

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18799 of PNC Bank National Assoc., pursuant to 11 DCMR § 3104.1, for a special exception under 11 DCMR § 214 to allow continued use of the accessory parking spaces in the R-2 zoned western portion of property located at 3808-16 Morrison Street, N.W. (Square 1859, Lot 95) (the "Site"), to serve the PNC Bank branch located on the C-1 zoned eastern portion of the Site.

HEARING DATE: July 22, 2014

DECISION DATE: July 22, 2014

DECISION AND ORDER

SELF-CERTIFIED

PNC Bank National Assoc. (the "Applicant"), the owner of the Site, submitted a self-certified application on May 13, 2014, seeking a special exception from § 214 of the Zoning Regulations to allow continued use of the accessory parking spaces in the R-2 zoned western portion of the Site, to serve the PNC Bank branch located on the C-1 zoned eastern portion of the Site. The use was last approved by the Board of Zoning Adjustment ("Board" or "BZA") in Application No. 16359 for a ten-year term subject to seven additional conditions. Following a public hearing on July 22, 2014, the Board voted to approve the application, subject to conditions.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated May 13, 2014, the Office of Zoning provided notice of the application to the Office of Planning ("OP"); the District Department of Transportation ("DDOT"); the Councilmember for Ward 3; Advisory Neighborhood Commission ("ANC") 3G, the ANC in which the Site is located; and Single Member District/ANC 3G06. Pursuant to 11 DCMR § 3112.14, on May 20, 2014, the Office of Zoning mailed letters providing notice of the hearing to the Applicant, ANC 3G, and the owners of all property within 200 feet of the Site. Notice was published in the *D.C. Register* on May 23, 2014.

Party Status. In addition to the Applicant, ANC 3G was automatically a party in this proceeding. The Board also granted three requests for party status in opposition to the application submitted by Mara Verheyden-Hilliard and Carl Messineo; Annemarie Maguire and William E. Scheurch; and Janet Shenk. Mara Verheyden-Hilliard and Carl Messineo own property located at 3825

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Livingston Street, N.W.; Annemarie Maguire and William E. Scheurch own property located at 3819 Livingston Street, N.W.; and Janet Shenk owns property located at 3821 Livingston Street, N.W., all of which are located across the public alley to the south of the Site. The Board consolidated the individual party status requests to a single party (the "Party in Opposition"). The Board denied a request for party status submitted by Chevy Chase Arcade, LLC ("CCA"), which is located at 5520 Connecticut Avenue, N.W., based on the finding that CCA's party status request related exclusively to issues outside of those related to the application for the continuation of the accessory parking use on the Site. The Board also denied the CCA's request to amend the special exception application to include consideration of CCA's storage of its trash on a portion of the Applicant's property.

Applicant's Case. The Applicant provided evidence and testimony from Lynn Osman, Vice President of Realty Services for the Applicant, and Wayne Fortune, Branch Manager for the PNC Bank branch located on the Site. Ms. Osman and Mr. Fortune described the prior BZA approvals for the accessory parking use on the Site, the bank's hours of operation, the present and historic use of the accessory parking both for the bank and as a community resource, community engagement and ANC review of the application, and their personal history and dealings with the Site and its uses. The Applicant's witnesses also asserted that the application satisfied all requirements for approval of the requested zoning relief.

OP Report. By memorandum dated July 15, 2014, OP recommended approval of the application. OP also recommended the Board grant the use for the same ten-year term as permitted in the prior approval and subject to six of the seven conditions of that approval. The condition proposed not to be carried forward merely repeated a requirement of the Zoning Regulations. OP also noted that it was no longer necessary to require the "erection" of bumper stops, since those already had been constructed.

ANC Report. By resolution dated July 14, 2014, ANC 3G indicated that at a regularly scheduled public meeting held on July 14, 2014, with a quorum present, ANC 3G voted 6-0 to support the special exception to allow the continued use of the R-2 zoned portion of the subject property for accessory parking uses, subject to certain conditions. Like OP, the ANC recommended that the prior conditions of approval be maintained, but also requested additional conditions that will be discussed as part of the "great weight" discussion portion of this Order. The ANC recommended a five-year term.

Persons in Support. Mike Abbariki, the owner of CCA, testified generally in support of PNC's application. Tony Brown, the owner of a restaurant business in CCA, also testified in support of the application. He stated that the community is well served by having PNC's parking lot available on evenings and weekends.

