

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18147-A of Eun Sun Kim, pursuant to 11 DCMR § 3104.1, for a special exception to allow a fast food establishment under § 733, in the C-2-A District at premises 1100 Eastern Avenue, N.E. (Square 5200, Lot 805).

HEARING DATE: December 7, 2010
DECISION DATE: December 17, 2010
MOTION FOR MINOR MODIFICATION FILED: November 22, 2011
DECISION DATES ON MOTION: January 10, 2012, February 7, 2012

ORDER DENYING MOTION

On December 17, 2010, the Board of Zoning Adjustment (“Board”) entered an Order (the underlying Order, No. 18147) approving the Applicant’s request for a special exception allowing a fast food establishment in the C-2-A Zone District. The underlying Order imposed four conditions, including a condition (Condition No. 1) setting forth the hours of operation for the fast food establishment from 8:00 a.m. to 8:00 p.m. On November 22, 2011, the Applicant filed a “Motion for a Minor Modification” with the Board, asking the Board to allow the operation of its liquor store from 9:00 a.m. to 12:00 a.m. (midnight). For reasons explained further below, the Board dismissed the Applicant’s motion.

The Underlying Order

1. In a letter dated September 24, 2010, the Zoning Administrator (“ZA”) referred the Applicant to the Board for zoning relief under § 733 to establish a fast food establishment.
2. Although the site of the application was located within the jurisdiction of the ANC 7C, the Board did not receive a report from ANC 7C. The Board did receive a letter from the Single

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Member District (“SMD”) 7C04, which expressed certain concerns, and the SMD representative testified at the public hearing that she was working with the Applicant to satisfy the concerns she had raised. (Exhibit 26.)

3. In response to concerns raised by the ANC, the Applicant submitted supplemental information regarding hours of operation, hours of deliveries, details regarding trash collection, proposals to repair/replace an existing fence and metal guard rail, and a proposal to provide a screening enclosure. (Exhibit 30.)
4. On December 17, 2010, the Board entered a Summary Order approving the Applicant’s request to operate a fast food establishment at 1100 Eastern Avenue, N.E. (Square 5200, Lot 805), in the C-2-A Zone District. (Exhibit 31.)
5. The Summary Order incorporated the Applicant’s proposals as conditions of approval. One such condition was Condition No. 1, which stated that the hours of operation for the fast food establishment “shall be from 8:00 a.m. to 8:00 p.m.”.

The Motion for a “Minor” Modification

6. On November 22, 2011, the Applicant filed a Motion for Minor Modification (the Motion) with the Board. (Exhibit 33.)
7. The Motion asked to Board to allow it to operate a liquor store at the premises from 9:00 a.m. to 12:00 a.m. (midnight).¹ The Motion stated that those hours were permitted by the “ABC Board”.²
8. According to OP’s report, the ZA explained that the Applicant intends to create a separate liquor store use on the subject property, with a separate entrance and a separate address at 1102 Eastern Avenue, N.E. As such, the Applicant has applied for a separate tax lot and separate address for the liquor store. (Exhibit 35.)
9. In addition, the Applicant has obtained a license from ABRA to sell liquor at this location between the hours of 9:00 a.m. and 8:00 p.m., Monday through Saturday. (Exhibit 35.)

¹ The Applicant also asked for permission to change its hours for the fast food establishment from 9:00 a.m. until 8:00 p.m., instead of 8:00 a.m. to 8:00 p.m. However, this request was unnecessary and will not be addressed. Condition No. 1 regarding hours of operation set the parameters for the most intensive use at the property; i.e., the fast food establishment may not operate before 8:00 a.m. or after 8:00 p.m. Board permission is not required to open at 9:00 a.m., an hour later than is already allowed.

² Presumably, the Applicant is referring to the “Alcoholic Beverage Control Board”, also known as the “ABC Board”. The ABC Board is part of the Alcoholic Beverage Regulation Administration (“ABRA”), a District agency which, among other things, issues licenses that enable businesses to sell and serve alcoholic beverages.

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10. According to the ZA, the Board had no jurisdiction to consider the Motion because:

- a. Liquor sales are permitted as a matter-of-right within the C-2-A zone;
- b. The liquor store will have an address that is separate from the fast food establishment; and
- c. The area of the special exception use (the fast food establishment) will decrease.

The Board Proceedings

11. The Motion came before the Board on January 10, 2012.
12. The Board received filings in opposition to the Motion from ANC 7C (Exhibit 34) and Councilmember Yvette M. Alexander. (Exhibit 38.)
13. In light of OP's report, the Board re-set the matter to February 7, 2012, to give the Applicant an opportunity to clarify those issues raised in the OP report. (Meeting Transcript of January 10, 2012, p. 67-69.)
14. The Board next considered the matter at its Public Meeting Calendar on February 7, 2012. However, no additional filings were received from the Applicant.
15. The Board finds that the relief sought in this Motion does not relate to the fast food establishment authorized by the Board.

The Board Lacks Jurisdiction

As stated, the relief sought by the Applicant relates to the hours of operation of a liquor store, not the hours of operation of a fast food establishment. What is more, the Applicant was granted a license to operate a liquor store by ABRA, the District's Alcoholic Beverage Regulation Administration. This license has nothing to do with the Board's special exception approval of a fast food establishment.

The Board has limited jurisdiction. It may grant variances and special exceptions and exercise all other powers authorized by the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended, D.C. Official Code § 6-641 (2001 ed.)). The Board may also 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. *Id. See, also*, 11 DCMR §§3100.1 and 3100.2. In contrast, the laws and rules that establish the grounds and processes for granting a liquor license are not in the Zoning Regulations, but in Title 25 of the D.C. Official Code and the regulations thereto. For example, ABRA itself was established by D.C. Official Code § 25-202 (2001 ed.). Moreover, ABRA's website includes forms for use, such as a "Change of Hours Application" for licensees. This Board does not wish to advise the Applicant as to how he

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should proceed. However, it is clear that the Board has no authority to consider his request to modify the hours of operation established by ABRA.

For all of these reasons, the Board concludes that it lacks jurisdiction to hear the Applicant's Motion for Minor Modification. Therefore, for the reasons stated above, it is hereby **ORDERED** that the Motion is **DISMISSED**.

VOTE: 4-0-1 (Meridith H. Moldenhauer, Nicole C. Sorg, Lloyd J. Jordan, and Jeffrey L. Hinkle to Dismiss; Konrad W. Schlater not present, not voting, being necessarily absent.)

Vote taken on February 7, 2012

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

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: September 18, 2012

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.