

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY

MAY 14, 2002

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The Public Hearing convened in Room 220 South, 441
4th Street, N.W., Washington, D.C. 20001, pursuant to notice at
9:48 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

| | |
|-----------------------|---------------------|
| GEOFFREY H. GRIFFIS | Chairperson |
| ANNE MOHNKERN RENSHAW | Vice Chairperson |
| DAVID LEVY | Board Member (NCPC) |
| CURTIS ETHERLY, JR. | Board Member |

ZONING COMMISSION MEMBERS PRESENT:

| | |
|----------------------|--------------------|
| CAROL J. MITTEN | Commissioner |
| JAMES HANNAHAM | Commissioner |
| ALBERTO BASTIDA | Secretary |
| MAXINE BROWN-ROBERTS | Office of Planning |
| STEPHEN COCHRAN | Office of Planning |

COMMISSION STAFF PRESENT:

SHERI M PRUITT, Secretary, BZA
JOHN K.A. NYARKU, Office of Zoning
BEVERLY BAILEY, Office of Zoning

D.C. OFFICE OF CORPORATION COUNSEL:

MARIE SANSONE, ESQ.

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P-R-O-C-E-E-D-I-N-G-S

(9:48 a.m.)

CHAIRPERSON GRIFFIS: □- meeting of May 14th. As I indicated before we started up, we do have a Special Public Meeting which is some, I think □-well, will be fairly quick decision makings. We will then go straight into our Public Meeting. And again, we apologize for the delay in starting this morning, but know we were in here as early as possible, and are getting the work done that we have to. And it's just taking a little bit more time.

Okay. Let us call the first case for the Public Meeting then, if staff is ready.

SECRETARY PRUITT: Good morning, Mr. Chair.

CHAIRPERSON GRIFFIS: Good morning.

SECRETARY PRUITT: The first case before you today is Application 16710 of Pande, a request for a Reconsideration.

CHAIRPERSON GRIFFIS: Great. Thank you very much.

And I will save all the introduction until we get into the Public Hearing, and then I will let everyone know who is in front of you this morning, but in order to conserve some time and move ahead with this. Okay. Board, the first issue as we get into this, I think we ought to address the Advisory Neighborhood Commission letter that was submitted by Mr. Finney, and I believe he's here today. And we, again, thank you for being here. And also, I'm full of apologies today, but also apologize for not

1 hearing this last week. As you know, we were absolutely packed
2 with things and couldn't get to it.

3 Board Members, do we want to speak to this? First
4 of all, Mr. Finney has indicated - well, is a Single Member
5 District, which if I'm not mistaken, the property is not located.

6 MR. FINNEY: Yes, it is, sir.

7 CHAIRPERSON GRIFFIS: All right. Actually, if - I
8 will pull together all the questions, and then I'll have you up
9 here if I need you to respond to anything. But as a Single
10 Member District, Mr. Finney is not a party in the case
11 representing the entire ANC. The ANC is a party in the case. I
12 don't have record of the full ANC submitting - and I'm just
13 trying to paint the whole picture here, and what we have in terms
14 of the submission, so what we need to do is figure out whether we
15 accept this - waive our rules and accept this into the record,
16 or not. And anyone can pick that up to speak to it if they need.

17 VICE CHAIRPERSON RENSHAW: Mr. Chairman.

18 CHAIRPERSON GRIFFIS: Yes.

19 VICE CHAIRPERSON RENSHAW: I would move that we
20 waive the rules and accept Mr. Finney's submission. The letter
21 that he had sent to the Board does not indicate, of course,
22 whether or not he was able to reach his ANC. I am not sure about
23 their meeting date as to whether or not they have been able to
24 direct comments in a Public Meeting session. But as Mr. Finney
25 is the Chair of the ANC, and is the Single Member District

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1 Commissioner for this, I believe his comments are important to
2 this reconsideration.

3 CHAIRPERSON GRIFFIS: Okay. There's a motion. Is
4 there a second?

5 COMMISSIONER HANNAHAM: Second.

6 CHAIRPERSON GRIFFIS: Motion is before us and
7 seconded. Does anyone want to speak to the motion, outside of
8 additions to Ms. Renshaw's?

