

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56

REGULAR MEETING OF THE
BOARD OF ZONING APPEALS
City Council Chambers
300 Park Avenue
Falls Church, Virginia 22046
Thursday, November 12, 2009

1. CALL TO ORDER:

Chair Stoodley called the meeting to order at 7:27 p.m.

2. ROLL CALL:

Members Present: Mr. Castillo (arrived late)
Mr. Murphy
Mr. Stoodley
Mr. Taylor
Mr. Williamson

Administrative Staff Present: Mr. John Boyle, Zoning
Administrator
Mr. John Foster,
City Attorney

3. MINUTES AND RESOLUTIONS:

October 15, 2009 Meeting Minutes
Resolution from October Meeting (V1496-09)

CHAIR STOODLEY: Because it affects tonight's proceedings, we're first going to look at the draft minutes from October 15th because there were some resolutions in there we need to approve before we go on to the first order of business.

I'll turn it over to Mr. Murphy to go through the draft minutes for corrections.

MR. MURPHY: We'll go through the draft minutes, call out any changes by page.

I have a correction on page 6, line 298. It should read "or the appropriate code as recodified."

MOTION: Mr. Williamson moved, and Mr. Murphy seconded, to approve the minutes of October 15, 2009, as amended.

Upon voice vote, the motion passed unanimously.

CHAIR STOODLEY: October 15, 2009, meeting draft meetings are approved as final.

Next is the resolutions from the October meeting.

MR. MURPHY: I'd like to check with the Board. We have two versions of the resolution before us. We have one that came in our package and we have one that we circulated just after the meeting last time that went around for corrections, etcetera.

I would propose that we use the version that we had circulated. If you want to take a look at that real quick, I can pass it on to you. This includes the draft I put together and the comments that Mr. Castillo had on the resolution.

MR. WILLIAMSON: This looks okay.

MR. MURPHY: Do I have a motion to approve?

MOTION: Mr. Williamson moved, and Mr. Murphy seconded, to

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

57 approve the Resolution as circulated following our
58 previous meeting and just reviewed and will be entered
59 in the minutes by Mr. Murphy.

60
61 CHAIR STOODLEY: All in favor, a voice vote?

62
63 Upon voice vote, the motion passed unanimously.

64
65 CHAIR STOODLEY: The resolution from October meeting is approved
66 unanimously.

67
68 4. OTHER BUSINESS: None.

69
70 5. OLD BUSINESS:

71
72 CHAIR STOODLEY: Gentlemen, I realize many of you are here for the new
73 business. I'm going to try to rush through. I know you've got other appointments.
74 We've got to take things in order.

75 The old business is a continuation of V1497-09, application for variance of
76 38-28 (B)(5)(d) which has now been changed to allow an unenclosed porch to project
77 12.5 feet into the existing front yard instead of 8 feet, on the premises known as
78 515 South Spring Street, Lot 22, Section 3, RPC #52-602-022 of the Falls Church
79 Real Property Identification Map zoned R-1A, low density residential, by Rolando
80 Henriquez, property owners Juan Pablo and Maria F. Henriquez.

81 CHAIR STOODLEY: So you've already been sworn in previously. Does anybody
82 else want to speak on this matter?

83 Seeing none, we'll continue with Mr. Boyle.

84 MR. BOYLE: The Board will recall where we left off last month, staff
85 offered to do a field inspection of the property with the hopes of identifying any
86 peculiar features. Staff provided a memo to the BZA on November 3rd that should
87 have been in your packet along with a photograph.

88 And just summarizing the memo, staff noted that there is a considerable
89 slope in the rear yard that begins roughly at the rear foundation wall and climbs
90 severely towards the rear. And further, that may indicate why the house was
91 situated so far forward on this property. And we offer that and the photograph of
92 the property for consideration by the Board to see if it complies or makes this
93 variance request eligible under Section 48-172, the powers of the BZA to grant
94 variances.

95 And with that, we'll defer to the applicant.

96 CHAIR STOODLEY: All right. Just note that there are only four members, the
97 fifth member is not going to be here until after 2000. And you have to get three
98 votes in your favor. So you have the option now to continue again if you choose or
99 what do you want?

100 THE APPLICANT: We'll still go ahead.

101 CHAIR STOODLEY: So would you make your presentation.

102 THE APPLICANT: Yes. I know you did the research and I did some myself.
103 And what I found is that, well, we talk about it before, why no one has applied for
104 variances before. And I think it was because this request was being looked as
105 maybe as a new construction and it's just an addition and it's being looked into
106 the current Code and maybe looked into the Code that the house was built, in that
107 year. And if there are several houses on this street which they have porches added
108 to it. You have 513, 509, 507, 508 that have porches added to it.

109 So there were no variances applied to it so I think that the Code that the
110 houses that was built that year, that is what was applied to it.

111 CHAIR STOODLEY: All right.

112 THE APPLICANT: And if you want the hardship, I think the current Code is

113 the hardship.
114 CHAIR STOODLEY: Yeah. I'll have to agree with you on that. You can't
115 argue that point.
116 Okay. Mr. Boyle, anything to add?
117 MR. BOYLE: No, sir.
118 CHAIR STOODLEY: All right. I'll open it to members of the Board. Who
119 would like to go first?
120 Mr. Murphy.
121 MR. MURPHY: I guess I'll repeat my thinking on this last time, that there's
122 three conditions that we have to find before we can grant a variance. One, I'm
123 completely comfortable with, that the authorization of the variance will not be of
124 substantial detriment to adjacent property and the character of the district will
125 not be changed by the granting of a variance.
126 I agree with that 100 percent. I don't think adding a porch to this house
127 will have any detrimental impact on the surrounding properties or the character of
128 the neighborhood.
129 Where I get caught is the other two requirements, that the hardship is not
130 shared generally by other properties in the same zoning district in the same
131 vicinity, where it appears and I would ask staff to confirm this, that most of the
132 houses, if not all of them, seem to be set approximately the same or were averaged
133 when they were built. That was my recollection of the neighborhood, that it is
134 generally shared. It's not something that's just applicable to that property.
135 And the other one is the undue hardship. That is a lower standard than was
136 the case in the past with a hardship approaching confiscation. But I'm just not --
137 I'm not comfortable that that level of undue hardship has been reached.
138 That's my thinking on these. I think it would be a wonderful addition. I
139 think it would be in character with the neighborhood. I just don't feel at this
140 point in time that we have the authority to do this because it is a problem that's
141 generally shared throughout the entire neighborhood there on Spring Street.
142 And while I oftentimes have trouble with our current Zoning Code as well,
143 I'm just not sure that approaches the level of undue hardship.
144 CHAIR STOODLEY: Thank you, sir. You want to go next?
145 MR. WILLIAMSON: Oh, no.
146 CHAIR STOODLEY: You want to go ahead.
147 Mr. Taylor.
148 MR. TAYLOR: I agree.
149 CHAIR STOODLEY: Anything else to say? It's up to you now.
150 MR. WILLIAMSON: Well, I guess what I would say is looking at the three
151 conditions, I think we would agree on no substantial impacts to people in the
152 surrounding areas. We've had several neighbors submit supporting documents and
153 essentially testify as well that they would be in support of this.
154 Second one is that I believe it's not shared by others in the area, and
155 while it's true there are porches with a similar set up, I guess staff did study
156 this and there are what looks like unique topographical differences for this house
157 that require the house to be set further forward on the lot as I read the
158 information. I think that is unique to this site, which would make it unusual.
159 And I guess the third thing that I would say in terms of undue hardship,
160 we'd be talking, if I read the minutes last time correctly and discussed, we'd be
161 looking at a two foot wide porch which I think any of us would agree is a hardship,
162 in light of this being put in place to accommodate, if I understood correctly from
163 last time, parents that are moving in to the home.
164 So the location of the driveway absent a porch, it just seems like there are
165 -- I'm not sure how you could have such a house with a 2 foot porch or no porch
166 given the intended use that the Board had approved last time. When I hear these
167 things, I actually see several reasons that would suggest that there is undue
168 hardship, that is, in fact, not shared.

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

169 CHAIR STOODLEY: Thank you, sir.
170 MR. TAYLOR: Could I ask a quick question? I think I may not have
171 interpreted what you said in the same way. You said you went to the property and
172 there was a slope in the back yard?
173 MR. BOYLE: Yes.
174 MR. TAYLOR: Did you mean to say that none of the neighbors have a slope in
175 their back yard?
176 MR. BOYLE: There is a slope in that neighborhood. I would say it's
177 probably the most severe on this particular property. And that it begins right at
178 the rear of the home whereas on some of the other properties there is a flat area
179 behind. So in the picture you can see how quickly the fence sections climb away
180 from the house.
181 And it's an assumption but I believe that probably had something to do with
182 the placement of that house so far forward which is what is impacting how much
183 porch they have available.
184 And I think also if you looked on this property at where a porch could go,
185 there is a driveway on one side of the property. There is insufficient setback on
186 the other. Really, the only other place would be the rear yard which would require
187 some excavation into that slope. There is a slope on other properties but it's
188 more severe on this property and it begins more to the back of the house.
189 MR. TAYLOR: So in your professional opinion you would say these
190 circumstances are, in fact, unique to this house and in your opinion would satisfy
191 Number 2?
192 MR. BOYLE: I think that's for the Board to decide but there is a condition
193 on this property that's more severe than we see elsewhere in the neighborhood.
194 CHAIR STOODLEY: Mr. Murphy.
195 MR. MURPHY: One of the things we asked staff to do was look at the location
196 of the other houses in that area. Is this one set substantially more forward than
197 all of the other houses on this street or are they all essentially aligned within
198 this neighborhood?
199 MR. BOYLE: They're all essentially aligned very similarly. I think the
200 presence of that slope probably impacted where these houses were set. To use the
201 back yard on this property I think is what would be unusual compared to the others,
202 being that the slope begins much closer to the back of the house.
203 CHAIR STOODLEY: All right. Mr. Murphy, do you have any questions?
204 MR. TAYLOR: One more follow-up on that. Just to clarify, the front setback
205 on similar houses in that area are the same or --
206 MR. BOYLE: Yes. We don't have plats for those but looking at the overhead,
207 they appear to be relatively similar.
208 MR. TAYLOR: Thank you.
209 CHAIR STOODLEY: Okay. Gentlemen, I personally examined the property at
210 some length. The back yard is sloping, I understand that. So are others. On your
211 side of the street there are 13 properties, I think on your block. Only two or
212 three, I'm sorry, only three of the 13 have porches. I think they're all set about
213 the same, as best I can tell, I'm not a surveyor, about the same distance back.
214 A porch is a convenience, not a necessity, so I can't justify granting a
215 variance for that because if we do, then we have a variance for ten other
216 properties and I don't think that that's what the Code calls for. So I would vote
217 against it.
218 Can I have a motion please? Somebody.
219
220 **MOTION:** Mr. Murphy moved, and Mr. Taylor seconded, for denial
221 of the request for Variance V1497-09 on the conditions
222 that the hardship is generally shared by other
223 properties in the zoning district and that we have not
224 shown undue hardship with the request of the porch.

