellant contends that the current use of the property is "2-Floor 13-Seat Restaurant (7 seats on 1st Floor & 6 seats on 2nd Floor)" pursuant to

[1] The Appellant originally challenged only the October 14, 2009 decision but was permitted to amend the appeal to address the decision made November 2, 2009, involving a subsequent C of O, as well. As will be explained in the Conclusions of Law, only this second Notice has any legal relevance.

[2] The second C of O issued to the Appellant's business superseded the prior C of O and effectively rendered moot the first notice of revocation. For purposes of the Board's decision on the appeal, the issues raised by the two notices of revocation are essentially identical.

C of O No. CO 0903354, issued September 21, 2009, and that the ZA erred in deciding that the use as operated was not a "restaurant" as defined in § 199 of the Zoning Regulations and revoked the C of Os because "[t]he actual occupancy d[id] not conform with that permitted." (12A DCMR § 110.5.) Following a public hearing, the Board of Zoning Adjustment ("Board") voted on February 16, 2010 to deny the appeal.

PRELIMINARY MATTERS

Motion for Stay. Simultaneously with the appeal, the Appellant requested "immediate action" by the Board "to issue a Stay of the Notice to Revoke to prevent its enforcement" by the Department of Consumer and Regulatory Affairs ("DCRA") while the appeal was pending. The premise of the motion was that DCRA had the authority to compel the closing of the establishment without the Board having to first decide the merits of the appeal or issue a written order giving effect to that decision. The Board considered the request on November 17, 2009, hearing argument and testimony from the Appellant and DCRA. At the conclusion of the meeting, the Board voted to stay the effectiveness of the Notice to Revoke, effective immediately, until the completion of the Board's hearing on the appeal. An order reflecting that decision was issued November 25, 2009.

Notice of Appeal and Notice of Hearing. By memoranda dated October 28, 2009, the Office of Zoning ("OZ") provided notice of the appeal to the Office of Planning; the ZA at DCRA; the Councilmember for Ward 2; Advisory Neighborhood Commission ("ANC") 2E, the ANC in which the subject property is located; and ANC Single Member District 2E05.

Party Status. The Appellant, DCRA, and ANC 2E were automatically parties in this proceeding. The Board granted a request to intervene in opposition to the appeal submitted jointly by Lynn Schubert, Anne Alonzo, and Alex Meeraus, who are all residents of the 1200 block of Potomac Street, N.W., near the subject property (collectively, the "Intervenors").

ANC Report. At a properly noticed, regularly scheduled meeting on January 11, 2010, with a quorum present, ANC 2E approved a resolution that authorized Martin Sullivan, who also represented the Intervenors, to represent the ANC before the Board in this case. The resolution refers to another resolution, adopted "immediately prior," in which the ANC recommended denial of the appeal.[3] (Exhibit 39.) The ANC's submission incorporated a letter, dated November 12, 2009, to the Board from Bill Starrels, the ANC Commissioner for the Single Member District in which Philly Pizza is located. The letter indicated strong support for the ZA's decision to revoke the Appellant's C of Os, on the ground that the "Zoning Administrator is correct in determining that Appellant operates a fast food establishment, not a restaurant, in violation of applicable zoning rules." (Exhibit 39.)

[3] At least one page of the ANC's resolution recommending denial of the appeal is missing from the Board's record, and thus the submission does not reflect whether the two resolutions were in fact adopted at the same Public Meeting on January 11, 2010 with a quorum present.

FINDINGS OF FACT

The establishment of the use

1. The subject property is located at 1211 Potomac Street, N.W. (Square 1207, Lot 124). The property is improved with a two-story plus basement building built in 1825.

2. In May or June 2008, the Appellant was issued Building Permit No. 119148 for "Conversion of an Existing Office Space in to a Restaurant."

3. Certificate of Occupancy No. CO0800124, issued September 11, 2008, authorized use of the property by Philly Pizza & Grill Inc. as "restaurant 7 seat-prepared food shop." The certificate specified "ownership change" as the "type of occupancy," and indicated that 1,500 square feet of space, on the first floor, could be occupied by the restaurant use.