9 MEMBER LEVY: Mr. Chair.

10 CHAIRPERSON GRIFFIS: Yeah.

11 MEMBER LEVY: I take the opposite position in this
12 matter. I'm concerned that Mr. Finney is not a party to the
13 case, and in addition to that, the letter was not received in a
14 timely manner. But more importantly, he's not a party to the
15 case, so I don't see that it's appropriate that we accept this
16 into the record at this time.

17 CHAIRPERSON GRIFFIS: Okay. Thank you, Mr. Levy.
18 I would also be against the motion in terms of the fact of, just
19 in terms of process, this wasn't served on all of the parties, or
20 it wasn't noted that it was served. I think this is a fairly
21 clear motion, so there it is. Any other discussion? Motion
22 before us to waive the rules and accept the report has been
23 seconded. I would ask for all those in favor of the motion
24 signify by saying aye.

25 (Vote.)

1 CHAIRPERSON GRIFFIS: And opposed?

2 COMMISSIONER HANNAHAM: Nay.

3 CHAIRPERSON GRIFFIS: Opposed. WE can record the
4 vote.

5 SECRETARY PRUITT: Staff would record the vote as a
6 motion made by Ms. Renshaw, seconded by Mr. Hannaham, 3-2 to
7 waive the filing time of received information.

8 CHAIRPERSON GRIFFIS: So for total clarity, we're
9 accepting - we're waiving the rules, and we're accepting this
10 letter from Mr. Finney as part of our deliberations to the motion
11 of whether we reconsider the Pande case, so let's move right
12 ahead to the Motion for Reconsideration.

13 I just want to also give some clarity to the fact
14 that this would not be - this is not a motion for a total
15 rehearing. We would not open the record. What's being asked for
16 is reconsideration. That would mean that we have the Board
17 Member, Mr. Etherly, who was not appointed at the time read the
18 record, and the entire Board would reconsider its decision, Mr.
19 Etherly considering its decision.

20 There were two points that were made in the motion,
21 and that was one, as I've indicated, that we did not have a full
22 Board of five sitting, but I think most importantly in particular
23 to this case was the fact that the motion failed for lack of a
24 majority of a vote. That is, that there were four, and the vote
25 was split 2-2.

1 What is indicated by that practically in this case
2 is that the order that goes out does not have a Finding of Fact
3 for or against. There is no real discussion because the motion
4 just flatly failed. That's the facts in the matter.

5 The other issue that was brought up was the Federal
6 Fair Housing Act, which requires Special Exception be approved as
7 reasonable accommodation to handicapped. Actually, there were
8 three notions in the motion, and that is the others, that the
9 neighbors in opposition, since we didn't substantiate their
10 adverse impact.

11 I would move that we grant the motion for
12 reconsideration on this case, and I'd ask for a second, and I'll
13 speak to the motion.

14 COMMISSIONER HANNAHAM: Second.

15 CHAIRPERSON GRIFFIS: Thank you, Mr. Hannaham. I
16 would say □- I think the first point is fairly strong, in the
17 fact that this was a split vote that frankly no one, either in
18 opposition or in favor, or however this proceeds, has clear
19 documentation of the Findings of Facts in this proceeding. I
20 think in the basis of fairness, and in the integrity of our own
21 procedure, we can expend the additional time that it takes to
22 reconsider this and have a full five member board. The second,
23 in terms of the neighbors' opposition to the application, I
24 thought the case was full.

25 I don't think there was lacking information in

1 terms of neighbors, so I would not tend to grant the motion based
2 on the second point. And on the third, the Federal Fair Housing
3 Act, there was discussion of this in the case, and I don't
4 believe that this would be the basis for granting a
5 reconsideration. I think it was an issue of bearing in the case,
6 and I think it was discussed to its logical □- to its needed
7 extreme with the particulars in the case, and so I would rest my
8 support of my own motion on the first issue, and that is, having
9 a full board for the consideration of this case. And unless
10 there's anything else that people want to add.

11 MR. FINNEY: Mr. Chairman, are you open to comment
12 from the parties in the case?

13 CHAIRPERSON GRIFFIS: We are not, actually. Then I
14 would □- Ms. Renshaw.

15 VICE CHAIRPERSON RENSHAW: Just to review, you are
16 basing your motion strictly on this basis of fairness. Is that
17 correct? And having a full board vote on the case.