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

225
226 CHAIR STOODLEY: Do I have a second?
227 Do I have an alternative motion?
228 MR. TAYLOR: I second.
229 CHAIR STOODLEY: Okay. We have a second. Voice vote please.
230 RECORDING SECRETARY: Mr. Stoodley.
231 CHAIR STOODLEY: No. I'm sorry. Yes.
232 RECORDING SECRETARY: Mr. Murphy.
233 MR. MURPHY: Yes.
234 RECORDING SECRETARY: Mr. Williamson.
235 MR. WILLIAMSON: No.
236 CHAIR STOODLEY: Mr. Taylor.
237 MR. TAYLOR: Yes.
238 CHAIR STOODLEY: Okay. Your variance has been denied. I'm sorry to have
239 bad news for you but I hope you enjoy at least the second story addition. Thank
240 you, sir.
241
242 6. PETITIONS: None.
243
244 7. NEW BUSINESS:
245
246 CHAIR STOODLEY: We have new business. We're in receipt of the recodified
247 City Code. Anybody have questions on those? Same old code but new numbers.
248 We have two appeals we're going to hear simultaneously. That is A1498-09,
249 an appeal of the Zoning Administrator's decision to deny an occupancy permit for a
250 restaurant and nightclub with dancing and entertainment, at 6763-R3 Wilson
251 Boulevard, RPC #218-006 of the Falls Church Real Property Identification Map zoned
252 M-1 light industry, property owner Eden Center, Inc., appellant is Virginia Icon,
253 Inc, of Vienna, Virginia.
254 Second one, because they're all together, we're going to hear A1499-09, an
255 appeal of the Zoning Administrator's decision to deny an occupancy permit for a
256 restaurant and nightclub with dancing and entertainment at 6763-R3 Wilson
257 Boulevard, the same address, RPC #52-218-006 of the Falls Church Real Property
258 Identification Map, zoned M-1 light industry, property owner and appellant Eden
259 Center Inc..
260 So we have the same property, same address, with two appellants. The first
261 is the Eden Center and the second is -- I'm sorry. The first is the VA and the
262 second is -- so we've got all that.
263 Mr. Boyle, proceed.
264 MR. BOYLE: Yes, Mr. Chairman. This is, as you stated, an appeal of a
265 decision that was rendered by way of Occupancy Permit application by a third party
266 who's not involved in this appeal.
267 I think because there will be considerable discussion related to what their
268 basis of appeal is and what have you, we'll hold our staff report until they
269 complete their presentation.
270 And so with that, I think we'll defer to the applicants. But did the Board
271 want to or has the Board decided to hear these two matters together?
272 CHAIR STOODLEY: Yes.
273 MR. BOYLE: We'll defer to the applicants in their presentation then.
274 (Witnesses sworn.)
275 CHAIR STOODLEY: You each need to sign in with your names, address, and who
276 you're representing please.
277 MR. FRANK: While we sign, I'll introduce myself. I'm Alan Frank and good
278 evening. I'm general counsel and senior vice president of Capital Commercial
279 Properties, the owner of Eden Center.
280 CHAIR STOODLEY: Of Eden Center, yes.

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

281 MR. JENKINS: If I may, I'm Mark Jenkins and I represent Virginia Icon. I'm
282 going to refer to Virginia as the tenant, because they are the tenant of the space.
283 MR. NGUYEN: Sir, my name is Gene Binh Nguyen. I'm the general manager for
284 Diamond Restaurant.
285 CHAIR STOODLEY: Thank you.
286 MR. JENKINS: Which is the tenant.
287 CHAIR STOODLEY: The current tenant.
288 MR. JENKINS: Yes.
289 CHAIR STOODLEY: Not the tenant that's applying.
290 MR. JENKINS: Correct.
291 CHAIR STOODLEY: We need to get that all straightened out. I read so much
292 stuff.
293 MR. JENKINS: If I may, I have some other stuff including some documents.
294 I've got some legal argument. I realize you won't be reading it here but I also
295 have some documents that I'd like to give to each member because I'm going to be
296 referring to it as I go along.
297 CHAIR STOODLEY: Since the staff has deferred for their report, Mr. Foster,
298 I presume that is for you.
299 MR. FOSTER: I agree with what Mr. Boyle had said. I'll let the appellant,
300 since they have the burden of proof, go first.
301 MR. JENKINS: I might not quite agree with that but I understand what he's
302 saying.
303 MR. FRANK: If I may interject, we're trying not to repeat ourselves here
304 and we tried to do that in the appeal itself, I'm going to try to do it here
305 tonight. As far as the record goes on this, we ask that the whole record be the
306 same record really for both of us, everything that's said.
307 CHAIR STOODLEY: That's fine. That's why we're hearing them together.
308 MR. FRANK: Thank you.
309 CHAIR STOODLEY: Who wants to speak first?
310 MR. JENKINS: Mr. Chairman, I will go first.
311 Again for the record I'm Mark Jenkins. I represent the tenant, Virginia
312 Icon.
313 I do think and as I stated in my supplemental statement, we think it's very
314 important that we go through a little bit of the history here as well as the
315 history of the use that was approved in 2003, because a lot of that detail in our
316 view is missing from the staff report and is critical to this matter.
317 The matter arose -- well, let me back up. Virginia Icon has occupied the
318 space since August of 2003. They received the Certificate of Occupancy on that
319 date. This particular matter arose in August of this year roughly. Virginia Icon
320 had placed the -- had entered into an agreement to sell its assets to another user
321 called Paper Moon. Paper Moon's use was whatever they said it was in their
322 application. They were not speaking for the current tenant. They simply came in
323 and applied for a new Certificate of Occupancy.
324 Now in response to that, the City denied that and the problem here today is
325 this: The denial letter, which is the letter from which the appeal has come, of
326 course, makes certain characterizations and conclusions, both about the basis for
327 denying that permit as well as about the -- what is the current use, claiming that
328 the current use has evolved from a restaurant to a night club.
329 Both of those, we think, have created a problem for the tenant, rendered us
330 an aggrieved party, and that is the basis for the appeal.
331 So ultimately we think that while it is true that the application by the
332 former applicant is in a sense moot because his contract has been terminated, it's
333 not relevant. Nevertheless, the legal effect of this letter really and completely
334 is such that we believe that it is a denial of rights of my client and we seek that
335 the entire letter be reversed.
336 CHAIR STOODLEY: All right, sir. And who is the current user?

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

337 MR. JENKINS: Virginia Icon, using the name Diamond. They had a Certificate
338 of Occupancy since 1993.

339 And let me go immediately to that history. In about January of 2003 --
340 sorry. It wasn't 1993, 2003. In January of 2003 is when Mr. Nguyen first
341 approached the City about taking over this space. He'd entered into negotiations
342 to lease it. He was going to make a serious investment.

343 CHAIR STOODLEY: To lease it from Eden Center or from Virginia Icon?

344 MR. JENKINS: Eden Center. Virginia Icon is the tenant. Mr. Nguyen is in a
345 loose sense, is all one. He's the manager for Virginia Icon.

346 CHAIR STOODLEY: I understand that.

347 MR. JENKINS: So Eden Center is the landlord. And he was, the applicant
348 again, the tenant was very concerned about making sure he knew exactly what he
349 could do there.

350 And if you look at Exhibit 1, you'll see a letter from Mr. Nguyen to Mr.
351 Khokhar, who's then a building official with the City, and he outlines exactly what
352 he wanted to do. And this included a restaurant but with entertainment. And
353 specifically at times using a cover charge and at times carding people at the door
354 in order to enforce the ABC laws and to prevent underage drinking.

355 So he very plainly informed the City of what the kind of use that he wanted
356 to do. That, in turn, led to this submission of the application for a building
357 permit which is Exhibit Number 3.

358 Between those two periods of time as set out in some detail in an affidavit
359 that is attached as Exhibit 2, which I'll summarize, Mr. Nguyen engaged in
360 discussions with Mr. Khokhar and other members of the City staff to discuss exactly
361 the matters that he raised in his letter. He was very careful to do this because
362 he was about to invest somewhere in the neighborhood of \$500,000 to build out the
363 space. He needed to know what he would be permitted to do.

364 So if you read the staff report for this matter, you will see no references
365 to all of this. You'll see no references to the building permit.

366 I also want to draw your attention to Exhibit 3. The Certificate of
367 Occupancy was Exhibit 4. Exhibit 3 is a floor plan. This floor plan, it will bear
368 us to take a look at it. This floor plan was part of the plan submitted to the
369 City in March of 2003 as part of the application for the Certificate of Occupancy
370 and the building permit.

371 And it laid out and we have copies of the plans here stamped by the Health
372 Department. Mr. Frank has a set because he reviewed them as the landlord. This is
373 what was submitted and approved by the City in 2003. And it shows the details of
374 the principal use, a restaurant. It shows the kitchen, 500 plus square feet. It
375 shows a very large dining area and somewhere by my count, about 60 sets of tables
376 and chairs or booths for serving dinner.

377 It also shows a small stage and a small dance area. This follows up
378 directly from Mr. Nguyen's letter in which he said he was going to have
379 entertainment and dancing. He told the City what he desired to have.

380 There was no response to him that indicated that this was a problem. What
381 the City was being presented to, in our view, was a restaurant with a principal use
382 which is permitted by right in the M-1 District, with an accessory use, in the
383 dance area and the stage, small, as you can see just physically in the layout.
384 They're not large, not overwhelming. And that is what he applied for and, in fact,
385 that is what was approved in 2003.

386 Now when that was approved in 2003, at the time and even today, to my
387 knowledge there is nothing in your Ordinance that says, and let's set aside for the
388 moment what I'm going to call the operating features. The operating features are
389 this age limitation and minimum food purchases which the City letter identified as
390 the two problems in this case.

391 In other words, as I understand the City letter, what I'm calling the City
392 letter which gave rise to this complaint, the existence of admission fees or cover

393 charges and carding at the door so that people under 21 can't enter at certain
394 times, those two things transform a restaurant into a nightclub. And for that
395 reason that led to the conclusions of the City letter.

396 Now let's set that aside just for a moment for analysis. When this --
397 CHAIR STOODLEY: Will you have the record show that Mr. Castillo just
398 arrived.

399 RECORDING SECRETARY: Yes.

400 CHAIR STOODLEY: Go ahead. I'm sorry to interrupt you.

401 MR. JENKINS: When this Certificate of Occupancy was approved, and again,
402 setting aside what I'm calling these operating features, assuming that was not an
403 element, there was nothing in the City that prevented music or even dancing that
404 was an accessory use to a restaurant from operating every evening and up to 1 a.m.

405 I cite in my supplemental statement you have an ordinance that specifies how
406 late these places can stay open. So what this means is that as of 2003 the City
407 necessarily, in our view and as a matter of law, approved the restaurant use and
408 the accessory use shown on these plans, described in the letter, in other words and
409 in other ways was built out in accordance with the approved plans.

410 The Zoning Administrator when he reviews such an application by a specific
411 reference in the ordinance, formerly Section 38-7, has an express duty to insure
412 that that plan conforms with the Zoning Ordinance. And the necessary effect of the
413 approval in 2003 was to precisely determine that this use, principal use, accessory
414 use, complied with all matters such as parking, signage, and all other zoning
415 matters. That is the history that is left completely out of the staff report and
416 the City letter.

417 Now it also happens to be the case in our view that even these operating
418 features, the cover charge and the minimum food purchase criteria that is of
419 concern to the City, whereas you see from Exhibit No. 1 plainly disclosed to the
420 City and to the building official.

421 I might note that Mr. Khokhar who received that letter is one of the two
422 people who signed and approved the Certificate of Occupancy. He signed it and the
423 then Zoning Administrator signed it, Mr. Rock.

