

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 12, 2009

The Special Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Marc D. Loud, Chairman, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC D. LOUD Chairman
SHANE L. DETTMAN Vice Chairman

ZONING COMMISSION MEMBER PRESENT:

ANTHONY HOOD Chairman

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
BEVERLEY BAILEY Sr. Zoning Spec.
JOHN NYARKU Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on May 12, 2009.

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

2 9:38 a.m.

3 CHAIRMAN LOUD: This meeting will,
4 please, come to order. Good morning, ladies
5 and gentlemen. This is the May 12th Public
6 Meeting of the Board of Zoning Adjustment of
7 the District of Columbia. My name is Marc
8 Loud, Chairperson. Joining me today are Vice
9 Chair Shane Dettman, to his right, Anthony
10 Hood, Chairperson of the Zoning Commission.
11 To my left is Mr. Cliff Moy, Secretary of the
12 BZA, Ms. Lori Monroe of the Office of Attorney
13 General and Ms. Beverley Bailey, Zoning
14 Specialist, in the Office of Zoning.

15 Copies of today's meeting agenda
16 are available to you and are located to my
17 left in the wall bin near the door. We do not
18 take any public testimony at our meetings,
19 unless the Board asks someone to come forward.

20 Please, be advised that this
21 proceeding is being recorded by a Court
22 Reporter and is also webcast live.

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1 Accordingly, we must ask you to refrain from
2 any disruptive noises or actions in the
3 hearing room. Please, turn off all beepers
4 and cell phones.

5 Does the staff have any preliminary
6 matters?

7 MR. MOY: Yes, we do, Mr. Chairman,
8 but staff would suggest that we take that up
9 when we call the case.

10 CHAIRMAN LOUD: Thank you, Mr. Moy.
11 Then let's proceed with the agenda.

12 MR. MOY: Good morning, Mr.
13 Chairman, Members of the Board. The one case
14 for decision this morning is the Appeal
15 Application No. 17902 of Joseph Park. This is
16 pursuant to 11 DCMR 3100 and 3101, from an
17 August 29, 2008 decision of the Zoning
18 Administrator, to revoke Certificate of
19 Occupancy No. 167331, for a liquor store.
20 This is the Oasis Liquors in the R-4 District
21 at premises 1179 3rd Street, N.E. The property
22 is in Square 773, Lot 277.

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1 As the Board will recall on April
2 14, 2009, the Board completed public
3 testimony, closed the record and scheduled its
4 decision on May 12th of this year. The Board
5 requested additional information to supplement
6 the record from the appellant as well as
7 allowing responses from parties, which is the
8 ANC and DCRA, the appellee.

9 In your case folders, Mr. Chairman,
10 are the following filings. There are two
11 filings from the appellant. The first is
12 dated April 24, 2009, which contains business
13 franchise tax documents and is identified as
14 Exhibit 28. We also have a filing also from
15 the appellant which is a letter dated April
16 24, 2009 identified as Exhibit 29. The Board
17 should consider this document as a preliminary
18 matter.

19 There are finally two other
20 filings. First, from the appellee, which is
21 DCRA, they submitted a letter in response to
22 the appellant's letter of April 29th and the

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1 appellee's filing is identified as Exhibit 30.

2 Their response is to the appellant, Exhibit
3 29.

4 And of course, in response to the
5 appellee's filing from the appellant, which is
6 dated April 28, 2009, this document is -- this
7 post-hearing document is Exhibit 31. This
8 filing has an A and a B. Mr. Chairman, first
9 is the Board should act on whether to admit
10 the appellant's filing. And of course, in the
11 appellant's filing, it also contains a motion
12 to strike the appellee's response submission
13 of Exhibit 30.

14 After the Board's action on these
15 preliminary matters, the Board is to act on
16 the merits of the appeal.

17 The staff also notes for the Board
18 that the variance application for the subject
19 property is also on the docket for this
20 morning. And that completes the staff's
21 briefing, Mr. Chairman.

22 CHAIRMAN LOUD: Thank you, Mr. Moy.

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1 I think the Board has reviewed all of the
2 pleadings, post-hearing pleadings as well as
3 the record, underlying record in the various
4 testimony transcripts, etcetera.

5 I think we do want to move to
6 deliberation on the merits. With respect to
7 the preliminary matters, I think that what is
8 -- what was submitted in Exhibit 29 was
9 specifically requested by the Board,
10 specifically, I'm referring to the
11 unincorporated business franchise tax returns.

12 MR. MOY: That's Exhibit 28, Mr.
13 Chairman.

14 CHAIRMAN LOUD: 28. Thank you for
15 the correction. Everything after that,
16 however, we did not leave the record open for
17 and I don't believe that we are going to allow
18 any of those beyond the tax filings into the
19 record. But let me defer to Board Members for
20 weighing in as well. I think by their silence
21 they agree.