4. Section 199.1 of the Zoning Regulations defines a "restaurant" as:

> a place of business *that does not meet the definition of a "fast food establishment"* or "prepared food shop," where food, drinks, or refreshments are prepared and sold to customers primarily for consumption on the premises. Any facilities for carryout shall be clearly subordinate to the principal use providing prepared foods for consumption on the premises.

(Emphasis added).

5. The definition of "fast food establishment" provides that an existing establishment must be considered a fast food establishment if any one of the following three characteristics is met:

   (a) The premises include a drive through;

   (b) Customers pay for the food before it is consumed; or

   (c) Food is served on/in anything other than non-disposable tableware.

(11 DCMR § 199.1.)

6. Even if one or more customers purchase food for off-site consumption, the use will not be considered a fast food establishment if the carryout service is subordinate to a different principal use and none of the other elements are met.

7. Philly Pizza & Grill opened for business in September 2008. The business is open approximately 110 hours per week, opening every day at 11:00 a.m. and remaining open

until around 2:30 a.m. Sunday through Thursday and until around 3:00 a.m. on Friday and Saturday.

8. The Appellant's business occupies two stories and the basement of the building at the subject property. The basement contains a prep kitchen, containing food-preparation appliances and a three-compartment sink used to wash tableware, and is also used to store disposable tableware. The first floor of the establishment contains a counter where orders are placed, and tables with seven chairs; the second floor has tables with a total of six seats. A large commercial storage freezer servicing the business is located in the rear yard.

Events leading to the issuance of the notices of revocation

9. Between August 15 and early September 2009, DCRA performed a regulatory investigation at the subject property. A DCRA investigator devised a plan for conducting an investigation for purposes of determining whether the use was operating in compliance with its C of O and the Zoning Regulations. Pursuant to the plan, the investigator made four visits to the premises: three of the visits, during a week in mid-August 2009, were unannounced. During each of these visits, the investigator and a companion entered the business and purchased food or beverages for on-premises consumption and also observed the Appellant's operations from a nearby location off the subject property.

10. These unannounced visits were made at varied times selected to allow observation of both lunch and dinner operations. The visits occurred on Saturday evenings for approximately two and a half hours beginning around 8:00 p.m.; at 11:30 a.m. on a Tuesday (as well as a brief inspection of trash facilities around 6:15 a.m. earlier on the same day); and on another day starting around 2:00 p.m. and lasting approximately one hour. The total duration of the inspection visits was approximately eight hours.

11. For the fourth visit, in early September 2009, the investigator identified himself and toured the premises with the business owner.[4]

12. During the inspection visits, the DCRA investigator observed a total of only two other people dining on the premises but witnessed multiple carryout and delivery orders, which he estimated at approximately 80% and 20% of the total business, respectively. The investigator testified that, during the inspection visits, food and beverages were served to customers on disposable tableware; no non-disposable plates, glasses, or tableware were seen on the premises, except for a few plates that were designated for use by employees; on each visit he paid for food and beverage purchases before consuming the items; and employees on the premises included one person at the counter, two cooks in the basement, and two delivery persons, but no waiters.

---

[4] The Appellant denied ever meeting with the inspector until receiving the Notice to Revoke in October 2009. The Board was persuaded that the DCRA inspector toured the premises with a manager or other responsible employee, if not in fact the owner of Philly Pizza.

13. Following his inspection visits to the Appellant's business, the DCRA inspector wrote a report, ultimately submitted to the ZA, that recommended revocation of the Appellant's C of O for operating "outside the scope of the issued certificate of occupancy" in violation of § 3203 of the Zoning Regulations. (Hearing Transcript of February 16, 2010, p. 261.) The inspector concluded that the business was not operating as a restaurant, as that use is defined in the Zoning Regulations, because the majority of food being prepared at the business was not prepared for on-site consumption but was being taken out by individuals "by carryout."

14. On September 1, 2009, the Appellant applied for a new C of O. C of O No. CO0903354, issued September 21, 2009, authorizes use of the property by Philly Pizza & Grill Inc. as "2-floor 13-seat restaurant (7 seats on 1st floor & 6 seats on 2nd floor)." The certificate specifies "load change" as the "type of occupancy," and indicates that 1,068 square feet of space, on the first and second floors, could be occupied by the restaurant use.