Persons and Party in Opposition. The Board received letters and heard testimony in opposition to the application from members of the Party in Opposition. The Party in Opposition generally contended that use of the parking lot on the subject site after banking hours was causing

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disruptive noise and light, and asked that the Applicant be required to lock the gates to the parking lot and restrict its use at the close of the business day.

FINDINGS OF FACT

1. The Board has approved accessory parking on the Site for use by the bank on a number of occasions, beginning in 1948. The most recent renewal expired in 2008.
2. The bank building is open for business until 5:00 p.m. on weekdays and 1:00 p.m. on Saturdays. The ATM machines are open 24 hours a day, seven days a week. The ATM machine on the Morrison Street side of the bank building is programmed to accept large commercial deposits until 10:00 p.m. The Applicant also testified that other customers prefer to use the ATM machine after the bank building is closed, rather than using the drive-up ATM machine, because they cannot reach the ATM machine from their vehicle. These ATM customers who do not use the drive-up ATMs park in the bank parking lot, and use the ATM machines.
3. The Applicant has continued to operate the accessory parking in accordance with all applicable conditions. The Applicant acknowledged that the recent updating of the lighting on the lot has caused the direct rays of the lighting to extend beyond the surface of the parking lot. The Applicant will make adjustments to the lighting.
4. Since the time of the last approval by this Board, the Applicant has allowed the lot to be available for parking on evenings and weekends, as a community resource, to alleviate parking congestion on the neighborhood streets. Both the ANC representative and one of the persons in support testified in support of continuation of this arrangement. OP stated in their report that they have no objection to this arrangement.
5. The ANC representative testified that accessory parking lots for other businesses in the neighborhood are open until 10:00 p.m.
6. The party in opposition, and the persons in opposition, testified that persons using the parking lot after the bank building is closed for business are loud and disruptive. The party in opposition stated that the disruption generally begins at 6:00 p.m. The Board notes that it is not uncommon for residents of areas that abut a busy commercial corridor such as this to experience some degree of noise, but also finds that an appropriate limit on the use of this parking lot should be set. Although the Board finds that there is a valid business reason for the parking lot to be open until 10:00 p.m. for bank business, the rights of nearby neighbors to the peaceful enjoyment of the properties require the lot's closure after that time until 7:00 a.m.

CONCLUSIONS OF LAW

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The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(2) (2001)), to grant special exceptions as provided in the Zoning Regulations. The Applicant applied under 11 DCMR § 3104.1 for a special exception pursuant to 11 DCMR § 214 to allow continued use of the accessory parking spaces in the R-2 zoned western portion of property located at 3808-16 Morrison Street, N.W. (Square 1859, Lot 95), to serve the PNC Bank branch located on the C-1 zoned eastern portion of the same property.

The Board can grant a special exception where, in its judgment, two general tests are met and the special conditions for the particular exception are met. First, the requested special exception must “be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.” (11 DCMR § 3104.1.) Second, it must “not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map.” (11 DCMR § 3104.1.)

The Board concludes that the continued use of the accessory parking spaces, as conditioned, will not tend to adversely affect the use of neighboring property in accordance with the Zoning Regulations and Map. The Board agrees with the Applicant that the continued use is appropriate for the Site and complies with the applicable provisions of §§ 3104.1 and 214 of the Zoning Regulations.

The prior approval granted in Application 16359 was for a ten year period. The Office of Planning recommended the use of the same period, ANC 3G recommended a five year term, and the Applicant at the decision meeting indicated it would defer to the Board.

A term limit provides an antidote to the inherent uncertainty in granting a first-time special exception. *See, e.g., Woodbury v. Zoning Board of Review of City of Warwick*, 82 A.2d 164, 167 (R.I. 1951). (A two-year term imposed, at the end of which, “the board would be in a position, according to the facts then appearing, either to renew the exception if requested, or to permit the property to again be used as a tourist home.”). Although this case involves the renewal of a special exception use that has been in the community for decades, the Board concluded that a relatively short term is needed to ascertain whether the closing of the parking lot at 10:00 p.m. is sufficient to mitigate the potential impacts of noise in the adjacent residential neighborhood. Therefore, the Board is imposing a three year limit on its approval.

