

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18923 of Geng Chen Enterprise, Inc., pursuant to 11 DCMR § 3104.1 for a special exception under § 733 of the Zoning Regulations to allow use as a fast food establishment in the C-2-A District at premises 2918 Martin Luther King, Jr. Avenue, S.E. (Square 5951, Lot 30).

HEARING DATE: February 24, 2014
DECISION DATE: February 24, 2014

DECISION AND ORDER

This application was submitted on November 7, 2014, by Neng-Hsiang Wang, CPA, on behalf of Geng Chen Enterprise, Inc. (the “Applicant”), the tenant of the property that is the subject of the application. The application requests a special exception under § 733 of the Zoning Regulations to allow use as a fast food establishment in the C-2-A District at 2918 Martin Luther King, Jr. Avenue, S.E. (Square 5951, Lot 30) (the “Subject Property”). Following a public hearing on February 24, 2015, the Board of Zoning Adjustment (the “Board”) voted to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated November 18, 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 4; Advisory Neighborhood Commission (“ANC”) 8C, the ANC for the area in which the Subject Property is located; and Single Member District/ANC 8C03. Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed letters on December 2, 2014, providing notice of the hearing to the Applicant, ANC 8C, and the owners of all property within 200 feet of the Subject Property. Notice of the hearing was published in the *D.C. Register* on December 12, 2014 (61 DCR 12607).

Party Status. The Applicant and ANC 8C were automatically parties to this proceeding. No other persons requested party status.

OP Report. By memorandum dated February 18, 2015, OP recommended approval of the application. Based on issues raised by ANC 8C regarding the Establishment’s condition and sanitation issues, OP recommended that approval be for one year only with the condition that the Applicant continue to meet with the ANC to regularly address these issues. (Exhibit 25.) With respect to dumpsters used by the Establishment that are left unenclosed in a nearby alley, OP

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stated in its report and at the hearing that, because the Subject Property has no direct access to the alley, the requirement of § 733.4 that dumpsters used by the Establishment be kept in an enclosure does not apply to the Applicant. OP stated that, due to the lack of direct alley access, any enclosure of the dumpsters is a public space issue to be addressed by the Public Space Committee. OP further stated that it had inquired with the Public Space Committee as to whether this issue would require that Committee's review, but had yet to receive any response. However, upon further discussion at the public hearing, OP changed its position and stated that the Applicant was, in fact, required to provide an enclosure for any dumpsters used by the Establishment under § 733.4.

DDOT Report. By memorandum dated February 18, 2015, DDOT indicated that it had no objection to approval of the relief requested. (Exhibit 24.)

ANC Report. By letter dated February 20, 2015, ANC 8C indicated that it discussed the application at its regularly scheduled, properly noticed meeting on February 4, 2015, and, with a quorum present, voted 6-0-1 to oppose the application. In its letter, the ANC explained that it had concerns about the Establishment's dilapidated and unsanitary condition. (Exhibit 26.) Specifically, the ANC was concerned about the following: a leak dripping from the ceiling of the Establishment; an infant crying behind the counter; the unclean condition of the floor and plexiglass in the Establishment; a missing ceiling tile; and a foul odor in the Establishment.

Persons in support. No additional persons appeared in support of the application.

Persons in opposition. No additional persons appeared in opposition to the application.

FINDINGS OF FACT

1. The Subject Property is an interior, rectangular lot located on the east side of the street at 2918 Martin Luther King, Jr. Avenue, S.E., between Malcolm X Avenue, S.E. and Lebaum Street, S.E. (Square 5951, Lot 30).
2. The Subject Property is improved with a one-story structure and is zoned C-2-A.
3. The Subject Property has been providing carry-out and delivery service for over ten years, although it does not currently possess a valid certificate of occupancy.
4. The Subject Property has no rear alley access. There is an alley to the northeast of the Subject Property; to access the alley one must exit the Subject Property to the front and walk around the neighboring property to the north.
5. The dumpsters used by the Establishment are located in the alley and are not enclosed.