18 CHAIRPERSON GRIFFIS: Yeah. My motion is exactly
19 based on the first issue, and that is, for a full board, based on
20 the fact that there was a split vote, that it failed for lack of
21 majority. There is no Finding of Facts either in favor or in
22 opposition, so that there is no basis for, I think, a substantial
23 order in this case, no matter which way it goes. And I think
24 it's important enough that this Board, in a situation like that,
25 expend its own time in reconsidering.

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1 VICE CHAIRPERSON RENSHAW: Well, just to say that
2 we have spent a great deal of time on this case, in all □- in
3 fairness to the fairness argument, I believe that we gave ample
4 opportunity to both sides to air their points of view, as to
5 whether or not the case should be approved or denied.

6 CHAIRPERSON GRIFFIS: I don't disagree with that.

7 VICE CHAIRPERSON RENSHAW: And unfortunately, we
8 had only four voting. And in the opinion of the four, two were
9 against, and two were for approval.

10 CHAIRPERSON GRIFFIS: Right.

11 VICE CHAIRPERSON RENSHAW: And that's just the way
12 it was that day. And to interject yet another opportunity to
13 vote the case up or down, kind of strikes against all of the work
14 that we have done to this point, where the arguments were not
15 substantial enough to cause one of the people on either side to
16 vote in the opposite manner.

17 CHAIRPERSON GRIFFIS: Well, here's the basis. I
18 absolutely agree with you, Ms. Renshaw. I don't think we're
19 looking for new information. We're not asking to open the
20 record. I think the case stands on itself, but you said that in
21 the opinion of the Board we split.

22 My problem is that, in fact, our opinions are not
23 fleshed out. It would have been in the transcript, if you read
24 it, but the order can't be written □- the order just failed □-
25 the motion just failed, so the order doesn't add or substantiate

1 any Findings of Facts on either side.

2 What I think would be important in a case like
3 this, although this is □- well, in a case □- in all cases I think
4 it's important that no matter which direction the Board goes,
5 that there's substantiation to each of the sides. And especially
6 in something that was split, as clearly as this, I find it not
7 that encumbering on the Board to reconsider it in order to, in
8 fact, substantiate and state the opinions that we found in the
9 case.

10 VICE CHAIRPERSON RENSHAW: Well, we stated our
11 opinions when we voted on that.

12 CHAIRPERSON GRIFFIS: Not in the order. That's the
13 bottom line.

14 VICE CHAIRPERSON RENSHAW: But we did state it
15 during the case itself.

16 CHAIRPERSON GRIFFIS: Oh, no question. I □- you
17 know, no question. I mean, well □- anybody else?

18 MALE SPEAKER: You're the one that's got to read
19 it. Do you want to □-

20 CHAIRPERSON GRIFFIS: No, we don't need to have you
21 say anything. Okay. I will give another quick couple of
22 questions if people want to □-

23 MEMBER ETHERLY: Mr. Chair, I will say that, just
24 for the sake of our conversation, I did have an opportunity to
25 review the transcript in this matter. I was of somewhat of a

1 split mind. However, I am swayed by your argument that what
2 we're □- I think essentially what you're talking about is you're
3 talking about resolution, resolution one way or the other.

4 And the fact is that we have absence of resolution
5 in this case, and the objective of this body, I believe, is in
6 most instances to try to bring some resolution to questions and
7 issues, so I would be inclined to support your motion, and grant
8 an opportunity for reconsideration.

9 CHAIRPERSON GRIFFIS: Good. Thank you.

10 MEMBER ETHERLY: Thank you, Mr. Chairman.

11 CHAIRPERSON GRIFFIS: Anybody else? All those in
12 favor of the motion then, I would ask to signify by saying aye.

13 (Vote.)

14 CHAIRPERSON GRIFFIS: And opposed?

15 (Vote.)

16 VICE CHAIRPERSON RENSHAW: We have two.

17 SECRETARY PRUITT: I'm sorry. Could we get the
18 nays again. Is it one or two?

19 VICE CHAIRPERSON RENSHAW: Two.

20 SECRETARY PRUITT: Two. Okay. Staff would □-
21 well, motion was made by Mr. Griffis to reconsider, seconded by
22 Mr. Hannaham. The Staff □- with a vote of 3-2 to reconsider.
23 Ms. Renshaw and Mr. Levy in opposition to the motion.