15. The issuance of C of O No. CO0903354 rendered C of O No. CO0800124 null and void.

16. Nevertheless, by letter dated October 9, 2009 and signed by the ZA on October 14, 2009, DCRA gave notice of its intent to revoke the nullified certificate.

17. The Appellant filed an appeal of the ZA's decision on October 23, 2009.

18. Then, on October 23, 2009, DCRA gave the Appellant official notice that C of O No. CO0903354 would be revoked, effective in 10 days, because the actual occupancy on the premises did not conform with the restaurant use permitted. Instead, the notice indicated that DCRA had concluded that the primary use of the property was consistent with a fast-food establishment.[5]

19. By prehearing statement submitted December 29, 2009, the Appellant also appealed this ZA's decision.

Post revocation evidence

20. The Appellant testified and presented evidence seeking to prove that the operations of the business differed from those observed by DCRA.

21. The Appellant testified that the business has two managers and a staff of seven or eight

[5] The November Notice also noted that during the business compliance inspection, the DCRA investigator observed that Philly Pizza & Grill "used the basement, [and] a backyard that contained food storage in a walk-in freezer. However, C of O No. 0903354 authorizes only the first and second floors to be used for this purpose." (Exhibit 33, Tab C.) Although the Appellant made no effort to refute the contention, DCRA did not claim that this aspect of the notice constituted a separate ground for revocation. Therefore, the Board will only discuss the nature of the use on the premises and not the extent to which either a restaurant or fast food establishment use may have extended to areas not permitted by the C of O.

other persons who are employed as a waiter/cashier; a person who takes orders, serves beverages, and cleans tables; a person who makes pizzas and prepares other food; dish-washers; and drivers who deliver food orders.

22. The Appellant testified that it was his policy not to allow persons who dined at the establishment to pay for food before it was consumed.

23. The Appellant showed the Board examples of red plastic non-disposable tableware that he said is used to serve dine-in customers, but also stated that disposable tableware was sometimes used during some late-night periods when the business was extremely busy with a large number of customers. According to the Appellant, the establishment has between 30 and 40 plates, as well as 10 glasses. Photographs submitted by the Appellant depicted dine-in customers using disposable containers for beverages, including soda cans, plastic water bottles, and paper cups.

24. The Appellant testified that he had not kept records of the proportion of sales attributable to dine-in customers, carry out, or delivery during the period when DCRA undertook its investigation of the business. However, the Appellant began to compile those records after he filed this appeal. The Appellant contended that the results from nine full or partial weeks between mid-November 2009 and early January 2010 were comparable and illustrative of sales that had occurred in August 2009.

25. The Appellant's post-revocation records showed that, during the nine-week period, the customer transactions attributable to dine-in sales ranged from 36 to 54% per week; to carryout service ranged from 18 to 35%; and to delivery service ranged from 22 to 36%. During the nine-week period, approximately 47% of total customer transactions were attributable to dine-in customers, 25% were for carryout service, and 28% were for delivery service.

26. The Appellant testified that the numbers of dine-in customers have been increasing in recent months, since several improvements were undertaken at the property to encourage customers to eat on the premises. The interior of the building was painted; new tables, chairs, and fixtures were purchased; trash receptacles were removed from the public areas; tables are now cleared by employees; and the Appellant sometimes offers specials on dine-in orders.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), to hear and decide appeals where it is alleged by the Appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations.

This appeal concerns two notices of revocation of two different C of Os. The first notice

concerned C of O No. CO0800124. The notice was dated September 11, 2009 and issued October 14th. Between those two dates, a superseding C of O (No. CO0903354) was issued. This second certificate was the subject of the Notice to Revoke Certificate of Occupancy No. CO0903354 issued November 2, 2009 ("Notice"). The Board stayed the effect of that notice until the completion of the hearing on this matter. Since the Board adjourned the hearing without taking further action on the stay, the revocation became effective on February 16, 2010 at 9:11 p.m.