22 COMMISSIONER HOOD: Well, I would

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1 just concur.

2 CHAIRMAN LOUD: Okay.

3 COMMISSIONER HOOD: I would concur
4 with you, Mr. Chairman.

5 CHAIRMAN LOUD: Thank you, Mr.
6 Hood. Mr. Dettman nodded his head as well.
7 So we will allow the unincorporated business
8 franchise tax returns into the record and
9 proceed to deliberation on the merits.

10 I'll start us off, colleagues, and
11 just give a brief summary of the case before
12 us. The appellant in this case is Oasis
13 Liquors, which is located at 1179 3rd Street,
14 N.E. since 1986 and has operated it as a
15 liquor store from 1986 until the period that
16 is in dispute in the case before us.

17 During the period of appellant's
18 ownership, the property zoning changed from
19 CM-1, which allowed the liquor store as a
20 matter-of-right use to R-4 and that was in
21 1997. The zone change made the liquor store
22 nonconforming, but allowed its continued use

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1 in the R-4 as long as the use was not
2 discontinued for a period of three years.

3 Appellant concedes that failing
4 health led to the liquor stores inactive
5 status in September 2006 and, thereafter,
6 appellant sought a purchaser through
7 advertisements, through real estate brokers,
8 through business brokers. Appellant also
9 contends he maintained his lottery and food
10 licenses, that he paid taxes and he kept the
11 property in good repair.

12 Then after two years without
13 successfully selling or leasing the business,
14 appellant did locate a leasee and secured
15 what, I believe, is a 10 year/5 year option
16 lease for the liquor store with a Mr. Akyun
17 Nguyen. I hope I'm pronouncing that correctly
18 and that was a lease dated April 30, 2008.

19 DCRA issued a change of ownership C
20 of O for the Oasis Liquors on May 30, 2008 and
21 a building permit for some interior
22 modifications on July 18.

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1 Then on August 29, 2008, DCRA
2 revoked the May 2008 C of O citing as evidence
3 the following: No. 1, appellant lapsed basic
4 business license for the Oasis Liquors, which
5 expired July 31, 2003. Secondly, on November
6 9, 2005, a letter from the Alcohol Beverage
7 Regulation Administration stating that the
8 liquor store was not operating and required
9 licensure safekeeping. And third, D.C. WASA
10 sewer records showing that, from April 2005 to
11 May 2008, water service had been disconnected
12 at the premises.

13 The appellant thereafter filed a
14 timely appeal October 28, 2008 claiming error
15 and estoppel in the pleadings that were
16 submitted.

17 At the hearing on 4/14/2009, DCRA
18 alleged -- I'm sorry, DCRA called a number of
19 witnesses including the Zoning Administrator,
20 the DCRA inspector, Mr. Pemberton, six
21 neighborhood witnesses who testified variously
22 that they had not seen activity at the liquor

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1 store since either 2004 or 2005, depending on
2 the witness.

3 Mr. Park testified on his own
4 behalf at the hearing and submitted unsworn
5 letters from a Terez White and a James West
6 that each patronized the store respectively in
7 March '06 for White and April '06 for West.

8 Park also submitted an American
9 Express merchant financial activity statement
10 for the period 12/12/07 to 1/11/08 showing a
11 \$5.95 transaction during that period and a
12 document showing a \$96.90 receipt for what
13 appears to be a phone product. The latter
14 document, however, has a handwritten date on
15 it and lacks any reference to OAS on the face
16 of the document.

17 The ANC did submit a great weight
18 report, that is our Exhibit 15. The ANC
19 representative also testified at the hearing
20 and the ANC supported revocation citing
21 largely the evidence contained in DCRA's
22 notice to revoke C of O No. 167331.

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1 Post- hearing submissions, I think,
2 Mr. Moy you covered those. Those include the
3 appellant's unincorporated business franchise
4 tax returns for tax year 2001 and then 2004
5 through 2008.

6 Moving forward with the
7 deliberation this morning, let me start by
8 stating the rule under which this case is
9 being reviewed. The provision of law that
10 covers this case is found at 11 DCMR Section
11 2005.1, which provides -- and I'm going to
12 read the whole section into the record. Bear
13 with me for just a second. Thank you, Mr.
14 Dettman. I think it's important to establish
15 the legal framework for all of our cases, but
16 especially this case, because the law that
17 governs how we're deliberating, I think, is
18 very important.

19 Section 2005.1 reads as follows:
20 "Discontinuance for any reason of a
21 nonconforming use of a structure or of land,
22 except where governmental action impedes

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1 access to the premises, for a period of more
2 than three years shall be construed as prima
3 facie evidence of no intention to resume
4 active operation as a nonconforming use. Any
5 subsequent use shall conform to the
6 regulations of the District in which the use
7 is located."