24 CHAIRPERSON GRIFFIS: Wow, that was a close one.
25 Okay. So in that we have, in fact, by a motion of 3-2 moved to

1 reconsider application □- right, the Case 16710. I don't think
2 we're going to need to spend a lot of time on this. I think Mr.
3 Etherly is up to speed on it, although it is a huge file. I
4 would say we set this for a Special Public Meeting next week, 9
5 a.m., on the 21st of May. Oh, Lord. However □- no, that's what
6 we're going to do.

7 SECRETARY PRUITT: Okay.

8 MR. FINNEY: What time, sir?

9 CHAIRPERSON GRIFFIS: Mr. Finney has asked from the
10 audience what time. Our Special Public is set for 9 a.m. We
11 have two other issues in the Special Meeting on the 21st, so this
12 will be the third, so I would anticipate that we'd start on time
13 next week, as we'll get back to our normal advertised schedule,
14 so it would be sometime between 9 and 10. Anything else we need
15 to deal on that? Very well then. I tell you what, if you're
16 going to talk, I'm going to give you two seconds to do it, but
17 you absolutely have to come up to the microphone. Otherwise, I
18 have to repeat everything that you say, and I don't always get
19 that correct.

20 MR. FINNEY: I apologize.

21 CHAIRPERSON GRIFFIS: That's okay. And if you
22 wouldn't mind, Mr. Finney, just introducing yourself.

23 MR. FINNEY: My name is John Finney. I'm the Chair
24 of ANC 3D.

25 CHAIRPERSON GRIFFIS: And I'm going to ask you to

1 turn on the mike.

2 MR. FINNEY: I'm John Finney. I'm Chair of ANC 3D.
3 ANC 3D is a party to this case, and I have represented ANC 3D in
4 this case. I would like some information, when you reopen the
5 case which, of course, I disagree with, but what do you now
6 expect in the rehearing?

7 CHAIRPERSON GRIFFIS: I'm absolutely glad that
8 you've asked this question, because there is a clarification that
9 needs to happen. Two things, this is not a rehearing, it's a
10 reconsideration.

11 MR. FINNEY: Reconsideration. All right.

12 CHAIRPERSON GRIFFIS: Secondly, the record is not
13 reopened. It is still closed, and will remain closed.
14 Therefore, we will not have any additional testimony. We will
15 have no additional submissions. What is going to happen, as Mr.
16 Etherly is reading the entire case and transcripts, and will be
17 deliberating on the exact case that the rest of the Board heard.

18 MR. FINNEY: I see.

19 CHAIRPERSON GRIFFIS: And so, on Tuesday of next,
20 we will come in, and we will re-deliberate as part of our
21 reconsideration, and we will vote.

22 MR. FINNEY: I see. Thank you.

23 CHAIRPERSON GRIFFIS: That's no problem. Any other
24 questions?

25 MR. FINNEY: It looks like a full day, because I

1 think St. Patrick's is heard the same day.

2 CHAIRPERSON GRIFFIS: Oh, gosh.

3 VICE CHAIRPERSON RENSHAW: Mr. Chairman, that's
4 with the inclusion of Mr. Finney's material that we waived into
5 the record.

6 CHAIRPERSON GRIFFIS: Oh, yeah. I'm sorry. We
7 waived - the only thing that we've opened the record to is to
8 accept your letter.

9 MR. FINNEY: All right.

10 CHAIRPERSON GRIFFIS: And that is it. But other
11 than that, this week we're not accepting any other additional
12 information.

13 MR. FINNEY: Thank you, Mr. Chairman.

14 CHAIRPERSON GRIFFIS: Certainly. Yes, St.
15 Patricks' is in the afternoon, so all right. We'll be
16 streamlined by then. Okay.