The Board is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give “great weight” to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 3G. To satisfy the great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. Similarly, the Board is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990, (D.C. Law 8-163; D.C. Official Code § 6-623.04) to give great weight to OP recommendations.

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As noted, by resolution dated July 14, 2014, ANC 3G voted to support the special exception subject to certain conditions. Most of these conditions were included in the prior Board approval. As to one of these, the ANC recommended that “three spaces of the five spaces on the east side of the parking area, closest to the entrance to the bank, shall continue” to be marked for and reserved for persons with disabilities. The prior approval only requires two spaces, so it is unclear whether the ANC may have been mistaken as to the number being continued. In any event, the ANC has not offered persuasive advice as to why this number must be increased.

The ANC also requested that the Applicant be required to remove snow along the sidewalk on Morrison Street. An adjacent property owner’s responsibility to remove snow is stated in legislation adopted by the Council and is not a proper subject of the Zoning Regulations or of any order granting a special exception under such regulations.

Proposed ANC Condition No. 10 would permit the Applicant to leave the lot open for the use of the public after banking hours provided it erect signs requesting the public to be quiet and respect the peace of the adjacent neighbors. This order now specifies that the lot must be closed and access prohibited through a gate or other device between 10:00 p.m. and 7:00 a.m., thus obviating the need for the ANC’s proposed condition. As noted, the Board has imposed a three year term in order for it to later determine whether the operation of the lot past normal banking hours was consistent with the peaceful enjoyment of nearby residential properties. The Board is confident that the Applicant will take the measures needed to ensure this is the case without the Board having to require the posting of the requested signs.

Finally, the ANC requested that the Board’s approval include permission for the Applicant to permit the Chevy Chase Arcade to locate a solid waste dumpster on a portion of the site that is purportedly the subject of an easement by proscription. The Applicant has not requested this flexibility and the Board concludes it is speculative to include it.

As to OP, that Office, through its report dated July 15, 2014, recommended approval of the application subject to most of the substantive conditions of the prior order and for a ten year term. The Board included the conditions substantially as recommended by OP and, for the reasons stated above, concluded that a three year term was the appropriate length of its approval.

It is therefore **ORDERED** that the application to allow continued use of the accessory parking spaces, pursuant to Exhibit No. 35B (Revised Plans), is hereby **GRANTED WITH THE FOLLOWING CONDITIONS:**

1. Approval shall be for a period of THREE (3) YEARS from the effective date of this Order.
2. Two spaces of the five spaces on the east side of the parking area, closest to the entrance to the bank, shall continue to be marked for and reserved for persons with disabilities.
3. Bumper stops shall be maintained for the protection of all buildings.

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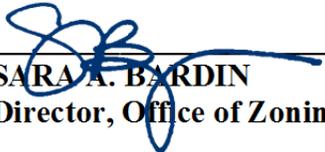
4. No vehicle or any part thereof shall be permitted to project over any lot or building line or on or over the public space.
5. All parts of the lot shall be kept free of refuse or debris and shall be paved or landscaped. Landscaping shall be maintained in a healthy growing condition and in a neat and orderly appearance.
6. No other use shall be conducted from or upon the premises and no structure other than attendant's shelter and facilities associated with drive-in tellers and ATMs shall be erected or used upon the premises unless such use or structure is otherwise permitted in the zoning district in which the parking lot is located.
7. Within 90 days of the final date of this Order, the Applicant shall make adjustments as necessary to ensure that any lighting used to illuminate the parking lot or its accessory building is arranged so that all direct rays of such lighting are confined to the surface of the parking lot.
8. All areas devoted to driveways, access lanes, and parking areas shall be maintained with a paving material forming an all-weather impervious surface, except that if the Applicant resurfaces or repaves the lot, it shall consider using other all-weather surfaces, including porous (or pervious) concrete, porous asphalt, and/or mechanically-reinforced grass, excluding grass or gravel, as permitted by § 2303.1(a).
9. The Applicant shall prohibit use of the parking lot between the hours of 10:00 p.m. and 7:00 a.m., seven days per week, by use of an automatic or manual gate, or other appropriate enforcement mechanism.

VOTE: **4-0-1** (Lloyd J. Jordan, Anthony J. Hood, Marnique Y. Heath, and Jeffrey L. Hinkle to Approve; S. Kathryn Allen not present, not voting.)

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: March 17, 2015

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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.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS

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PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.