CONCLUSIONS OF LAW AND OPINION

The Applicant requests special exception relief under § 733 of the Zoning Regulations to allow use as a fast food establishment in the C-2-A. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.), to grant special exceptions as provided in the Zoning Regulations where it will be in harmony with the general purpose and intent of the Zoning Regulations and Map and will not tend to adversely affect the use of neighboring property, subject to specific conditions. (11 DCMR § 3104.1.) The Applicant bears the burden of proof to demonstrate that all of the requirements for a special exception have been met. (*Id.* § 3119.2.)

Among the specific conditions stated in § 733 is that “any dumpsters used by the fast food establishment will be housed in a three-sided brick enclosure equal in height to the dumpster or six feet high, whichever is greater.” The application does not satisfy § 733.4, because the dumpsters used by the Establishment are not enclosed and the Applicant does not propose to construct any enclosure.

In deciding to grant or deny applications for zoning relief, the Board must give “great weight” to the issues and concerns that the affected ANC raises in its written report. Section 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)). The written rationale for the decision must articulate with precision why the ANC does or does not offer persuasive evidence under the circumstances. In doing so, the Commission must articulate specific findings and conclusions with respect to “issues and concerns” raised by the ANC. (D.C. Official Code § 1-309.10(d)(3)(A) and (B).) The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).

Here, ANC 8C voted unanimously to oppose the application. In its report, the ANC expressed concern regarding the Establishment’s internal condition and issues of sanitation. Such assertions would only be relevant where they pertained to the external impacts of the use. However, the Board did not reach that issue, but denied the application solely because the dumpsters used by the Establishment were non-compliant with § 733.4. Therefore, the ANC’s issues and concerns were not legally relevant to the Board’s disposition of this case.

The Board is also 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’s recommendations. The Board must demonstrate in its findings that it considered OP’s views and must provide a reasoned basis for any disagreement with those views. *Glenbrook Rd. Ass’n v. D.C. Bd. of Zoning Adjustment*, 605 A.2d 22, 34 (D.C. 1992) (internal citation omitted).

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OP's report recommended that the Board approve the requested relief, with two conditions aimed at addressing ANC 8C's concerns: (1) that approval be for one year only; and (2) that the Applicant regularly meet with the ANC to address its concerns. At the public hearing, OP testified that the purpose of limiting approval to a term of one year would be to provide sufficient time for the Applicant to resolve the issues raised by the ANC. With respect to the Establishment's dumpsters, OP made inconsistent statements in its report and at the public hearing regarding the applicability of § 733.4 to this case. Both in the report and at the outset of the hearing, OP stated that § 733.4 does not apply to the Applicant because the Establishment does not have direct access to the alley in which the dumpsters are located. OP stated that the issue of enclosing the dumpsters is a public space issue to be addressed by the Public Space Committee. However, upon further discussion at the hearing, OP changed its position and affirmed that an enclosure is required for any dumpsters used by the Establishment.

The Board disagrees with OP's initial position that § 733.4 does not apply to the Applicant, and therefore declines to adopt OP's recommendation of temporary approval because it was based upon OP's misassumption that § 733.4 did not apply. By its terms, § 733.4 is not limited to dumpsters located in an alley directly accessible by the Subject Property or to any specific location. Rather, the provision applies to "any refuse dumpsters" used by the Applicant. (11 DCMR § 733.4.) The applicability of § 733.4 does not depend upon whether the Public Space Committee has jurisdiction over dumpsters. The Zoning Act recognizes that both a District regulation and a Zoning Regulation may impose standards on the same subject matter. (D.C. Official Code 6-641.11.) When that is the case, the higher standard applies. (*Id.*)

Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: **3-0-2** (Lloyd J. Jordan, Anthony J. Hood, Marnique Y. Heath to Deny; Jeffrey L. Hinkle not participating; one Board seat vacant.)

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: October 7, 2015

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.