The Notice was based upon 12A DCMR § 110.5.1, which is part of the District's Construction Codes and provides:

> 110.5 Revocation of a Certificate of Occupancy. The code official is authorized to revoke a certificate of occupancy pursuant to any of the Sections 110.5.1 through 110.5.5.
>
> 110.5.1 Different Occupancy. Any certificate of occupancy previously issued or issued pursuant to Section 110 shall be revoked by the code official, after notice, if the actual occupancy does not conform with that permitted.

The C of O authorized use of the property by Philly Pizza & Grill Inc. as "2-floor 13-seat restaurant (7 seats on 1st floor & 6 seats on 2nd floor)." (Exhibit 33, Tab D.) The Notice alleged that the operation consisted of a fast food establishment. The Appellant claims this conclusion to be in error. The Board disagrees.

The ZA did not err in concluding that Philly Pizza & Grill was being operated as a fast food establishment.

A. The use as observed by the DCRA investigator met two of the definitional criteria of a fast food establishment.

The Zoning Regulations (Title 11 DCMR) recognize three types of eating establishments: (1) restaurant; (2) prepared food shop; and (3) fast food establishment. Subsection 199.1 of the Zoning Regulations contains a definition of each type of use. The definition of "fast food establishment" provides that "a proposed or existing establishment meeting this definition shall not be deemed to constitute any other use permitted under the authority of these regulations." (11 DCMR § 199.1, definition of "fast food establishment".) The definition provides three separate criteria for determining whether a proposed or existing use is a fast food restaurant. An existing establishment must be considered a fast food establishment if any one of the following three characteristics is met:

(a) The premises include a drive-through;
(b) Customers pay for the food before it is consumed; or
(c) Food is served on/in anything other than non-disposable tableware.

The second criterion encompasses two different sets of circumstances. The first is when the establishment sells food for off-site consumption, *i.e.* a carryout service. The definition provides that "a restaurant … providing carryout service that is clearly subordinate to its principal use shall not be deemed a fast-food establishment." (11 DCMR § 199.1, definition of "restaurant".) The second circumstance is when customers pay for the food for consumption on the premises. The "clearly subordinate exception" does not expressly apply to such dine-in customers, although clearly more than a *de minimis* number of such transactions must be observed for this criterion to be met.

The Board will discuss the applicability of each of these criteria, including the two variations of the second criterion.

First Criterion: Do the premises include a drive-through?

DCRA did not allege that the premises included a drive-through and there is no evidence to suggest it did. Therefore, the first criterion has not been met.

Second Criterion; First Circumstance: Did customers pay for food and then leave the premises without consuming it (carryout service)?

The Appellant does not deny its business includes a carryout service and the DCRA investigator witnessed most customers paying for food that was not consumed on the premises. However, the Appellant claims that the carryout service falls within the exception stated in the definition of fast food establishment because: (1) it is a restaurant; and (2) the carryout service was clearly subordinate to that principal use. Because a use meeting one or more of the elements of a fast food establishment cannot be deemed any other use, including a restaurant, the Board must determine if any of the remaining elements of the definition are met before it can consider whether the exception applies. If Philly Pizza meets one of these other elements, it would not matter how subordinate its carryout service was.

Second Criterion; Second Circumstance: Did customers pay before consuming food on the premises?

The Board credits the DCRA's inspector's testimony that on each visit he paid for food and beverage purchases before consuming the items; and employees on the premises included one person at the counter, two cooks in the basement, and two delivery persons, but no waiters. The Appellant claimed that it was not his policy to allow dine-in customers to pay before consuming their food and that the cashier also served as a waiter. The Board finds that if any such policy existed in August of 2009 it was not being implemented. In addition to the inspector's observations, the Appellant's business was too brisk and his staff too small to treat dine-in customers differently from those ordering carryout. The Board concludes that all customers paid for their food prior to consumption and that, following such payment, dine-in customers brought their food to a table just as the DCRA investigator did during his several visits.

Third Criterion: Was food served on/in anything other than non-disposable tableware?

As a result of the investigation conducted by DCRA, the ZA knew and reasonably concluded that food and beverages were served to customers on disposable tableware; no non-disposable plates, glasses, or tableware were seen on the premises, except for a few plates that were designated for use by employees.