424 So those very features were disclosed to them and I think it's a necessary
425 part of this approval as well.

426 Mr. Frank is going to speak to this but there are other restaurants in the
427 City, similar zoning, classified in a similar way as a restaurant, that have music
428 and entertainment. In fact, some are more extensive than this and who sometimes
429 impose cover charges, not always, and sometimes have a card at the door to enforce
430 ABC laws.

431 The importance of all of this is that when you look at the City letter, what
432 we don't see is that this use has already been approved and so the ability of the
433 City to create what amounts to a new definition, which we don't think is authorized
434 anyway of something called a nightclub, is simply contrary both to the actual
435 history of this site as well as how the rules have been applied to others in the
436 City.

437 And among other things, this is something that really is prohibited by
438 Virginia Code Section 15.2-2311(C) which is the provision that provides that when
439 certain determinations are made by a locality and 60 days lapses, then after that
440 they're not subject to any reversal or modification or revocation of such a
441 determination.

442 All of this as well demonstrates that the premise of the City letter is
443 simply factually inaccurate. There has not been an evolution in the use here. The
444 City letter assumes and asserts without identifying any evidence that there's been
445 some evolution in how this has operated since day one. Well, now we see that it's
446 entirely consistent with what was approved because as Mr. Nguyen can say, I'll
447 summarize it but he can certainly say himself, there was not a change to the
448 physical configuration affecting say the dance area or the stage throughout the

449 entire use until this matter arose. He ran the business exactly as he described it
450 in his letter and in other discussions with the City. He did not expand
451 facilities.

452 And I might add that I submitted a Freedom of Information Act request to the
453 City and both the request themselves as well as the full response are in Exhibit
454 10. And what I was seeking was any information, any documents, any files for a
455 history that might indicate that there had been some sort of a change or assertion
456 of a change by the City and there are no such documents. There are also no
457 documents reflecting any zoning violations, assertions of a zoning violation or any
458 complaints by neighbors.

459 So to this extent, I also provide you in the materials in Exhibit 6, for
460 example, a sample menu that has been used throughout the history of the site to
461 show it's a substantial restaurant. It has always maintained a full kitchen, a
462 full time professional chef. Depending on the size of a function that evening,
463 they have a professional waitress or waiter staff of 10 to 20. Their meals are
464 cooked in the kitchen, served to the patrons at tables. The tables themselves are
465 an investment of over \$50,000.

466 I say all this because this reinforces the fact that the restaurant is the
467 principal use.

468 You should also know that the ABC regulations and this use has always had a
469 mixed beverage license, a mixed beverage license is a license for a restaurant and
470 a restaurant is a defined term in the ABC regulations and it requires substantial
471 entrees. It requires equipment facilities and personnel that are able to serve
472 that substantially entrees and serve them at tables. So there is another guarantee
473 that all along this use has been a principal use of a restaurant. That is what it
474 was designed to be with an accessory use of music and dancing, which historically
475 has occurred Friday and Saturday evenings.

476 Lately it's only been one night a week because of the economy but it's never
477 been more than two nights a week.

478 Now I have to mention a few other matters as well, somewhat technical but
479 they're very relevant.

480 In my appeal papers, and I expand on this in the supplemental statement,
481 there is a Virginia code provision that provides a definition and some guidance on
482 what it defines as a public dance hall. In turn, that statutory definition is used
483 in the City Code. And I provide you the citations and copies of both of those
484 sections in Exhibits 8 and 9. To try to summarize, the ordinance definition is
485 very broad. It really covers anything, any public place where dancing occurs and
486 in which some form of compensation is paid. It is so broad, I think the plain
487 meaning is it would cover, even something you might want to describe as a
488 nightclub.

489 Now, it also ends up with an exemption. It says, However in a city, a
490 nightclub that has a dance area of less than 10 percent of the total floor area,
491 and which is licensed under the ABC regulations with a mixed beverage license,
492 shall not be treated as a public dance hall.

493 I think the plain meaning is, given the way it's defined, that is telling
494 you that you want to call it a night club, call it anything you want because
495 calling it that, the labels don't matter. What matters is the function. I think
496 that means by State law as well as under the City Code, a restaurant remains a
497 restaurant with the principal use when it's dancing and associated music presumably
498 are confined to an area less than 10 percent. That has always been the case here.

499 CHAIR STOODLEY: Sir, you have to wrap up in about two minutes.

500 MR. JENKINS: There are some other legal issues which I analyze in the
501 supplemental statement. I think I'll defer to that for now. I think the primary
502 matter that we wanted to stress to the Board this evening was the importance, and I
503 request that my supplemental statement and the documents be submitted into the
504 record, the importance of that because in working with a client and trying to

505 reconstruct the past, it became quickly evident that this was missing from perhaps
506 the assumptions of the Zoning Administrator and they're critical to see that he
507 really has -- was approved for what he was doing now. There has not been an
508 evolution and being approved as an accessory use, there really is no factual or
509 legal basis for the action taken in the City letter.

510 It appears to me as if there was a reaction to the application from the
511 contract purchaser who described things in a very broad and perhaps imprecise way.
512 It's unfortunate. We had no prior knowledge that that had occurred. We learned
513 about it later. But that I don't think can affect the validity of the Certificate
514 of Occupancy or the use as it presently exists today.

515 CHAIR STOODLEY: Thank you, sir, and an excellent presentation. One
516 question to clarify in my own mind, what we're really talking about tonight is
517 whether Diamond can continue their current business in the current form, is what
518 we're saying?

519 MR. JENKINS: I think so because the City letter, it's a little unclear to
520 me.

521 CHAIR STOODLEY: I understand that. If you were to win your appeal, what
522 would the result be?

523 MR. JENKINS: Any characterization of its current use as a nightclub,
524 impermissible nightclub would be stricken.

525 CHAIR STOODLEY: What about further occupancy by other contractual
526 arrangement?

527 MR. JENKINS: Well, that any person who comes in has to apply for a
528 Certificate of Occupancy.

529 CHAIR STOODLEY: Thank you.
530 Your turn, sir.

531 MR. FRANK: Thank you. I'm Alan Frank. I'm general counsel and senior vice
532 president for Eden Center.

533 I jumped into this because, quite honestly, this tenant and I have known
534 each other since the beginning. Gene came to me in 2003 and he wanted to open up
535 this restaurant. And I told him that's fine. We worked out a deal. We said the
536 buildout is tenant's expense. This is the rent, we worked out everything, go to
537 the City, make sure everything you want to do there is okay. Because it's a non
538 contingent lease. I'm not going to write it and then wait and see. But I'll wait
539 and I'll be patient it and if it takes you a month or two, whatever it takes, I'll
540 wait for you.

541 He did that. This gentleman went to the City. He wrote a letter. He's as
542 honest as they come. This is what I'm going to do in the premises. I'm going to
543 run a restaurant and I'm going to have entertainment. He did that. He does it
544 much less today than he used to do it. It's only once a week or so and maybe a
545 special event.

546 He has been straight with me for all these years and that is why I decided
547 that Eden Center should get involved in this. He spent a ton of money fixing this
548 place up and he's run a very sound business there since 2003. He's been a good
549 taxpayer in the City.

550 I have a package. It's not too much but I'll pass it around and I'll
551 mention a couple of things.

552 The first is just a plat of the center. If you're not familiar with it,
553 that is Eden Center. We have about 200,000 square feet of retail area on the
554 ground floor there and Gene's restaurant is located in the center. It's about
555 10,000 square feet.

556 I think the City has said, the determination has said that he's operating a
557 night club and a nightclub is an unlawful use in the zone. We disagree with all of
558 that and --

559 CHAIR STOODLEY: Excuse me. You're disagreeing it's unlawful or it's not a
560 nightclub?

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

561 MR. FRANK: It's not a nightclub. It's not --
562 CHAIR STOODLEY: Is a night club unlawful in the district?
563 MR. FRANK: There is no such thing. There is no definition of a night club
564 in the City. What he does is legal under the ordinance.
565 Mr. Boyle addressed his determination letter to the applicant for the
566 Certificate of Occupancy. It was Paper Moon. The City obviously went far to
567 discourage the assignment of Gene's lease to Paper Moon. Gene terminated the Paper
568 Moon deal. He didn't like the way things were going. He did it. He got rid of
569 Paper Moon. And then I asked the City, now that Paper Moon is gone, would you
570 please withdraw this letter and let this man operate his business. And I've asked
571 that on several occasions. The City has refused.
572 I've asked the City, Well, is there something else that we can do? What are
573 you concerned about? And the City has not responded to that. They suggested that
574 we enter into a memorandum of understanding and I asked what's going to be in the
575 memorandum of understanding and I don't know where it is. So here we are tonight.
576 The determination raises concern for Eden Center.
577 It's interesting that even November 6, 2009, in Mr. Boyle's memorandum, he
578 takes the first 2 whole pages of that memorandum and talks about Paper Moon. I
579 still don't know why when the City has known for, I don't know, two months, that
580 that deal is gone, it's dead. It's a moot issue. And we're today only for Gene
581 and his restaurant. I don't know. They won that battle, but here we are.
582 The remainder of the letter is the thing that causes us concern and that's
583 the number 2 part that says that Diamond is a nightclub and the operation of a
584 nightclub at that location is unlawful.
585 Let me say that in my observations, I've been a part of Edens Center since
586 1995. I know what goes on there on a day-to-day basis. I know how much
587 entertainment is in Gene's restaurant, I have been there myself. We have worked
588 with the City very hard. I think the second thing, even the City in their Treats
589 and Eats, they put up this beautiful thing, they include Diamond Restaurant. They
590 even say there is entertainment available there, that little dot that you see. It
591 means that there's entertainment available.
592 We worked with the Economic Development Department. We tried to be good
593 citizens of the City. And the City though places weight on the allegation that
594 this has evolved into a nightclub. It's become something today that it wasn't
595 before. And what is their evidence for that? Some Internet advertising that gets
596 around for the events or entertainment that takes place once a week or so at the
597 restaurant.
598 Now of course there isn't any other significant advertisement because you
599 advertise when you have a singer. You have to pay the singer to come in. You have
600 to make money on it. I really applaud Gene. He's an entrepreneur. He owns this
601 business. He has the Present restaurant, a very fine restaurant up on Arlington
602 Boulevard, and another restaurant in Annandale. He knows that if he's going to
603 bring in a singer, he's got to charge money. He's got to bring in people to the
604 Center to see that, so he can make a go of it.
605 The City would have this Board believe that the word, the use of the word
606 "nightclub" in an advertisement turns them into the same, even though it happens
607 once a week when he has entertainment. But I want you to realize that that word
608 first is not defined and it's loosely used. It's a marketing word. It means that
609 we're going to have a singer in or something to come see. There's some
610 entertainment that night. That's all it means.
611 You know, there's another word that's loosely used in the City, "tavern."
612 And I could go to the Dogfish Tavern, another word that's not defined in the City
613 ordinances. It's not a tavern, you know. I know what a tavern is. If you look it
614 up in Webster's, it's a bar. It's a place that serves liquor. But the City is not
615 complaining that the Dogfish Tavern exists.
616 Let me show you one letter that we received from the Chamber of Commerce.