8 The BZA has previously addressed
9 this provision, including in one of our appeal
10 cases, No. 15893, which is the Appeal of
11 Malone. In fact, in the Malone case, the
12 history, some of the history of section 2005.1
13 is discussed and it's noted how they
14 originally proposed, but ultimately rejected,
15 the language of the section included the
16 following:

17 "Intent to resume active operation
18 as a nonconforming use shall not alter the
19 provisions of this chapter." That's Malone
20 case at page 4. As stated, that language was
21 rejected by the Zoning Commission.

22 The District case law is consistent

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1 with the approach that ended up in our final
2 version of the regulations very specifically
3 incorporating an intent to abandon requirement
4 into the discontinuance element.

5 The test in the district continues
6 to be: No. 1, the intent to abandon and No.
7 2, some overt act or failure to act which
8 carries the implication of abandonment. And
9 that case is George Washington University vs.
10 D.C. BZA, 429 A.2d 1342 (1981) case.

11 In sum, for discontinuance to be
12 shown under section 2005.1, the law requires
13 more than a mere lapse of time or discontinued
14 use as we might interpret that term in plain
15 language or layman's terms. The law also
16 requires this intent to abandon.

17 As we seek to apply that standard
18 to this case, I could not find, in our record,
19 the evidence that would lead me to the
20 conclusion that for any three year period, the
21 appellant evidenced the required intent to
22 abandon.

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1 If we were to start in 2003, which
2 is part of the Zoning Administrator's initial
3 letter to the appellant, with the lapse of the
4 basic business license and then seek a
5 discontinuance period of three years with 2003
6 as the benchmark, then we would still have the
7 tax record filings from 2004/2005, which
8 showed income for both of those years, 2006
9 which did not show income, but did show that
10 repairs were being made on the property, all
11 of which would suggest to me that there was an
12 intent throughout this period to continue
13 operation of the liquor store.

14 In addition to that, there was the
15 receipt for a transaction in late 2007, early
16 2008, which I referred to earlier, the
17 American Express merchant financial activity
18 statement showing a \$5.95 transaction. And as
19 I indicated, the appellant showed repairs made
20 on the property in '06.

21 And very significantly, the
22 appellant showed an executed lease to a third

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1 party that is dated April 30, 2008 for the
2 operation of the Oasis Liquors and I think
3 it's a permissible inference that the
4 negotiations which led to the final execution
5 of that lease on April 30, started sometime
6 prior to 2008. And in fact -- April 2008 and,
7 in fact, March 24, 2008 the appellant paid the
8 safekeeping fee for his liquor license,
9 something that he had also done in 2007 and
10 2006.

11 Park also testified that the liquor
12 store was his sole means of retirement and
13 that while he did start to suffer from failing
14 health in 2006, he continued to open the store
15 a couple times a week after encountering those
16 health issues.

17 There were six witnesses who
18 testified to not seeing the liquor store open
19 after 2004. And the witnesses were credible
20 and all of them testified that they were there
21 at different periods of time, including
22 walking their dogs, some on weekends, some in

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1 the morning in route to Metro and so on and so
2 forth. And that testimony was considered by
3 me.

4 But on the other hand you have
5 directly running up against that testimony the
6 tax filings records, the payment of the
7 safekeeping license, you have the execution of
8 the April 2008 lease, all of which again tend
9 to suggest, to me anyway, that there was never
10 an intent to abandon. And I don't think that
11 one could infer from the neighbor testimony,
12 although it was very strong testimony, that
13 they were able to monitor the premises 24
14 hours a day, 7 days a week for a three year
15 period, such that one could draw the
16 conclusion that there was an intent to abandon
17 the store.

18 So I'll conclude, in a sense, the
19 way I started out by saying that I could not
20 look in our record and find a three year
21 period where it could be shown that Park
22 intended to abandon the liquor store. I think

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1 that our rule in this case, particularly as it
2 has been interpreted by the courts, is a very
3 high standard to satisfy in terms of intent.

4 And in this particular case, I
5 don't think that it was satisfied. There was
6 some testimony regarding the lapse of the
7 basic business license in 2003 and that
8 marking the beginning of a period of
9 discontinuous use and/or abandonment. I think
10 an inference can be made with respect to that,
11 particularly in light of the tax records that
12 were later filed, that that could have been
13 simply a sloppy management.

14 It could have been the fact that it
15 was a new requirement in the District around
16 that time and small businesses were not
17 prepared to or did not understand fully the
18 implications of it. But I don't think failure
19 to file the BBL equates to an intent to
20 abandon the liquor store.