The Appellant sought to refute these observations by displaying non-disposal tableware to the Board and claiming that these were the items used to serve customers during the period of the DCRA investigations. The Board finds the evidence both suspect and unpersuasive. Indeed, recent photographs submitted by the Appellant show customers drinking out of disposable bottles and cans as well as considerable supplies of pizza boxes, paper cups, and other disposable materials on shelves in the establishment. Even if the Board chose to credit the Appellant's testimony, the very limited number of non-disposable plates and cups the Appellant said were in use at the establishment would be insufficient to serve the number of dine-in customers claimed by the Appellant, particularly since the business lacks a dishwasher on the premises. The Board finds that testimony of the DCRA inspector to be both credible and sufficient on this issue.

Because the Board has concluded that diners paid for their food before consumption and were served the food overwhelmingly on disposable tableware, the Board must conclude that the use was not a restaurant. Since it is not a restaurant, the degree to which its carryout service was subordinate to its illegal fast food establishment use is irrelevant. Nevertheless, the Board, as part of its deliberations, analyzed whether the Appellant's carryout service was a subordinate use and concluded that it was not, as will now be explained.

B. The carryout service was not clearly subordinate to a principal use.

The Board concludes that the observations of the DCRA inspector would have warranted the ZA to conclude that the Appellant's carryout service was not subordinate to a principal use, but was, together with the delivery service, *the* principal use. During the inspection visits, the DCRA investigator observed a total of only two other people dining on the premises but witnessed multiple carryout and delivery orders, which he estimated at approximately 80% and 20% of the total business, respectively.

The Appellant sought to discredit the inspector's testimony through the introduction of post-revocation evidence including a breakdown of customer transactions. In order for this evidence to be probative, the Board must be convinced that the post-revocation operations described accurately reflected the Appellant's operations during the time period when the DCRA investigation was proceeding. The Board simply does not believe that the Appellant, knowing the existence of his business was at stake, did not take measures to make the operations more like a restaurant. In fact, the Appellant testified that he did take measures during this period to encourage customers to eat on the premises. The interior of the building was painted; new tables, chairs, and fixtures were purchased; trash receptacles were removed from the public

areas; tables were now being cleared by employees; and the Appellant sometimes offered specials on dine-in orders. The Board, therefore, concludes that the post-revocation evidence did not reflect the operations as observed by the DCRA investigator in August 2009 and is, therefore, irrelevant. In any event, the customer transaction breakdown proffered only confirmed that most food purchases were for the off-premises consumption.[6]

C. DCRA's investigation methodology was appropriate.

The Board rejects the Appellant's assertion that the investigation undertaken by DCRA was undocumented, limited, or unreliable. The DCRA investigator devised a plan before undertaking the investigation, and carried out repeated visits sufficient to make an accurate assessment of the nature of the Appellant's operation. The visits occurred at different times of the day and night, on different days of the week, and included time spent observing the establishment from the outside as well as repeated visits to the interior of the establishment. The Board does not agree with the Appellant that an accurate assessment could not have been made unless the investigator stayed on the premises for a longer period, given the total duration of the visits and the consistency of the investigator's observations during each visit.

The Board also finds no merit in the Appellant's contention that the investigation was flawed due to its lack of empirical evidence of the operation. In fact, the criteria for determining whether an existing use is a fast food establishment are based upon what is observed, not what is counted. If an inspector observes a drive-through, the exclusive use of non-disposable plates and utensils, or a significant proportion of customers paying for food before consumption, the definition is met. The only relevance for empirical data might be in corroborating whether a carryout service is subordinate to a principal restaurant use, but, as noted, that test is only relevant when a carryout is the sole definitional element observed.