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

617 CHAIR STOODLEY: I think we've read that, sir.
618 MR. FRANK: Yeah. And they're supportive of the appeal, I think I can just
619 say that in general.
620 And I'll go through several of the restaurants. I have five that I wanted
621 to show you.
622 What we have in the City, we have the State Theater which is a proposed use
623 and their CO is Performing Arts Center. I don't know what that is exactly,
624 Performing Arts Center, but it's a nightclub, okay. Maybe that's what the City
625 should call it. It's a place where there's performances. There is food, there is
626 drink. I don't know. But that to me, the fact there is a lack of parking, it's in
627 the middle of a place where there is residences and other businesses. It has off-
628 site parking. It has --
629 CHAIR STOODLEY: Sir, we're not here to denigrate and examine the utility of
630 other places.
631 MR. FRANK: Okay.
632 CHAIR STOODLEY: So if you'd just restrict yourself to the appeal.
633 MR. FRANK: Let me just briefly continue this because I need it to be in the
634 record.
635 This place does exist. It has entertainment. It has age restricted
636 entrance. It has cover charges.
637 The Clare and Don's Beach Shack, same thing. They have entertainment
638 regularly, more than once a week. The Dogwood Tavern has entertainment. Their CO
639 says they're a bar, something that's not in the City ordinance. It's not
640 permitted. They have entertainment three times a week.
641 The Bangkok Blues Restaurant has live entertainment five nights out of the
642 week, cover charges and all that. They have a full schedule listed on the Internet
643 of three or four months worth of entertainment and they call themselves a club.
644 So these words are loosely used. And I can leave it at that as far as all
645 the other examples in the City.
646 I have seen the entertainment act at the Diamond Club. He has singers in
647 from Viet Nam. It's a culturally important thing. It's the only place around here
648 that a Vietnamese singer can come in. He has a Vietnam Idol just like we have, and
649 he brought her in. I remember that.
650 We only ask for a couple of things really. One is that as Mr. Boyle
651 suggested in his memorandum, the City may want to pass an ordinance. And if they
652 do, that's fine. And we would be delighted to work with the City on that
653 ordinance. But they don't have one now. We operate under the existing law, not
654 what might come down the road.
655 The second thing is that we believe that Eden Center tenants have to be
656 treated just like every other business in the City. We are in a M-1 light industry
657 district. It's a broader zoning than the B district, in the B-1 and B-2, the
658 downtown area, yet there is numerous operations in this district that have live
659 entertainment, five nights out of the week, and Gene only has the occasional one
660 night a week. We have all the parking in the world at Eden Center at night on
661 site, self-contained, and all these other places spread out their parking
662 throughout the community.
663 One last item. I want to go to the ordinance itself, the M-1 ordinance
664 where the City has set forth principal uses, conditional uses, accessory uses, and
665 prohibited uses. This City has 38 prohibited uses in that ordinance. If they
666 wanted to prohibit entertainment, if they wanted to prohibit liquor, if they wanted
667 to prohibit dancing, they could have had Number 39, 40, 41. They chose not to do
668 that. It's not a prohibited use in this zoning district.
669 I want to conclude that Gene has always abided by the law. He has been
670 straightforward with the City and to essentially call him an unlawful business is
671 improper and we ask that this Board reverse the opinion of the Zoning
672 Administrator. I ask that everything that I've said, all the documents set forth

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

673 tonight and the exhibits be part of the record.

674 I appreciate your time.

675 CHAIR STOODLEY: Thank you, sir.

676 Mr. Boyle, will you make sure this all gets into the record.

677 MR. BOYLE: Yes, sir.

678 CHAIR STOODLEY: Mr. Nguyen?

679 MR. NGUYEN: I don't have anything really anything more to add onto this.

680 Just a little bit. I work really hard with all my saving and before I invest
681 tremendously through this business in the City and I was very carefully check
682 because I don't want to do a business behind anybody back. The landlord, the City,
683 the police, or ABC. So I check with all the law carefully. I met with Mr. Khokhar
684 a few times and everything that I wanted to do was exist in the City before.
685 Galaxy was there for ten years at Hillwood Avenue. The Ritz was in Eden Center.
686 So we have this tradition in the Vietnamese community for the last 20 years.

687 And these people retired and didn't want to do it anymore so there was a
688 need. So there was a need, I want to do that. There was a need and I check to
689 make sure before I dare make a commitment to the landlord and to build out.

690 And I just ask the Board to please carefully look into this because, you
691 know, that's our livelihood. Beside my family, we have about 50 employee that work
692 there. That's the livelihood of 50 employees. We are trying to do our very best
693 to provide safe, fun entertainment and restaurant serving the community and also a
694 livelihood for all the families, the people that work there with us right now.

695 CHAIR STOODLEY: Thank you, sir.

696 MR. BOYLE: I believe I'll defer to the city attorney.

697 MR. FOSTER: Thank you, Mr. Boyle.

698 I just want to respond to the points that have been raised this evening.
699 I'm not going to repeat what was laid out in Mr. Boyle's memorandum.

700 First of all, the argument I think that we first heard this evening was that
701 the applicant back in 2003 submitted information to the City. And in point of
702 fact, the information appears that it was submitted not to the Zoning Administrator
703 but the Building Code Official, Mr. Khokhar, who is not here. And most importantly
704 for the Zoning Administrator's purposes and for the Board of Zoning Appeal's
705 purposes is the application for Certificate of Occupancy which is the document that
706 matters.

707 And what it says on that application for Certificate of Occupancy is
708 restaurant. It doesn't talk about entertainment or late night entertainment or
709 anything of that nature. It simply says restaurant. Clearly and I think by the
710 appellant's own admission, this is much more than a restaurant today. We have late
711 night entertainment. We have, as is indicated in the Zoning Administrator's
712 package, I think an event referred to as Naked Sushi, and another one appearing to
713 be a reggae rock band, also clearly not simply a restaurant.

714 Related point that was raised by Mr. Jenkins, I think he seemed to be
715 arguing that, well, the building official knew about this or purportedly knew about
716 the entertainment in 2003 and so therefore the City is now barred, the Zoning
717 Administrator is now barred from coming in, determining that this nightclub use is
718 not permitted.

719 Virginia law clearly allows the Zoning Administrator to come in. In fact, a
720 case that was cited by Mr. Jenkins supports that proposition, Gwinn versus Alward,
721 where you had a situation there where the locality over decades had continued to
722 issue permits and then in 1984 decided we're not going to allow the issuance of
723 permits anymore and we've determined that this is not authorized under our Zoning
724 Ordinance.

725 Supreme Court of Virginia said clearly the locality is authorized to do
726 that. That basically is a similar situation to the situation here. What triggered
727 this review is the Paper Moon came in for approval of a Certificate of Occupancy,
728 listed it accurately as being a restaurant, entertainment and nightclub use, and

729 that triggered the Zoning Administrator to not only look at the proposed use by the
730 Paper Moon but also the current use on the property.

731 And when he investigated it, determined that there was a nightclub use that
732 was going on in the property today and that led to bullet number 2 of his
733 determination letter, concluding that it had evolved into a nightclub use and it
734 was clearly not permitted.

735 Final point, essentially although they don't use this word in their papers,
736 they're arguing that the City is estopped and the Zoning Administrator is estopped
737 from claiming that now this is a nightclub use and it's not permitted. You know,
738 Mr. Jenkins is a good attorney. He knows not to use that term but that's the
739 reality of what they're alleging here and the Gwinn versus Alward case clearly
740 says, the sovereign, in this case the City of Falls Church, and the Zoning
741 Administrator are not subject to the rules of estoppel and can in this
742 determination conclude that a nightclub is not permitted. So that's the first
743 point.

744 The second point I wanted to respond to is this argument that somehow
745 because City Code talks about dance halls and establishes hours for dance halls,
746 that that somehow excuses everything else that the appellant is alleged to have
747 done here and bars the Zoning Administrator from making the determination that he
748 did.

749 Let's look at that Code Section in its proper context. That's a criminal
750 code section. It's in the miscellaneous offenses section of the City Ordinance,
751 specifically 28-21 that talks about closing hours and it's a Class 3 misdemeanor to
752 operate in violation of that.

753 The very next section of the Code is assault and battery, and the next one
754 after that is peeping toms and eavesdroppers. Okay. What they're trying to do is
755 use a criminal provision involving dance hall hours and apply it to the civil
756 context that we're in here with respect to determining whether a nightclub is
757 permitted under the civil zoning ordinance. And it's really an apple and orange
758 comparison that does not and should not really carry much weight with this Board.

759 I think what matters is the plain dictionary definition and meaning of what
760 is a nightclub and that's laid out in the Zoning Administrator's memorandum. I'm
761 not going to repeat it verbatim. But clearly this satisfies the definition of a
762 nightclub, the Diamond Club. It's operated late at night, they provide
763 entertainment late at night, they charge a cover charge, again by their own
764 admission. It's much more than simply dancing. And that's why this dance hall
765 argument doesn't really apply. It's not just dancing. It's music. It's other
766 entertainment as is laid out in the Zoning Administrator's memorandum. So the
767 attempt to bootstrap that dance hall definition into this context doesn't work.

768 Finally, this is a point that was made more in the memorandum but I do want
769 to respond to it and that is there is an argument that, well, because this use as
770 all uses that serve alcoholic beverages are controlled by the Virginia ABC, that's
771 really where the regulation and control should come in and we shouldn't have the
772 Zoning Administrator weighing into that.

773 Again, as a matter of law, that is wrong. The Virginia Supreme Court has
774 said in the Tiny House case as well as the Windy Hill case, simply because the
775 Virginia ABC may have some regulatory authority, local zoning officials also have
776 parallel authority to enforce their zoning ordinance. And for the reasons that Mr.
777 Boyle has determined that this is a nightclub, it is not permitted, we do have the
778 ability to go in and make that determination.

779 The other point that I wanted to respond to is at the conclusion in his
780 remarks, Mr. Frank said, Well, the City lays out a number of prohibited uses and it
781 hasn't expressly prohibited night clubs, so therefore this nightclub should be
782 permitted.

783 The problem with that is that the City's ordinance is what's called an
784 inclusive ordinance under the law. What that means is if a use is not expressly

785 permitted, it's not permitted. And nowhere in the Zoning Ordinance is a nightclub
786 listed as a permitted use, specifically in the M-1 district where this property is
787 located. If it's not listed as a permitted use, it's not permitted. That was the
788 main legal point that I wanted to respond to.

789 I also would like to also make this body aware of some statistics that
790 Police Chief Reitze and his staff have assembled regarding calls out to the Diamond
791 Club. We have Chief Reitze, here this evening in case there are any questions. I
792 hope you received the memorandum that the chief and his staff put together earlier
793 today but it lays out starting in 2003 when I believe the Diamond Club opened for
794 business.

795 MR. JENKINS: We didn't receive it.

796 MR. FOSTER: I'm sorry. I thought you all did. My apologies. I got it
797 just today myself. You're welcome to have that.

798 It lays out by calendar year the calls for service. You can see in 2003,
799 the total calls were 34. Of those 34 calls, the number that involved disorderly
800 conduct or alcohol-related or public nuisance calls were 8. And of those 8, you
801 can see in 2003 there were 5 that involved fights involving assaults. But to be
802 clear, no weapons were involved, and then it lists the dates.

803 And then we go through for each calendar year. In 2004, there were 102
804 calls for service. I want to be clear, this is not for the Eden Center as a whole,
805 this is only for the Diamond Club. And then again, the subset for disorderly and
806 alcohol related and public nuisance calls is 13. I'm not going to repeat it. You
807 can certainly read it yourselves.

