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Subject: no lawsuit challenging the Bagel Shop use variance

Date: Wed, 09 Feb 2011 15:48:01 -0500

from: David Giacalone

to: Historic Stockade Yahoo email list

Dear Neighbors and Stockade Lovers,

Tomorrow, February 10, is the last day a lawsuit can be filed to contest the Use Variance Jack McDonald received for his bagel shop last month from the Board of Zoning Appeals. I wanted you to know that, after a lot of consideration and preparation (to keep my options open), I have decided not to bring an Art. 78 proceeding to reverse what was clearly an unlawful action by the Board. Frankly, when Jack rejected my offer last weekend to forgo a lawsuit if he would promise not to make structural changes to the façade of the Gillette House, a lawsuit seemed even more important and urgent. But, on balance not suing makes the most sense for me in this neighborhood controversy, even if it does not satisfy the crusading or idealist lawyer in me.

Below, I have written at some length about my reasoning and my reaction to the entire bagel shop episode. Even if you have no interest in going further, I hope you'll consider reading the weblog post I just put up, "[a bagel shop - with a side order of preservation and safety](http://tinyurl.com/StockadeVigilance)," which urges even those who support the bagel shop to consider two important continuing issues: 1) preventing any structural changes to the façade of the most prominent building at the Gateway to our very special residential district; such changes are unnecessary, contrary to the usual Stockade practice, and very likely to mean the building will never go back to being residences or professional offices (making it a *defacto* zoning change); and 2) finding solutions to some inevitable traffic problems that a fastfood restaurant on that corner will surely cause. You can find the posting at <http://tinyurl.com/StockadeVigilance>

I am very aware that the vast majority of my neighbors who have spoken out on this issue want a bagel/sandwich shop in the Gillette House -- for the convenience, because they think anything is better than a vacant building, and/or because they simply want to support Jack for his Stockade successes, friendship, and generosity. That fact in itself is important to me. But, I had to weigh the popularity of Jack's proposal against the belief that the Association and Foundation were simply not asking in any meaningful way their usual questions (about the precedent that was being set regarding commercialization and preserving the residential nature of the Stockade), were forgetting about the many people who live at that end of what is a predominantly residential block, or were accepting on face value Jack's very disputable assertions about the inability to lease the building as professional offices or as residences, and about the commercialization of the relevant streetscape. I also believe that a shop selling sandwiches and soup a couple blocks from Arthur's Market will make it very difficult for that market to be revived.

Added to those issues was my surprise that the zoning board would so blatantly ignore the clearcut requirements of the law relating to granting use variances. In fact, the only phone calls I had in response to [my op/ed piece](#) about the board ignoring the law were from two separate men I have never met, who had been zoning board members in nearby towns. Each man thanked me for bringing this issue to the public, saying the lawlessness happens far too often, and both urged me to bring a lawsuit to fight the Board.

There is no doubt that a Petitioner who owned or lived in property within a few doors of the Gillette House would have won an Art. 78 lawsuit to reverse the use variance -- at the trial or the appellate level. But, the courts require that a petitioner show "standing to sue" in order to bring a lawsuit challenging government action; it is not enough just to be a member of the public. To have Standing the petitioner must be able to show special injury above the typical member of the public. The Stockade Association may have standing on Stockade zoning issues (as it did a decade ago challenging a special use permit at 232 Union St.), because the interests protected are at the core of the organization's purpose. But, an individual who lives 4 blocks away (even one who has taken thousands of photos of the Stockade over the past couple of years) could have a very hard time getting a judge who would rather not rule on the merits of the case to agree he has standing. And, a loss on the standing issue would then require a very expensive appeal, with lots of delay.

Having decided not to sue, I hope the bagel shop is a success. But, I cannot close this issue without saying how disappointed I have been that a number of people have been so very un-neighborly in response to my asking the very questions the Stockade Association would surely have asked if anyone but Jack had proposed a sandwich shop in the Gillette House. It seems some folks think it is impolite or perhaps even blasphemous to oppose, or even ask questions about, a proposal made by Jack McDonald. And how many simply did not care if the use variance is unlawful. After the ugliness of the dock issue, I would have hoped civility would be the norm now in the Stockade. More important, I hope we never again hear so many people saying that anything a particular person wants to do is okay with them, and suggesting that any opposition should be silent.

Thanks to those who have disagreed but let me know our friendship is not at stake.

And thanks for making the next Stockade controversy enlightening rather than frightening.

David