Given that these criteria are based upon things or conduct that are readily observable, the investigator in this case needed to observe the Appellant's operations only for so long as was necessary to establish a reasonable belief that one or more of the criteria had been satisfied. The number and length of the observations made here were consistent with those of other inspections that led to revocations based upon a different occupancy than permitted by a C of O. *See*, *Appeal No. 17504 of JMM Corporation*, 54 DCR 9871 (2007) (two observations); *Appeal No. 13967 of*

---

[6] The Appellant initially provided a breakdown of customer transactions into categories of dine-in, carryout, and delivery service (which were roughly 45, 26, and 29% respectively), but subsequently attempted to inflate the proportion of dine-in customers by ignoring delivery service and comparing the dine-in figure only to the carryout category, as if 100% of the operation's sales could be categorized as either dine-in or carryout. The Board finds that "carryout" in this context means both "carryout" and "delivery" service, consistent with the intent of the Zoning Commission in adopting the definitions to distinguish between food that is consumed by patrons dining in an establishment and food that is consumed off the premises. Similarly, the Board was not persuaded by the Appellant's contention that carryout customers are "end users" responsible for carryout and distinguishable from the operator of an eating establishment, because the focus of the Board's inquiry is on whether food is prepared at an establishment for consumption primarily on or off the premises.

California Steak House, Inc. (1983) (three observations).

Affirmative Defenses

The Appellant raised several affirmative defenses to the revocation. Specifically, the Appellant claimed that the Zoning Administrator lacked the authority to issue the notices of revocation, that he should be equitably estopped from enforcing it, and that the revocation was barred by the equitable doctrine of laches. The Board rejected each of these arguments for the reasons that follow.

*A. The ZA's authority to revoke the C of Os***.**

The Board concludes that the ZA had the authority to issue the notices to revoke.

The Construction Codes (Title 12 DCMR) vest the authority to revoke a C of O in the "code official." (12A DCMR § 110.5.) In relevant part, § 103.1 of Title 12A provides that the "Director of the Department of Consumer and Regulatory Affairs shall enforce the provisions of the Construction Codes, … and shall be hereinafter referred to as the code official." Subparagraph 103.1.1 states that the code official shall have the authority to delegate his or her duties and powers under the Construction Codes".

The ZA swore under oath that the DCRA Director had orally delegated revocation authority to him. The Appellant did not disprove the assertion. Such an oral delegation is entirely valid in the absence of a statutory prohibition. *Rivers v. Board of Educ. of City School Dist. of City of New York*, 66 A.D.3d 410, 410-411 (N.Y.A.D. 1 Dept., 2009).

The Appellant's reliance upon a memorandum from the Office of the Attorney General is misplaced. The memorandum does no more than indicate that a stop work order can only be issued by a District official who had been delegated the authority to do so. The memorandum does not go into how such a delegation should be made, including whether it must be in writing. The Board also notes that this memorandum is not an official opinion of the Office of the Attorney General and even those "are not valid legal authority." *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1031 (D.C. 1995).

B. Estoppel or laches

The Appellant argued that DCRA's action in revoking the Appellant's C of O was barred by estoppel and laches, because the Appellant had allegedly relied on building permits and C of Os in making improvements to the property and that DCRA waited too long to enforce the violations observed. The arguments are without merit.

To succeed on a claim for estoppel, the Appellant must make a six-part showing: (1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance

on (4) affirmative acts of the District government, (5) without notice that the improvements might violate the Zoning Regulations, and (6) equities that strongly favor the appellant. *See, e.g., Economides v. District of Columbia Board of Zoning Adjustment*, 954 A.2d 427, 444 (D.C. 2008)*; Bannum, Inc. v. District of Columbia Board of Zoning Adjustment*, 894 A.2d 423, 431 (D.C. 2006); *Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000, 1003 (D.C. 1981).

In this case, any improvements the Appellant made to the subject property were in furtherance of his purpose of operating an eating establishment, and were not made in reliance on any acts of the District government. The building permit only authorized the conversion of the building to a restaurant and the C of O only authorized a restaurant use. The regulatory inspections and approvals of its plumbing, electrical, and fire protection systems, had no bearing on the actual operation of the establishment as a restaurant or a fast-food establishment, but were based upon commercial construction code requirements unrelated to zoning. Neither the issuance of the permits nor the successful completion of regulatory inspections constituted an affirmative act of the District government on which the Appellant could reasonably rely to justify use of the property in a manner outside the scope of the C of Os and inconsistent with the Zoning Regulations. The equities disfavor the Appellant, whose operations have become a nuisance within its neighborhood.