808 But the concern there is and this is another thing I think motivated the
809 Zoning Administrator in his determination is the public safety aspect of this.
810 Although this came in as what is listed as a restaurant in 2003, I don't know of
811 any restaurants that have any, you know, police service calls, let alone this
812 number that involve disorderly conduct, alcohol-related problems, and fights,
813 assaults, and some involving -- there whether a couple highlighted here that
814 involve assaults on police officers.

815 This is much more than a restaurant. It's evolved into what is a nightclub
816 as determined by the Zoning Administrator and therefore we'd ask that the
817 determination be upheld.

818 I'm happy to answer any questions that you may have.

819 CHAIRMAN STOODLEY: Has everyone been heard?

820 MR. JENKINS: May I be allowed to respond?

821 With all due respect, many arguments made just now simply are not the
822 arguments, are inaccurate. I do not argue that ABC regulations control. I simply
823 mentioned that ABC regulations bear upon the issue because there is a statutory and
824 ordinance definition that exempts small scale dancing at restaurants and defines
825 the word "restaurant." It would bear upon the issue.

826 I'm very familiar with Tiny House, the Tiny House case. I don't make that
827 argument and didn't. I don't make an argument about estoppel. I didn't and I
828 didn't fail to use the word for craft or technique. I well recognize that estoppel
829 does not apply in Virginia. I've known that for a very long time. That said, the
830 Board and others can, of course, read 15.2 23-11 (C) for themselves, which is the
831 one I cited about the 60 day rule and the effect of 60 days lapsing after a
832 determination has been made and apply it to the situation. You don't need to get
833 to the word "estoppel."

834 I note that counsel makes a very narrow argument. He wants to say that
835 despite Exhibit One, a letter to Mr. Khokhar, despite conversations with Mr.
836 Khokhar, despite conversations with others, and despite plans that show an
837 entertainment area, plans approved by the county, that only the Certificate of
838 Occupancy counts. And I notice that he didn't even mention the plans. Didn't say
839 a word about them. Plans showed an entertainment area. He contacted the
840 appropriate official because you submit your building plans, your application for a

841 CO, then as now, pretty much as a package. They get routed to all the offices.
842 You can see the routing slips on the approved certificate. That routing slip is
843 signed by Mr. Khokhar and Mr. Rock together.

844 Are we to suppose that it is a defense in this City that the City may be
845 excused from its consequences of approving something by the expediency of saying
846 that we don't think the Zoning Administrator actually read it, even though it was
847 the Zoning Administrator's duty to do so. Look at Section 38.7. It specifically
848 states it's the duty, not the discretion, the duty of the Zoning Administrator to
849 approve that CO and to do so after finding compliance with law. That's what he did
850 here and he did it based upon information he was provided fully by this applicant
851 describing exactly what it was then and exactly what it is now.

852 The Gwinn case is a zoning violation case where the allegation was that they
853 violated it and it was a defense, I believe, of non-conforming use. Has little
854 bearing on this issue. And once again, I'm not making an estoppel argument.

855 The public safety matters, whatever it may be, the effect of that, that has
856 little bearing on the question of whether in responding to those issues if they're
857 illegitimate, the Zoning Administrator may by administrative fiat just change the
858 zoning. Because that's what's happening here. And there is no justification for
859 that.

860 There is a public safety problem and Gene can speak to this because he tells
861 me and I think he should be heard on this, has worked with the police department
862 over the years. He's worked very close with the ABC folks and they have a role,
863 not because they're determinative but because they obviously do have a role. If
864 you let things get out of hand, ABC can revoke your liquor license.

865 This issue was never mentioned in the responses to Paper Moon. Look at the
866 FOIA request that we made and the responses. You'll see an exchange of
867 correspondence between the City and Paper Moon. City is asking questions. Are you
868 going to do this, are you going to do that. Nowhere does the City ever say, Oh, by
869 the way, we really think there is a serious public safety problem there. They
870 never mention it. They never mention it in the issuance of the City letter. What
871 prevents the City from simply approaching him as they've done in the past saying
872 what more can we do to address the problem, if there is a problem. Mr. Nguyen will
873 be happy to do that and always has. So that is a bit of a canard.

874 In sum, quite frankly, I think the presentation thus far really confirms a
875 material part, the fact that the City unfortunately and with respect and I'm sure
876 in good faith but nevertheless quite incorrectly has issued this City letter and
877 that it should be overruled and withdrawn in full. Thank you.

878 MR. FRANK: A couple of brief things.

879 I agree with that. I was waiting tonight, finally we're going to hear what
880 it is that made this restaurant evolve into a nightclub. I haven't heard anything.
881 There is no evidence of that fact that's been presented. This place for about 300
882 days out of the year, out of 365, is just a restaurant with no entertainment.
883 That's all it is. It's a very secondary thing on Saturday nights to have music.
884 And I'll thank the chief honestly because we worked very hard with the officers at
885 Eden Center. I know many of them personally and I know Gene does as well.

886 We had incidents at Eden Center. Actually there is a lot of entries to the
887 Center in the area of the Diamond, so we did have some problems, okay. And you see
888 this number. I've never seen this before but in 2006, we now have 47 security
889 cameras at Eden Center. The police have direct access to them. I can see it from
890 my office. We have improved lighting. And you see the end of this. I'm so happy
891 that in 2009 it's all the way down to 68 calls. It is reduced every year. 2007,
892 each year, we put in as many as we could afford to put it in, and now we're up to
893 47 -- actually 48. We just put a new one, the officers asked for a camera in a
894 certain spot in Eden Center just a week ago and we installed it already. So we are
895 working all the time with the police and I think it's working. Thank you.

896 CHAIR STOODLEY: Thank you, sir. Anything else?

897 Mr. Foster?
898 MR. FOSTER: Yes, just briefly.
899 On the issue of 15.2 2311(C), that's the Virginia Code provision saying that
900 once a Zoning Administrator or other official has taken action, you can't change it
901 after 60 days. There is a very important and I think a very applicable exception to
902 that situation here and that is nightclub was not an authorized use in 2003. It
903 wasn't a permitted use under the ordinance in 2003 and it's not a permitted use
904 today. And even accepting as true everything that Mr. Jenkins and Mr. Frank and
905 Mr. Jenkins' client has laid out as what was submitted in 2003, doesn't change the
906 conclusion here reached by the Zoning Administrator which is a nightclub is not
907 permitted under this zoning ordinance.
908 And so with all due respect to the arguments that have been made by the
909 appellant, I think the law is very clear that the determination that this is a
910 nightclub and is not permitted in the M-1 District must be upheld. Thank you.
911 CHAIR STOODLEY: Thank you, Mr. Foster. I'm going to open it to the members
912 of the Board but I want you to first address the chief and if you have any
913 questions for him.
914 I'm sorry. There is one gentleman here.
915 Do you have anything to speak about?
916 No.
917 CHAIR STOODLEY: Now I open it to the Board, questions for the chief and
918 then we'll let him go.
919 MR. TAYLOR: Just one. On this list, are any of these dates not Fridays or
920 Saturdays?
921 CHIEF REITZE: I'm sorry?
922 MR. TAYLOR: Are any of these dates not Fridays or Saturdays?
923 CHIEF REITZE: I can't tell you that for sure. Most of them are on the
924 weekends.
925 MR. TAYLOR: Okay. Thank you.
926 MR. MURPHY: I have one or possibly two. Could you tell me a little bit
927 more about what a proactive patrol is rather than a service call?
928 CHIEF REITZE: We were there in anticipation of having problems.
929 MR. MURPHY: I guess a follow-up question, there is a community police
930 station in the Eden Center?
931 CHIEF REITZE: Yes, sir.
932 MR. MURPHY: What year did that open?
933 CHIEF REITZE: That opened -- Mr. Frank --
934 MR. FRANK: 1996.
935 CHIEF REITZE: It's not used -- while it was used for our primary policing
936 unit which no longer exists. Our officers use it now for other reasons. But the
937 unit itself does not operate anymore.
938 MR. FRANK: It only operated for a few years.
939 CHAIR STOODLEY: Any questions?
940 MR. WILLIAMSON: No questions.
941 CHAIR STOODLEY: Thank you, chief. Appreciate you being here and thank you
942 for your time..
943 CHAIR STOODLEY: Mr. Murphy, go ahead.
944 MR. MURPHY: I have a couple of questions for both parties. I'll start with
945 Mr. Jenkins.
946 Has there been any action on the part of the City to revoke the existing
947 occupant?
948 MR. JENKINS: Not to my knowledge.
949 MR. MURPHY: Okay. And the next one is at the Diamond Restaurant, what
950 percent of revenue is received from food as opposed to alcohol or other
951 entertainment receipts?
952 MR. JENKINS: By ABC regulation it must be at least 45 percent food and non-

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

953 alcoholic beverages and I actually probably have some figures here.
954 MR. MURPHY: Does food and non-alcoholic beverages include the entertainment
955 receipts or is that --
956 MR. NGUYEN: No, just food and beverages only.
957 MR. MURPHY: Just food and non-alcoholic beverages.
958 MR. JENKINS: If you give me a second --
959 CHAIR STOODLEY: I think that answered your question.
960 MR. JENKINS: Okay.
961 MR. MURPHY: I also had a question for -- at least one question for either
962 Mr. Foster or Mr. Boyle.
963 Are night clubs an allowed use in any zoning district in the City?
964 MR. BOYLE: No. That term does not appear in the Zoning Code.
965 MR. MURPHY: So there are no -- there is no authorization under the Zoning
966 Code for a nightclub to operate anywhere in the City of Falls Church?
967 MR. BOYLE: That's correct.
968 MR. MURPHY: Thank you.
969 CHAIR STOODLEY: Sir, go ahead.
970 MR. CASTILLO: Is this a one shot deal?
971 CHAIR STOODLEY: You can ask as many questions as you want. These guys had
972 an hour.
973 MR. CASTILLO: Do I need to exhaust my questions now or should I loop back?
974 Because I have a lot.
975 First of all, Mr. Frank, could you tell me why you think you have standing?
976 MR. FRANK: As the owner of the property, I believe we do. And we have
977 tenants that are in business, in the restaurant business basically, and the City
978 has chosen Gene to send this to, to notify that he's a, quote, unquote, nightclub.
979 I don't know how else --
980 MR. CASTILLO: The question is how are you aggrieved by the decision of the
981 Zoning Administrator?
982 MR. FRANK: As the owner. At this point it is. You know, we have a center.
983 I think as the owner, first of all, I'm aggrieved. As the owner of the property,
984 Eden Center Inc. is aggrieved, period. But I can add to that that I'm concerned,
985 you know, in this economy we try to keep our tenants. We have 80,000 square feet
986 vacant out of a 200,000 square feet of ground floor area. That's another reason.
987 But I think just plain as an owner, we have standing as an aggrieved party.
988 MR. CASTILLO: I have some serious questions about that. And my hope is
989 that's not going to ultimately be outcome determinative.
990 I guess I also just want to make sure that I understand from everybody here,
991 is anybody now really bringing into question the first determination by the Zoning
992 Administrator or are we solely here on the second?
993 MR. JENKINS: It's kind of a subtle point. We are, and we probably need to
994 look at it. We look at the first determination. It draws a conclusion and it
995 says, an age-restricted nightclub with entertainment and minimum food purchase
996 requirement is an illegal use. Now it's responding to a specific application but
997 it's drawing a conclusion which is a determination that such a thing is an illegal
998 use.
999 I think that's wrong and for the reasons we have advanced. And the core
1000 point is what I think the other side is missing is the music, the dancing,
1001 entertainment, it's an accessory use. In that sense it is provided for in the
1002 ordinance. Provided for subject to certain conditions. It's got to be
1003 subordinate, it's got to be customary and incidental. That presumably is why Bangkok
1004 Blues calling itself a club has music five nights a week.
1005 MR. CASTILLO: Okay. That raises a question -- another one. And that is,
1006 do we need to get to the issue of accessory use? Isn't the inquiry really here --
1007 okay, which raises another one. Do we have any factual finding anywhere at all
1008 about the relative proportion of total floor space to dancing hall space here in

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

1009 the record?