17 That dispenses with the first. Let's go to the
18 next case in this Special Public Meeting, please. Oh, yes.

19 SECRETARY PRUITT: Mr. Chairman.

20 CHAIRPERSON GRIFFIS: Yes.

21 SECRETARY PRUITT: Mr. Bastida is coming in to deal
22 with those.

23 CHAIRPERSON GRIFFIS: Yeah. That's true.

24 SECRETARY BASTIDA: The next case is a Civil
25 Infraction Case Number 97-0002, which is Rogers Brothers case

1 regarding a hearing that you had back in November 27, if I
2 believe is correct. You have received a summary of the review of
3 the case, and we were asking you to make a decision based on the
4 record. And if you have any questions, I will try to answer
5 them. Thank you.

6 CHAIRPERSON GRIFFIS: Good. Thank you very much.
7 One quick clarification, I believe the Civil Infraction Appeal is
8 98-0002.

9 SECRETARY BASTIDA: Yes, I stand corrected.

10 CHAIRPERSON GRIFFIS: Okay. All right. Let's get
11 right into this, Board Members. This is a long and involved
12 case, as you recall. We have had substantial documentation, and
13 I think we can just jump right into the issues that were
14 presented in the case. Let's take up issue number one. I think
15 for clarity, I'll try and reiterate some of it, but what we're
16 looking at is whether the ALJ actually erred in denying the
17 Appellant's Motion to Dismiss, on the basis of lack of
18 jurisdiction. And I can flesh out a lot of the issues if we need
19 to further, but I'm assuming that in our study of this, that we
20 are very familiar with that.

21 And that is, lack of jurisdiction is basically the
22 several processes by which this is being looked at in the courts,
23 and whether the - that the civil and the criminal, and the three
24 alternative remedies are exclusive, or can actually be joined or
25 concurrent, et cetera. But I'll open it up for discussion or

1 questions if we have, for clarification on this.

2 COMMISSIONER MITTEN: Mr. Chairman.

3 CHAIRPERSON GRIFFIS: Yeah.

4 COMMISSIONER MITTEN: I just want to elaborate on
5 what you started to say, which is that the □- what's at the heart
6 of the first point that's raised by the Appellant, is that
7 because there had been this consent order in □- that was before
8 Superior Court, and there was this venue that existed for the
9 district government to seek enforcement or compliance, to seek
10 compliance with the zoning regulations, that the government had
11 elected its venue. And that that somehow excluded the other
12 opportunities to seek enforcement either through a civil
13 infraction or issuing a criminal citation.

14 And there's nothing in the zoning regulations or
15 the law that creates the zoning □- the BZA or grants the
16 authority to enforce zoning, the zoning act. That suggests that
17 the three different methods to seek compliance with the
18 regulations are mutually exclusive, and there's also nothing in
19 the consent order that suggested that the other venues for
20 seeking compliance would not be available to the district
21 government.

22 So while there might have been the expectation on
23 the part of the Appellant, that once the consent order has been
24 entered, that that would be the only way that they would seek
25 enforcement, but there's nothing precluding a civil infraction

1 being issued. And so, I think that the basis for the claim that
2 the ALJ lacked jurisdiction doesn't have any basis in the □-
3 doesn't have any □- there hasn't been a showing that in fact
4 there was this exclusion of these other venues to seek
5 compliance.

6 CHAIRPERSON GRIFFIS: Well said, Ms. Mitten. Do
7 you want to put that into a motion? It was almost there.

8 COMMISSIONER MITTEN: All right. I move that on
9 the basis of issue number one, which is that the Administrative
10 Law Judge erred in his denial of the Appellant's Motion to
11 Dismiss based on lack of jurisdiction. I would move that we □-
12 let's see. How do I want to say that?

13 CHAIRPERSON GRIFFIS: Deny the Motion to Dismiss?

14 COMMISSIONER MITTEN: Well, actually that was □-
15 the allegation is that the judge □-

16 CHAIRPERSON GRIFFIS: Yeah.

17 COMMISSIONER MITTEN: □- that the ALJ erred in the
18 denial of the Appellant's Motion to Dismiss, so I would say that
19 we would uphold Judge Quander's (phonetic) decision to deny the
20 Appellant's Motion to Dismiss.

21 VICE CHAIRPERSON RENSHAW: Second.

22 CHAIRPERSON GRIFFIS: Good. So the motion is to
23 uphold ALJ's decision.

24 VICE CHAIRPERSON RENSHAW: Yes.

25 CHAIRPERSON GRIFFIS: And it's been seconded. Any

1 additional discussion on that clarification? Very well. All
2 those in favor?