The Appellant's claim that revocation of the C of O was barred by laches is similarly without merit. The District of Columbia Court of Appeals has held that:

> "Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." 3 Rathkopf, Law of Zoning and Planning, at 67-1 (3d ed. 1972). It is often claimed "where the inactivity of the officials charged with the enforcement of the ordinance has misled the owner into acts in violation of the ordinance ... or has misled persons into purchasing the property in ignorance of the illegality of the use or structure." *Id*. at 67-2. … [A] claim of laches in the zoning context is not judicially favored and is rarely applied "except in the clearest and most compelling circumstances." Where a party can prove inexcusable delay which has resulted in substantial prejudice, however, laches may be found.

Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7, 11 (D.C. 1978) (citations omitted).

Application of the doctrine of laches requires an unreasonable delay in seeking enforcement of the Zoning Regulations and resulting prejudice to the party asserting the defense. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 925 (D.C. 1980). In this appeal, the Appellant complains that if DCRA "had a viable claim against the issuance of the Certificate of Occupancy, it waited far too long in seeking recourse." (Exhibit 33.)

The Board finds no unreasonable delay in the issuance of the notices to revoke the Appellant's C of O. The compliance investigation was undertaken in August 2009, followed by completion of a report ultimately submitted to the ZA, and then the letters from the ZA, issued in October and November 2009 that gave notice of the revocation due to the Appellant's use of the property outside the scope of the certificate. In this case, DCRA took timely action, after receiving complaints from neighbors about the operation of the Appellant's establishment, to investigate the use of the property and to take prompt enforcement action necessary to enforce the Zoning Regulations. Not only was the Appellant not prejudiced during this period, but in fact was enriched by the revenues derived from a busy, but unlawful fast food establishment use.

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. D.C. Official Code § 1-309.10(d)(3)(A) (2001). In this case, ANC 2E did not submit a complete copy of its resolution recommending denial of the appeal and, therefore, its issues and concerns could not be given great weight. In any event, the appeal was denied as would seem to have been its wish.

Based on the Findings of Fact and Conclusion of Law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to the claim of error in the administrative decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, made October 14, 2009, to issue a Notice to Revoke Certificate of Occupancy No. CO0800124, or the administrative decision, made November 2, 2009, to issue a Notice to Revoke Certificate of Occupancy No. CO0903354 for a restaurant use on property located in the C-2-A District at 1211 Potomac Street, N.W. (Square 1207, Lot 124). Accordingly, it is therefore **ORDERED** that the appeal is **DENIED.**

VOTE: **5-0-0** (Marc D. Loud, Shane L. Dettman, Meridith H. Moldenhauer, Nicole C. Sorg, and Michael G. Turnbull to Deny the appeal)

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

ATTESTED BY: Jamison L. Weinbaum
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: DEC 01 2010

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

BZA APPEAL NO. 18027-A

As Director of the Office of Zoning, I hereby certify and attest that on DEC 01 2010, 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:

John Patrick Brown, Jr., Esq.
Kate M. Olson, Esq.
Greenstein Delorme & Luchs, P.C.
1620 L Street, N.W., Suite 900
Washington, D.C. 20036-5605

Juanita Gray
P.O. Box 196
Germantown, Maryland 20875-0196

Mehmet Kocak
Philly Pizza & Grill
1211 Potomac Street, N.W.
Washington, D.C. 20007

Chairperson
Advisory Neighborhood Commission 2E
3265 S Street, N.W.
Washington, D.C. 20007

Single Member District Commissioner 2E05
Advisory Neighborhood Commission 2E
1045 31st Street, N.W., #502
Washington, D.C. 20007

Matthew LeGrant, Zoning Administrator
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
1100 4th Street, S.W., Room 3100
Washington, D.C. 20024

Jack Evans, Councilmember
Ward Two
1350 Pennsylvania Avenue, N.W., Suite 106
Washington, D.C. 20004

Melinda Bolling, Esq.
General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024

ATTESTED BY: Jamison L. Weinbaum
JAMISON L. WEINBAUM
Director, Office of Zoning