1010 MR. JENKINS: You have in the record the drawings. It's exhibit Floorplan.

1011 MR. CASTILLO: And is there anybody -- because I looked at it. I thought it
1012 was about 15 percent. I couldn't tell for sure.

1013 MR. JENKINS: No, it's been scaled. Mr. Frank has done it. It's -- it's
1014 approximately almost 800 square feet which is less than 10 percent. It's a 10,000
1015 square foot space. That's correct, to my knowledge, that's never been put into
1016 question by the City. And again, these were the plans approved by the City.

1017 MR. CASTILLO: It seems to me the issue isn't accessory uses, it's the
1018 question of 10 percent versus non 10 percent. If there's under 10 percent, then
1019 there appears to be statutory permission and we don't need to go any farther than
1020 that.

1021 Yes, no?

1022 MR. JENKINS: That's one way you could analyze it. I think this is one of
1023 those cases where there's probably multiple reasons. I think another way to look
1024 at it is to say that statutory reason is an example, a statutory example of
1025 accessory use, if you want to think about it that way.

1026 But I agree with you, that that statute and the implementing City Code
1027 provision, are determinative of this issue and I argued that in my original appeal
1028 and do today. I just happen to think there's 2 or 3 others as well.

1029 MR. FOSTER: If I may respond to the question raised by Mr. Castillo on the
1030 10 percent point.

1031 Even if this is 10 percent or less at the Diamond Club, I still don't think
1032 that gets them to where they want to be. And the reason I say that, Mr. Castillo,
1033 is that the City is not limited to regulating this use or any other use in the City
1034 solely through, and to be exact it's Section 28-21 B of the criminal code. They
1035 have other tools available under their regulation, specifically the Zoning
1036 Ordinance. And as we talked about this evening, a night club use is not a
1037 permitted use under the Zoning Ordinance, separate and apart from this subset, this
1038 dance hall or dancing use. I think everybody agrees there is more than just
1039 dancing going on at this facility. We also have more general entertainment and
1040 music separate and apart from the dancing issue.

1041 MR. CASTILLO: To the extent that we're -- I think looking back on the
1042 introduction of the term "night club" in the original application has obviously had
1043 cascading effects here. From the standpoint, let's say, is the Diamond Club allowed
1044 to be exempt from being a public dance hall to the extent that it's under 10
1045 percent? I think the answer would be yes, correct?

1046 MR. FOSTER: That's correct.

1047 MR. CASTILLO: That may not be the end of the argument --

1048 MR. FOSTER: There's no question, if it's under 10 percent, I think the
1049 dance hall portion that is at issue here, as you said, is exempt.

1050 MR. JENKINS: I would like to add that the City Code provision ultimately
1051 derives from statute, 15.2 9-12. And the importance of that is if you read it, you
1052 have to read the statute and ordinance together to reconcile them. That's our
1053 goal. The fact that it appears in one place and there is a zoning ordinance as
1054 well doesn't cause them to repel each other. You have to read them together. When
1055 you read this statute of regulation, it's expressed in general terms. It says what
1056 a City or a locality may regulate or may not regulate without restriction. It's
1057 restricting and implying its rules to any power of any locality. You must conform
1058 to it in all of your code provisions.

1059 MR. CASTILLO: You're not saying the general police power that the City
1060 would have is completely subsumed by the fact --

1061 MR. JENKINS: No. This must be read in to that police power and applied to
1062 its particular context. It's a particular context of a public dance hall.

1063 MR. CASTILLO: The next question is why is this not moot? Why are we here?

1064 MR. JENKINS: It's not moot because by making these determinations, both in

1065 Paragraph 1 and in paragraph 2, paragraph 2 then making the affirmative statement
1066 that this use is illegal and it evolves, that has jeopardized the CO. I don't
1067 think it's entirely relevant that they haven't done anything yet. They have made
1068 that determination. If we did not appeal this, under Virginia law, after 30 days
1069 it would be a thing decided. If they then had come to us and say stop doing
1070 whatever we say, if we say it's a nightclub, we have no standing to have challenged
1071 that. It's Virginia law. It's very rigorous. It's 30 days and that's it.

1072 It's a classic definition of an aggrieved party. It's essentially denied a
1073 personal or property right of ours.

1074 It also affects the ability to dispose of property.

1075 I want to be careful here. My client has no intention of selling this
1076 property to Paper Moon. It's not in the picture. Apparently they weren't popular.
1077 I don't want to get into all of that but as a practical matter it's never going to
1078 happen. But that doesn't change the fact to have them make this ruling affects his
1079 ability to sell his business. That is a direct denial or interference with a
1080 property right. So I think that's the classic definition of an aggrieved party and
1081 standing and why it has to be addressed.

1082 CHAIR STOODLEY: Any other questions?

1083 MR. CASTILLO: Would you agree with that characterization? You have here
1084 what would appear to be an application that has then in the second finding a
1085 statement that could well -- it doesn't seem to have been necessary to the
1086 determination that was made. The issue is dead. The party who applied is the only
1087 one not here tonight fighting about it.

1088 MR. JENKINS: But it falls within the definition of a determination.
1089 Virginia law can be a little hazy on this. It basically says, you have an
1090 obligation to appeal anything that is a decision, a determination of a Zoning
1091 Administrator or the City officials. And you're at your peril if you don't do
1092 that. It's reasonably clear to me that if we did not appeal or this is not
1093 overruled, the City's position is going to be, I guess, whatever they want to call
1094 a nightclub is going to get prohibited.

1095 MR. CASTILLO: If we do overrule this, will the City then face some sort of
1096 collateral estoppel?

1097 MR. JENKINS: I think it will be go back to -- it won't interfere with the
1098 fact if they violate the zoning ordinance in some way in the future that will be
1099 the subject of another action which should be a specific action.

1100 Will it be a decision that the record here, I think one of the ways to look
1101 at this is what is the record here? Their argument has kind of evolved. When they
1102 did the City letter and they did their advertising, they really only mentioned age
1103 restriction and minimum food purchases as the features that transform something
1104 into a nightclub. That seems to be all they said. But now it's evolved into
1105 something else in which was one of our concerns in which -- it could be something
1106 else. It could be this, it could be that. It could be what is on the Internet.
1107 That is a little bit of a moving target. So how do we deal with that?

1108 Maybe one way to deal with it is they, the letter should have been confined
1109 to what they actually said and this case shouldn't be evolving. It should be
1110 overruled on that basis.

1111 I also recall that at the bottom of this letter the Zoning Administrator
1112 gave a notice of the right of the need to appeal. So it's just another reason why
1113 this had to come here or else again all parties could have been bound by it.

1114 I don't know how to answer the scope issue because I don't exactly know the
1115 scope the City has been arguing but to me it seems to be expanding.

1116 MR. FRANK: Let me add that I'm with you on your thinking on this. And what
1117 we had thought would be the solution to this would be the City would withdraw the
1118 letter without any prejudice and we would say that it doesn't mean anything. We
1119 can't hold it against you, that it's withdrawn. We can't do anything. And later
1120 on if you think the conduct of the way that Gene is running his restaurant is wrong

1121 in some way, that the dance floor is too big or something else, whatever it is,
1122 cite them. And we have a clean citation and we, you know, and we'll deal with it.
1123 But this is a muddled up thing because of the Paper Moon application.

1124 MR. JENKINS: I would have to say myself speaking for the tenant, I would
1125 have a little problem with that approach now because this has gone to this stage,
1126 that simply withdrawing something without prejudice because I think it leaves the
1127 issue hanging out there. There has already -- something has already occurred
1128 that's hurt my client which was he couldn't complete a sale that he wanted. Now we
1129 may all now say maybe that user wasn't ideal. That is a different question.
1130 Whoever that user is will always have to comply with the rules. Period. Will
1131 always have to apply for a new CO.

1132 But allowing this letter to hang out there is going to be a perpetual
1133 jeopardy, an interference with those rights, and I unfortunately think therefore it
1134 needs to be addressed. And I think the way to address it is simply to overrule
1135 that letter. Now that letter only identifies two things on its face so I suppose
1136 that speaks for itself.

1137 MR. CASTILLO: But again, I want to be clear about the relationship between
1138 the 2003 Certificate of Occupancy and then what was denied. There is no reason why
1139 the zoning -- there is no nexus between those two. Simply because there was
1140 something granted in 2003 doesn't mean that now the Zoning Administrator is not
1141 free to evaluate the 2009 application on its own merits, correct?

1142 MR. JENKINS: Yes. Now we may have a disagreement about interpretation of
1143 the law but that said, sure. Sure. And remember too, the other thing that has
1144 been stated here is a factual assertion. That the change of 2003 evolved. It
1145 wasn't specified very clearly but that was the end to which we obviously contest.
1146 So the effect of, if you did overrule it, would be to overrule that factual finding
1147 which I think would be personally useful because there is no evidence of evolution.

1148 MR. CASTILLO: But again, I think one of the problems we come back to here
1149 is, I think on the issue of the Diamond Club as such, it really is secondary to
1150 this whole inquiry. There aren't any findings of fact. There isn't any inquiry.
1151 We don't really know very much at all about the Diamond Club because that wasn't
1152 really the issue for the Zoning Administrator.

1153 So I mean to the extent you overrule something that didn't have a factual
1154 basis or didn't have the kind of factual record that would enable you to decide on
1155 the merits up or down as to whether or not it was conforming with whatever the
1156 applicable standard is is one thing. But I don't want to overrule something and
1157 give it more power as a sword going forward.

1158 MR. JENKINS: Maybe this helps. There is a statement in the City letter
1159 saying it evolved and it's declarative. It says was approved and subsequently
1160 evolved into a nightclub without approval. Now if as a result of this hearing we
1161 have a record that says it didn't evolve, then it's overruled for that reason.
1162 That isn't carte blanche to go do anything but it does use this record as the
1163 underpinning of a finding that Paragraph 2 should be overruled. And I think that's
1164 a key there because it is a factual assertion. It's probably a mixed question of
1165 both law and fact saying something changed, therefore we are allowed to tell you
1166 you're illegal. That can't be, in our view, shouldn't hang there. But now we have
1167 a factual record and that is the basis, I hope, for a finding that the conclusion
1168 of evolution is simply incorrect.

1169 MR. CASTILLO: And I'm sorry. I warned you. But with respect to the first
1170 finding, you are not asking us to direct the Zoning Administrator to grant the
1171 Certificate of Occupancy?

1172 MR. JENKINS: No, no. That is absolutely -- and I was thinking about that
1173 myself driving over here, perhaps the way to slice that particular salami is to say
1174 that as a practical matter we acknowledge that that one, that application is moot
1175 as terminated because the contract that would allow that person to have applied at
1176 all has been terminated for other reasons. The private contract reasons.