3 (Vote.)

4 CHAIRPERSON GRIFFIS: And opposed.

5 (Vote.)

6 CHAIRPERSON GRIFFIS: Why don't we record the vote
7 on that motion.

8 SECRETARY BASTIDA: The Staff would record the vote
9 5-0. Ms. Mitten moving, Ms. Renshaw seconded. Mr. Levy, Mr.
10 Etherly and Mr. Griffis voting on the affirmative.

11 MEMBER ETHERLY: Just a clarification on the
12 reading of the report of that vote, Mr. Chairman. Mr. Etherly is
13 to be recorded as voting no on that.

14 SECRETARY BASTIDA: Oh, okay.

15 CHAIRPERSON GRIFFIS: Right. Opposing the motion.

16 MEMBER ETHERLY: Thank you.

17 SECRETARY BASTIDA: Okay. Then the vote will be
18 recorded 4-1-0. Mr. Etherly voting in the negative. Thank you.

19 CHAIRPERSON GRIFFIS: Okay. The second issue that
20 came up is whether the ALJ erred in finding that the Appellant
21 was operating outside of the scope of the existing Certificate of
22 Occupancy, and therefore, obviously, that the Appellee would have
23 met its burden of proof in substantiating that. This is quite a
24 lengthy chronology, and it's well worth kind of fleshing it
25 entirely out, but I'm not sure it's absolutely needed at this

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1 point to walk through the entire piece.

2 I think what we □- let me just briefly, perhaps
3 summarize and ask for the rest of the Board's help in doing so,
4 but there was a lot of discussion of, first of all, definitions,
5 definitions of material, construction debris, demolition debris,
6 what was allowed to be in the yard. Secondly, what was allowed
7 to be done with it in terms of the terms recycling, in terms of
8 processing and storage, all of which, I think □- and did I say
9 sorting, which was the critical piece of that?

10 It really goes down to the heart of the matter, I
11 think, of the two points. One is, the functioning, what was
12 allowed to be happening there, and sorting goes to that. The
13 second was what was allowed to actually be in the yard, and
14 stored as a solid waste.

15 I think there was substantial documentation, and I
16 think others will speak to this, and should, in terms of
17 materials, and actually materials that were not allowed that
18 would have been beyond the scope of the Certificate of Occupancy.

19 Those were hazardous materials, batteries and the like. There
20 were also documentation of tires, and some other pieces. And
21 then the sorting and processing, et cetera.

22 There was testimony and documentation, and then
23 there was the issue of the Green Machine, but let me open that up
24 to the Board for further discussion. Why don't we □- let's make
25 a motion actually on that, and have discussion on it, if that's

1 okay with the Board Members. And how is that last one phrased,
2 because I would move that we uphold the ALJ's findings and
3 decision, that the Appellant was operating, I would say, beyond
4 the scope of the Certificate of Occupancy, and that the Appellee
5 has met the burden of proof.

6 MEMBER LEVY: Second.

7 CHAIRPERSON GRIFFIS: Thank you. And open up for
8 discussion. Mr. Levy, do you want to speak?

9 MEMBER LEVY: I'll speak to some of that.

10 CHAIRPERSON GRIFFIS: Yeah.

11 MEMBER LEVY: I'm particularly swayed by the
12 indication of hazardous materials on site, which were explicitly
13 precluded in the □- under the C of O, the batteries, the
14 photographic or the evidence of leaking batteries on site, and
15 tires. And also, an indication there was at least one
16 refrigerator on site, which is normally not construction debris,
17 but potentially contains hazardous materials, as well.

18 CHAIRPERSON GRIFFIS: Right. And I think it has a
19 classification of white goods in some legal jurisdiction. Okay.

20 MEMBER LEVY: Right.

21 CHAIRPERSON GRIFFIS: Anything else?

22 MEMBER LEVY: I'm also concerned about this whole
23 issue of the Green Machine, which appears to be some type of a
24 processing operation. I'm not exactly sure what's going on, but
25 it appears to be beyond the scope of the C of O. It doesn't appear

1 to be storing materials. It doesn't even appear to be sorting
2 materials. It appears to be combining materials of some kind, so
3 that, I think, would be outside of the C of O, as well.