21 I have the same conclusion with
22 respect to the cutoff of the water. I think

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1 that there -- I think an inference can be
2 drawn that that was bad management, that it
3 might be shrewd management in the sense that
4 one might now want to continue to incur those
5 expenses as one was cutting down to one or two
6 days a week being open.

7 But again, that alone, particularly
8 in the face of these business filings,
9 business tax filing, showing some income on
10 the property and showing some repairs to the
11 property and the lease, water cutoff alone, I
12 don't think amounts to or rises to the level
13 of substantiating a claim that there was an
14 intent to abandon operation of the liquor
15 store.

16 So with that, I think what I will
17 do is open the floor up for feedback from
18 other Board Members.

19 VICE CHAIRMAN DETTMAN: Thank you,
20 Mr. Chairman. I think I end up where you are
21 at. I don't think that the nonconforming use
22 was discontinued for a period of three years.

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1 The period that I really focused in on was
2 the three years previous to the issuance of
3 the Certificate of Occupancy and so that would
4 put me in May of '05 to May of '08 and so kind
5 of looking at the evidence collectively that
6 fit within that time period.

7 As I said, I come out where you are
8 at. I think you have done a great job of
9 laying out the evidence on both sides of the
10 case and so I won't go into that.

11 I will just make a couple comments.

12 You know, you had mentioned that there was
13 very strong evidence on the side of DCRA from
14 the neighbors. But as you say, you know,
15 there is really no possible way that we can
16 draw the conclusion that this place was being
17 monitored 24 hours a day, 7 days a week.

18 And if, in fact, it was and it was
19 shown that the doors never opened, it was
20 never open for business, that really just goes
21 to the passage of time. And I think, you
22 know, as you mentioned previous cases, Court

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1 of Appeals cases, the lapse of time is really
2 only one consideration that should be taken
3 into account when trying to conclude whether
4 or not a use has been discontinued.

5 On the other side, we also -- in
6 addition to the executed commercial lease that
7 was submitted by the appellant, which was
8 signed by Akyun Nguyen on April 30, 2008, in
9 addition to that we also have letters
10 indicating interest from several people. And
11 I believe it was found that a couple of people
12 from the neighborhood showed interest in
13 either purchasing the property or purchasing
14 the business.

15 And so to me that says that in one
16 way or another this business and property was
17 at least being advertised for continuing the
18 existing nonconforming use. So in addition to
19 those things, I looked at the franchise tax
20 documents, as you had mentioned. I think that
21 there is evidence on the side of DCRA, as you
22 mentioned, the water and the lapse in the

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1 general business license, that go towards
2 their case.

3 But looking collectively at the
4 evidence, I think that the discontinuance did
5 not occur.

6 CHAIRMAN LOUD: Thank you, Mr.
7 Dettman. Mr. Hood?

8 COMMISSIONER HOOD: I'll just --
9 not be belabor or to keep repeating anything
10 I've heard, I would just say that the
11 appellee, I thought, made a very good case, as
12 you mentioned, Mr. Chair, and also, with the
13 neighbors and everything and their comings and
14 goings and seeing what is actually taking
15 place at the liquor store.

16 But when the evidence came in for
17 the tax filings and the BBL license and all
18 those issues, for me, it was the tax filings
19 which let me know there was no intent to
20 abandon. And if you look at our law, 20 --
21 2005.1, I don't see in this record where the
22 appellant intended to abandon or discontinue

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1 the use.

2 CHAIRMAN LOUD: Thank you, Mr.
3 Hood. Why don't we then -- why don't I make a
4 motion and then see if there is further
5 deliberation, a second and then we can move to
6 close out our deliberations?

7 I would like to move that we grant
8 Appeal No. 17902 of Joseph Park regarding the
9 revocation of C of O 167331. Is there a
10 second?

11 VICE CHAIRMAN DETTMAN: Second.

12 CHAIRMAN LOUD: Is there further
13 deliberation? Okay.

14 All those in favor say aye.

15 ALL: Aye.

16 CHAIRMAN LOUD: All those opposed?
17 Any abstentions? Mr. Moy, can you call back
18 the vote?

19 MR. MOY: Yes, sir, Mr. Chairman.
20 The staff would record the vote as 3-0-2.
21 This is on the motion of the Chair, Mr. Loud,
22 to grant the appeal of Joseph Park, seconded

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1 by Mr. Dettman, the Vice Chair. Also in
2 support of the motion, Mr. Hood. And there
3 are no other two Board Members participating.

4 So again, the final vote to grant
5 the appeal 3-0-2.

6 CHAIRMAN LOUD: Thank you, Mr. Moy.

7 Do we have any further agenda items for the
8 decision meeting this morning?

9 MR. MOY: No, sir, that completes
10 the Special Public Meeting.

11 CHAIRMAN LOUD: Thank you.

12 (Whereupon, the Special Public
13 Meeting was concluded at 10:01 a.m.)

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