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

1177 MR. CASTILLO: Thank you all.
1178 MR. WILLIAMSON: Just one general question. It sounds like we're primarily
1179 disputing the use of calling it a nightclub, as I understand it. And we've got
1180 advertising and marketing materials that says Diamond Nightclub, check out the all
1181 new Diamond Nightclub. We're the largest nightclub in Virginia, things like that
1182 in marketing.
1183 Why is it okay for you to call yourself a nightclub and the Zoning
1184 Administrator not to call you a nightclub? It seems very clear, does it not?
1185 MR. JENKINS: I think it's -- I think it's a confusion of realm, so to
1186 speak. And if you need to call it something else as a practical matter, that would
1187 not be an issue. But I think there is a difference between the practical things,
1188 the way you advertise, and legal terms. As they concede, the word "nightclub" is
1189 simply not in the ordinance. That doesn't mean the Zoning Administrator in the
1190 appropriate circumstances can look to definitions. I think we're getting hung up
1191 on labels here.
1192 The real key to me is activity. What is the activity? Doesn't matter
1193 whether you call it a hedgehog or a nightclub in a certain sense. I don't mean to
1194 be flip, but this restaurant we believe was approved, nevertheless, has dancing in
1195 a confined area. Has music. This is true of other restaurants.
1196 Again, I urge you to look at Exhibit 7 which is a summary of that. I do
1197 that not for -- to excuse anything but it demonstrates a consistent interpretation
1198 by the City before that such subordinate and accessory uses are okay.
1199 The Bangkok Restaurant calls itself a club. I've got its literature. Does
1200 that make it not a restaurant under the Zoning meaning? I don't think so. And
1201 apparently the City does not think so either.
1202 Granted, you know, it could leave a wrong impression but when you also look
1203 at the layout, the physical layout, the 60 tables, the full service kitchen, that
1204 shows that primary use of eating, full staff, full chef, that's a real key. That's
1205 why I tried to emphasize that in the beginning. It shows the principal use is real
1206 here. This is not a couple of tables off to the side with a gigantic dance floor.
1207 This is a restaurant with some subordinate dancing activities and music. And that
1208 is exactly what is permitted by I think a very reasonable interpretation of
1209 accessory use that the City itself acknowledged in 2003.
1210 MR. WILLIAMSON: Okay.
1211 MR. FOSTER: Chairman Stoodley, could I just respond to --
1212 CHAIR STOODLEY: We're going to give you a chance.
1213 MR. TAYLOR: Couple of quick questions just for John. In Number 5 of your
1214 letter, you say that the Paper Moon floor plan showed a large performance stage.
1215 Did they submit a different floor plan than the one that has been in use?
1216 MR. BOYLE: That was the first time that I had seen the floor plan for this
1217 facility.
1218 MR. TAYLOR: When you say large floor plan, you're referring to the one that
1219 --
1220 MR. BOYLE: That you received.
1221 MR. TAYLOR: Okay. And the 10 percent, is that 10 percent of the public
1222 areas or 10 percent of the whole thing?
1223 MR. BOYLE: I have to admit that that language is -- it's not in the Zoning
1224 Code so that is not a section that I would apply to this review.
1225 MR. TAYLOR: And for the other John, one quick question. I think I may have
1226 missed it. Have you presented any evidence that would show that the current use
1227 has evolved over time? I've heard it several times. I see it a couple of times in
1228 print but it seems like everything I've heard from day one to day now, including
1229 this, shows that it's been doing the same thing the whole time.
1230 MR. FOSTER: All I can say is this, Mr. Taylor. The application as
1231 submitted was for a restaurant, not a nightclub. That's number one. And as I
1232 mentioned earlier, even if they came in on day one in 2003 and were operating

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

1233 exactly as they're operating today, that doesn't make it legal under the Zoning
1234 Ordinance. And the reason that it doesn't is the Zoning Administrator has
1235 determined this use is a nightclub use for all the reasons we talked about. It's
1236 got entertainment late at night, charges a cover charge and the other attributes
1237 laid out in his letter. And that is the problem that we're confronting.

1238 To be quite honest, my sense is looking at the stuff that was submitted by
1239 Mr. Jenkins and his client for the first time to me this evening where they seem to
1240 put on evidence, a letter in 2003 laying out the use, my sense is this was
1241 submitted to the building code official, not to the Zoning Administrator which
1242 would explain why it sounds like Mr. Boyle is seeing this stuff for the first time
1243 tonight. But even if it had been submitted to the Zoning Administrator, the point
1244 is that it is a nightclub, it's not a permitted use under the zoning ordinance and
1245 so therefore --

1246 MR. TAYLOR: I think I understand your assertion. I'm just asking the
1247 question: has it evolved over time?

1248 MR. FOSTER: I think the answer is, the evidence we've heard tonight is it
1249 has not evolved over time. One final sentence and then I'll conclude.

1250 That I think as a legal matter it's irrelevant because what matters is, it's
1251 not has it or has it not evolved over time. The question is, is it or is it not a
1252 nightclub? It's clearly a nightclub. I think everybody agrees it's a nightclub
1253 under the use going on there. It's not permitted under the zoning ordinance and
1254 therefore it's not allowed.

1255 MR. JENKINS: If I could answer the 10 percent question. The statute says
1256 10 percent of the total floor area of the establishment.

1257 MR. TAYLOR: Thank you.

1258 CHAIR STOODLEY: Mr. Murphy.

1259 MR. MURPHY: Couple more quick questions for I guess the City on this one.

1260 Restaurant is an allowed use by right in the B districts and the M district,
1261 etcetera. What are accessory uses not otherwise permitted which are customarily
1262 accessory and incidental to the permitted use? Is entertainment customarily an
1263 accessory to the permitted use of a restaurant? Is dancing customarily an
1264 accessory use incidental to the permitted use? What types of things suddenly go
1265 from a permitted use with accessory uses to a non-permitted use?

1266 MR. FOSTER: I would defer to the Zoning Administrator on that, Mr. Murphy.

1267 MR. BOYLE: Because the Code doesn't specifically define what a restaurant
1268 is and doesn't speak to a nightclub in any case, it's accepted practice for a
1269 Zoning Administrator to make a determination, try to see what is common practice,
1270 what is going on in the City at the moment and come up with what does the Code
1271 intend.

1272 What we have in Falls Church in the way of restaurants are generally places
1273 where families could go, where children would be allowed that are not age
1274 restricted. If there's entertainment, it is very accessory, very limited and
1275 subordinate to the primary use of a restaurant where you might expect to have
1276 primarily a food service with a bar attendant to that. Not a circumstance where
1277 there is age restriction and an emphasis on entertainment and dancing. And to that
1278 point I don't think anyone is arguing that this is a dance hall. That was not part
1279 of our consideration. That is not part of the Zoning Code. So we're left with,
1280 what does the Code intend in the way of a restaurant?

1281 In reviewing the application for occupancy, it was clear that what was
1282 intended there is not meeting the customary use of a restaurant as we see elsewhere
1283 in town here. I'm aware of no restaurant that operates in the way this use
1284 operates. So to that extent through the normal course of my duties as Zoning
1285 Administrator, when we have to define a use and see if it's appropriate and fits
1286 into the zoning district and is complimentary to the other uses and not a
1287 detriment, those are items that need to be reviewed and considered. What impact is
1288 there going to be? Is this different than other uses? And so that if it helps,

1289 that's the extent of the review we did in this case.
1290 MR. MURPHY: To make sure I understand then, the elements of this use you
1291 would not consider to be customarily accessory or incidental to the permitted use
1292 of a restaurant address the issues of age restriction and cover charges?
1293 MR. BOYLE: Yes.
1294 MR. MURPHY: If I may then present a question to Mr. Jenkins.
1295 What percentage of the hours of operation are age restricted or are part of
1296 a cover charge that require a cover charge? Is this always an operating
1297 characteristic or roughly what percentage of operating time does that age
1298 restriction or cover charge occur?
1299 MR. JENKINS: Cover charges, one way to say this, 4 hours a week. The music
1300 or the entertainment, the live music has historically been Friday or Saturdays,
1301 recently Saturdays. That's when you would have an admission charge and that's when
1302 the focus would be on, quote, age restriction.
1303 I think there is a sign on the door. They might do -- do you card every
1304 night?
1305 MR. NGUYEN: No, sir. We're a family restaurant. We serve everybody. As I
1306 told Mr. Jenkins, next week we have a birthday for one years old that have a party
1307 there. So it's -- we don't restrict age. It's not smart for a business to
1308 restrict anything. But I think for the public safety and to prevent underage
1309 drinking, we make that decision. I explained that to the city official when I say
1310 that that's in the best interest. Less money for us but it's safe for everybody.
1311 That's why we do that restriction.
1312 MR. JENKINS: The point is you're making sure that you avoid the underage
1313 drinking which seems to be a laudable thing to me.
1314 MR. MURPHY: Just to be clear then, what are the normal business hours of
1315 this establishment?
1316 MR. NGUYEN: At the current, sir, we open the business 7 days a week, 11
1317 a.m. to 10 p.m. on the normal days. On Friday and Saturday we open from 11 to
1318 around 2 a.m. So on the weekdays we close at 10 p.m. like any normal restaurant.
1319 CHAIR STOODLEY: Thank you.
1320 I'm in a quandary and the quandary is the following: One of your exhibits
1321 and there are so many exhibits here, but there are a number of other restaurants,
1322 whatever that means, in the City like Bangkok Blues, operating entertainment,
1323 liquor, ABC, all of those other things. Are you going to go after all of them?
1324 MR. BOYLE: The City has taken no action to date against any other
1325 establishment, including this one. I think a decision has been made that the --
1326 during the current zoning rewrite, rewrite of the Zoning Code that this is an issue
1327 that needs to be addressed. That what was intended as a restaurant use when the
1328 Code was drafted is different than how it's being used today. So it's -- we have
1329 no notice of violation out for any of the other establishments and we haven't
1330 conducted a review of any of these other establishments. This entire matter --
1331 CHAIR STOODLEY: I understand that. Well, that's my concern. My concern is
1332 it's parity. And while I don't argue that the Zoning Administrator has the right
1333 to review and refute uses, and I understand why this one was kicked off, but I'm
1334 not sure that it's -- that there is parity in the enforcement of the Code at the
1335 present time. Not because the Zoning Administrator, but because the City Code
1336 doesn't clarify the issue. So that's my statement.
1337 Do I have a motion, anybody?
1338 MR. TAYLOR: Can we discuss this more first?
1339 CHAIR STOODLEY: No. It's on the record so.
1340 MR. TAYLOR: Well, as far as a motion goes, I would make a motion to rescind
1341 at least parts of the letter. I wouldn't want to get into too much minutiae so
1342 procedurally --
1343 CHAIR STOODLEY: So what is the motion?
1344 MR. TAYLOR: Well, that's what I'm asking. Procedurally, is this a way to