4 CHAIRPERSON GRIFFIS: So mixing, and going right to
5 actual production of perhaps a third product, or what have you.

6 MEMBER LEVY: Right.

7 CHAIRPERSON GRIFFIS: Okay.

8 MEMBER LEVY: Even if it's - if that's not the
9 case, it's certainly beyond the scope of storing, and even
10 sorting. And you could argue whether sorting is allowed or not,
11 for that matter.

12 CHAIRPERSON GRIFFIS: Okay. Other item, Mr. Levy?
13 Okay. And I think we also need to touch upon the location, and
14 the area of operations. And Ms. Mitten, did you want to speak to
15 any of those issues?

16 COMMISSIONER MITTEN: Yes. I think the fact that
17 Rogers Brothers was operating on the Georgetown Express portion
18 of the site is undisputed in the record.

19 CHAIRPERSON GRIFFIS: Uh-huh.

20 COMMISSIONER MITTEN: There were excuses made about
21 why they were operating on the Georgetown Express portion of the
22 site, but I think this is the most unambiguous and lacking in
23 interpretation portion of the record in terms of we don't have to
24 figure out what sorting is. We don't have to figure out what
25 processing is.

1 CHAIRPERSON GRIFFIS: And opposed? Good. We can
2 record the vote actually on both of those.

3 SECRETARY BASTIDA: Yes. On the vote to call the
4 question, Ms. Renshaw moved it, Mr. Levy seconded. Ms. Mitten,
5 Mr. Griffis and Mr. Etherly voting on the affirmative. On the
6 motion to deny the Appellant's request, Mr. Griffis moved it --on
7 issue number two, Mr. Griffis moved it, Mr. Levy seconded. Ms.
8 Mitten, Ms. Renshaw, and Mr. Etherly voting on the affirmative.
9 Thank you.

10 CHAIRPERSON GRIFFIS: Just for quick clarification.
11 The motion was worded differently, but I think that the end
12 product is the same. We were - the motion was to uphold, and
13 you've just stated that it was to deny the appeal.

14 SECRETARY BASTIDA: Yeah, to -

15 CHAIRPERSON GRIFFIS: But to uphold the ALJ's
16 findings.

17 SECRETARY BASTIDA: Right.

18 CHAIRPERSON GRIFFIS: It's saying the same thing in
19 a different way, just for clarification. Okay. Third. Thank
20 you.

21 SECRETARY BASTIDA: Yes. No, thank you.

22 CHAIRPERSON GRIFFIS: The third issue for
23 deliberation for the Board is that the ALJ took official notice
24 of certain evidence, and that the ALJ relied on that evidence in
25 order to establish a character, and base a judgment on the case

1 of specific evidence that was given to us for discussion, was the
2 fact that there was a D.C. Yellow Pages Ad that was brought into
3 the □- that was looked at by the ALJ. And I would □- let me open
4 it up quickly for others to summarize if I haven't done an
5 adequate job on that, and then we can make a motion to it.

6 COMMISSIONER MITTEN: Mr. Griffis.

7 CHAIRPERSON GRIFFIS: Yes.

8 COMMISSIONER MITTEN: While it's true that the ALJ
9 did take official notice of a Yellow Pages Ad that was after the
10 date of the proceedings before him, and the Yellow Pages
11 advertising had been discussed, you know, for a prior year had
12 been discussed at the time of the hearing.

13 I think the ALJ did go beyond the scope of what was
14 appropriate, but I didn't see that there was any prejudice to the
15 Appellant because of it, so I would call that harmless error. I
16 think he did err, but I think it was harmless error.

17 CHAIRPERSON GRIFFIS: Okay. And would you agree
18 that we could not ascertain, or there may □- well, would you say
19 that the ALJ, who did make a finding, a conclusion on the
20 credibility of the witness, was it solely based on just the
21 Yellow Pages documentation, or is there □- is it your thought
22 that there may have been more within the case as you heard it,
23 that would have gone to that conclusion?

24 COMMISSIONER MITTEN: Well, I think there's
25 certainly more, and I mean, if you □- just one item is what I

1 mentioned about the Georgetown Express site.