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

1345 rescind without --
1346 CHAIR STOODLEY: Anybody else?
1347 MR. CASTILLO: My question would be the thought of vacating the Zoning
1348 Administrator's denial as -- and then listing the appeal as moot.
1349 CHAIR STOODLEY: As moot.
1350 MR. CASTILLO: As moot. There is no -- the contract has been terminated.
1351 There is really, in my mind, this is not --
1352 MR. TAYLOR: But parts of it are not moot. There are findings
1353 characterizing the existing dance floor as a large performance stage evolving over
1354 time, so if -- okay.
1355 MR. CASTILLO: The reason I would vacate it is because there is no longer
1356 any live issue as to the event that precipitated this whole thing which was the
1357 application for a new Certificate of Occupancy. So if you vacate the Zoning
1358 Administrator's denial basically it would be non-existent. It would go away.
1359 MR. MURPHY: Under what authority could we vacate a decision of the Zoning
1360 Administrator? My understanding is we have the authority to uphold or overturn a
1361 determination of the Zoning Administrator on appeal. I don't read vacate in there
1362 any where.
1363 So in some ways I think we're in a box here because we have an appeal before
1364 us. I don't think -- I certainly haven't heard a motion about lack of standing or
1365 that there is no reason or no authority for us to hear this.
1366 For the most part I personally tend to agree that both the tenant and the
1367 landlord have standing in this matter because the decision that calls the current
1368 tenant an unlawful use has immediate restrictions and impacts on his business as
1369 well as I assume there are collateral issues for a landlord who allows an illegal
1370 use to operate within his property.
1371 So standing is something I'm comfortable that the parties before us today
1372 have standing for those reasons. And I'm not necessarily as concerned about how
1373 equally the zoning code is enforced because that's not an issue. The City can
1374 decide to enforce it or not enforce it in any given case. Each case is different.
1375 What we have here is, in my mind, a determination of a use. And I'm not
1376 sure that the use "nightclub" is an appropriate determination of this use. I see a
1377 restaurant liquor license. I see a primary activity from the testimony that was
1378 presented, a primary activity of serving food and non-alcoholic beverages, or at
1379 least the plurality of their revenue, 45 percent. You assume that entertainment
1380 and alcoholic beverages are covering the balance of that, then the plurality or the
1381 primary activity is food, the primary activity is then a restaurant.
1382 In my mind then, are dancing and live entertainment, and other things
1383 periodically permissible accessory uses for a restaurant? Looking at some of the
1384 restaurants around the city, I would say that's a fairly standard accessory use for
1385 a restaurant.
1386 What I'm trying to understand is when it becomes a new use. Because I see
1387 restaurant, I see permissible accessory uses, I see other venues in the City which
1388 frankly are age restricted and have cover charges for basically every hour that
1389 they're open. And here I have a small minority of the hours that they're open,
1390 they might have an age restriction or they might have a cover charge. I've
1391 certainly been to family restaurants that after 10 o'clock have dancing and a
1392 guitar player and card everybody at the door. To me, that doesn't make it a
1393 nightclub. If this business is open 7 days a week from 11 a.m. to 10 p.m. and
1394 Friday and Saturday from 11 to 2 a.m, the age-restricted time period and the cover
1395 charges are clearly not the primary activity that is going on here.
1396 So I see a restaurant with permissible accessory uses.
1397 MR. CASTILLO: Which restaurant do you see? Which restaurant are you
1398 talking about?
1399 MR. MURPHY: The Diamond.
1400 MR. CASTILLO: Again, I return to the fact that the Zoning Administrator

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

1401 denied Paper Moon's occupancy permit. The contract has been terminated. If we
1402 were to overrule the Zoning Administrator, nothing would happen. That deal is dead
1403 and over.

1404 And so for that reason, I don't think that the Diamond Club is front and
1405 center. It may some day be but I don't think this is the appropriate action to
1406 come to some decision one way or the other on the Diamond Club. And I think the
1407 only -- on this I think the fact that so much is at stake because so little is at
1408 stake in this particular appeal and so might we modify the Zoning Administrator's
1409 decision to say that? But what are we going to modify it to? Had Mr. Boyle
1410 approved it and the contract fell through, this would be moot. So it is
1411 literally --

1412 MR. MURPHY: Had he approved it, they wouldn't be aggrieved and there
1413 wouldn't be potential damage to the existing business.

1414 MR. CASTILLO: Right, but what I'm saying simply saying up or down this is
1415 not going to revive the Paper Moon sale.

1416 MR. MURPHY: No, it will not. My concern is Point Number 2, the previous
1417 occupant, and I'll change the words "previous occupant" to "Diamond Club was
1418 approved as a restaurant and subsequently evolved into a nightclub without
1419 approval. The Diamond Club at that location is unlawful." That's the portion that
1420 I have concerns with.

1421 I agree Point One is moot. The proposed use is no longer on the table. No
1422 matter what we do, that use is gone. Any determination he made in that use has no
1423 bearing on the next applicant there.

1424 My concern is the second one. And like you said, if you take out "previous
1425 occupant" and you put in "Diamond Club", the current business at that location
1426 under Point 2 according to the City is an unlawful activity. That's where I have a
1427 concern. That's where we can modify the decision of the Zoning Administrator. We
1428 have all the powers of the Zoning Administrator within our control and power here
1429 as a BZA, but I don't think we can vacate this decision. I think we can accept it,
1430 we can deny it, we can modify it. I have no problems with Point One going through
1431 as it stands. That issue frankly is moot. It's the second point that really
1432 causes the problem.

1433 MR. WILLIAMSON: We could overturn Item 2.

1434 MR. MURPHY: We could modify his determination, yes.

1435 MR. WILLIAMSON: Modify the determination.

1436 MR. MURPHY: My understanding is we have the authority to do that under the
1437 Code. Is that correct, Mr. Boyle?

1438 MR. BOYLE: You may modify, yes. It's under Section 48-173.

1439 MR. JENKINS: Mr. Chairman, may I be briefly heard on this? I don't want to
1440 interfere.

1441 CHAIR STOODLEY: We're talking among the members of the Board. We're now in
1442 a motion.

1443 MR. JENKINS: Sorry.

1444 CHAIR STOODLEY: Do we have a motion? Any other questions.

1445 MR. CASTILLO: I'm happy if we can suspend our motion. I'm happy to get any
1446 input. If the Chair has ruled, so be it.

1447 CHAIR STOODLEY: You need to hear more stuff?

1448 MR. JENKINS: One suggestion on.

1449 MR. MURPHY: I'm willing to hear one suggestion.

1450 CHAIR STOODLEY: Okay.

1451 MR. JENKINS: My problem with Number One and I think it's well taken that of
1452 course Paper Moon is out of the picture, is simply it says it asserts age
1453 restriction, minimum food as also illegal uses. So perhaps the way to solve this
1454 would be to something like this: To the extent the determinations, plural, apply
1455 to the current use, they're reversed or --

1456 MR. FRANK: They're incorrect.

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

1457 MR. JENKINS: Or the appropriate term, to the extent this determination in
1458 paragraph one to apply to the current use, meaning something like that.

1459 MR. MURPHY: As I read it, it does not in any way apply to the current use.

1460 MR. JENKINS: Okay.

1461 MR. MURPHY: The language is "the proposed use is".

1462 CHAIR STOODLEY: The previous occupant.

1463 MR. MURPHY: We've had no testimony on what that use is. The Zoning
1464 Administrator's determination was on that use for point one. That use is moot.
1465 Now, whether that use was 24/7, age restricted and cover charged or what
1466 have you, none of that is before us. None of that has been presented as evidence.
1467 That use is off the table.

1468 MR. JENKINS: Really, I understand now. And since we've already discussed
1469 age restriction in the context of the current use and if 2 goes out, that just
1470 addresses that issue as to the current use.

1471 MR. MURPHY: I've certainly put my opinions forward as to what is an
1472 accessory use in my mind and what is a permissible accessory use and when is that,
1473 is it a majority, is it a minority, what percentage. All of that. And this will
1474 come down to whoever makes a motion.

1475 CHAIR STOODLEY: Okay. We're going to have that right now. Let's have a
1476 motion please. Somebody.

1477
1478 **MOTION:** Mr. Taylor moved, and Mr. Murphy seconded, that
1479 the Zoning Administrator's determination in
1480 regards to Certificate of Occupancy permit number
1481 20090458, dated August 26, 2009, be amended to omit
1482 Item 2, previous occupant at the location was approved
1483 as a restaurant and subsequently evolved into a
1484 nightclub without approval, the use of a nightclub at
1485 that location is unlawful, and the remaining contents
1486 of the determination be upheld.

1487
1488 CHAIR STOODLEY: Roll call vote please.

1489 RECORDING SECRETARY: Mr. Taylor.

1490 MR. TAYLOR: Yes.

1491 RECORDING SECRETARY: Mr. Williamson.

1492 MR. WILLIAMSON: Yes.

1493 RECORDING SECRETARY: Mr. Castillo.

1494 MR. CASTILLO: Yes.

1495 RECORDING SECRETARY: Mr. Murphy.

1496 MR. MURPHY: Yes.

1497 RECORDING SECRETARY: Mr. Stoodley.

1498 CHAIR STOODLEY: Yes.

1499
1500 MR. MURPHY: I have one question procedurally. Which variance or which
1501 appeal were we voting on? I think we should address each appeal request with a
1502 separate vote.

1503 CHAIR STOODLEY: I don't think you have to do that in my mind. You mean
1504 separate votes for each of the appeals or does the one vote cover both appeals?

1505 MR. FOSTER: I think that the one vote can cover both appeals.

1506 MR. TAYLOR: We started by saying we would hear them together.

1507 MR. FOSTER: Chairman, you can do one of two ways. You can have Mr. Taylor
1508 or another member of the Board make a second motion verbatim as to what was just
1509 made as to the second appeal I guess that was filed by the tenant.

1510 CHAIR STOODLEY: In order to cover our bases, let's do that.

1511 MR. JENKINS: Yes, please.

1512 CHAIR STOODLEY: We just voted on A1498-09 and then we need to vote on

MINUTES OF THE 12 NOVEMBER 2009 MEETING OF THE BOARD OF ZONING APPEALS
APPROVED 11 MARCH 2010

1513 A1499-09.
1514
1515 **MOTION:** Mr. Murphy moved, and Mr. Castillo seconded, that the
1516 same action be taken for Appeal 1499-09.
1517
1518 CHAIR STOODLEY: Roll call vote.
1519 RECORDING SECRETARY: Mr. Murphy.
1520 MR. MURPHY: Yes.
1521 RECORDING SECRETARY: Mr. Castillo.
1522 MR. CASTILLO: Yes.
1523 RECORDING SECRETARY: Mr. Williamson.
1524 MR. WILLIAMSON: Yes.
1525 RECORDING SECRETARY: Mr. Taylor.
1526 MR. TAYLOR: Yes.
1527 RECORDING SECRETARY: Mr. Stoodley.
1528 MR. STOODLEY: Yes.
1529
1530 CHAIR STOODLEY: All right, sir. Thank you for your excellent presentation
1531 tonight.
1532 MR. JENKINS: Thank you very much.
1533 8. ADJOURNMENT:
1534
1535 CHAIR STOODLEY: Motion to adjourn.
1536 MR. CASTILLO: Motion to adjourn.
1537 MR. MURPHY: Second.
1538 CHAIR STOODLEY: All in favor.
1539 Upon voice vote, the motion passed unanimously.
1540 CHAIR STOODLEY: Meeting is adjourned. (9:30 p.m.)
1541
1542 Respectfully Submitted, Noted and Approved:
1543
1544
1545
1546 Ann Hieber
1547 Recording Secretary
1548
1549 The City of Falls Church is committed to the letter and spirit of the Americans
1550 with Disabilities Act. This document will be made available in an alternate format
1551 upon request. Call 703.248.5040, TTY711.
1552
1553
1554