2 CHAIRPERSON GRIFFIS: Right.

3 COMMISSIONER MITTEN: Which is, you know, three
4 years after the fact they decided to clean it up. That just
5 doesn't ring true.

6 CHAIRPERSON GRIFFIS: Okay. So we could take as
7 this issue the specific documentation of evidence, and that is of
8 the Yellow Pages which, as you've indicated, was taken at a
9 current advertising, and then one that was actually spoken to in
10 the case itself, so that's what we would be addressing our motion
11 to at this point.

12 COMMISSIONER MITTEN: Would you like a motion?

13 CHAIRPERSON GRIFFIS: Right.

14 COMMISSIONER MITTEN: All right. I think I can get
15 both of these thoughts in one motion, which is that we would
16 uphold the Appellant's allegation, I guess, that the judge erred
17 in taking official notice of the Yellow Pages Ad, but that that
18 error was harmless error, and without prejudice to the Appellant.

19 CHAIRPERSON GRIFFIS: I would second the motion.
20 Any further discussion on that, clarifications needed? Giving a
21 moment just to collect thoughts. If there's no other need for
22 that, then I would ask for all those in favor, signify by saying
23 aye.

24 (Vote.)

25 CHAIRPERSON GRIFFIS: And opposed?

1 SECRETARY BASTIDA: The Staff would record the vote
2 5-0. Ms. Mitten moving, and Mr. Griffis seconded. Mr. Levy, Mr.
3 Etherly and Ms. Renshaw voting on the affirmative.

4 CHAIRPERSON GRIFFIS: Good. I think the only thing
5 we need left then is a motion to summarize the three motions, and
6 I think it would be stated by moving that we stand by and uphold
7 the ALJ's decision based on the findings.

8 VICE CHAIRPERSON RENSHAW: Second.

9 CHAIRPERSON GRIFFIS: Thank you. All right. I
10 think it's important to say that there was a finding in terms of
11 the character of the witness, and the principal reasoning for
12 that was delved into. I think that this Board has clearly found
13 that the one specific piece of evidence, that being the Yellow
14 Pages, and the ALJ moving beyond the scope of time, and of the
15 scope of the case, and looking at that was not appropriate, but
16 that was harmless error. And that there is more substantiating
17 the other issues, and most importantly, the substantive issue of
18 operating beyond the scope of the Certificate of Occupancy, that
19 being based on materials, location and actual use; that is,
20 mixing, sorting, or actually producing material.

21 Any other comments speaking to the motion, or
22 opposed to the motion?

23 MEMBER ETHERLY: Mr. Chair.

24 CHAIRPERSON GRIFFIS: Yeah.

25 MEMBER ETHERLY: I will support the motion. I

1 believe the record supports very clearly the Board's outcome in
2 this matter. I just simply wanted to, for my colleagues, put a
3 little meat on the bone with regard to my voting negative on that
4 first issue, which is just to say I don't believe that it's
5 appropriate for parties to necessarily have to look at a
6 multiplicity of fronts from the standpoint of enforcement, so I
7 kind of lean towards the side of figuring that there needed to be
8 one selection of a venue in this case, and that needed to be it,
9 as opposed to this kind of octopus approach to litigating this
10 matter, so I just wanted to clarify that for the record, and for
11 my colleagues. But otherwise, I am in full support of the motion
12 and the outcome. Thank you, Mr. Chair.

13 CHAIRPERSON GRIFFIS: Thank you. Others? If not,
14 then I would ask all those in favor of the motion to signify by
15 saying aye.

16 (Vote.)

17 CHAIRPERSON GRIFFIS: And opposed?

18 SECRETARY BASTIDA: The Staff would record the vote
19 5-0. Mr. Griffis moving, and Ms. Renshaw seconded. Ms. Mitten,
20 Mr. Etherly, and Mr. Levy voting on the affirmative. Thank you.

21 CHAIRPERSON GRIFFIS: Thank you very much. Okay.
22 That would then end the May 14th, 2002 Special Public Meeting, and
23 that was the exciting stuff, so the rest of it is going to be
24 pretty dry, just to prepare everybody in the audience.

25 (Whereupon, the proceedings went off the record at

1 10:30 a.m.)
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