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October 3, 2017

Glenn C. Mandalas  
Baird, Mandalas Brockstedt, LLC  
6 South State Street  
Dover, DE. 19901  
Via email and regular mail.

Re: Response to Request of Determination of Nonconforming Use for 2200 Coastal Highway<sup>1</sup> (the "Property")

Dear Glenn:

This letter is offered on behalf of William Mears, building official for the Town of Dewey Beach ("Dewey"), in response to your letter dated August 31, 2017, requesting a determination of the nonconforming use for the above referenced Property owned by W&C Catts Family Limited Partnership ("Catts") and being the former site of Ed's Chicken & Crabs ("Ed's").

The Property was the former site of a food service business known as "Ed's Chicken & Crabs" which operated in Dewey for many years before the building from which Ed's operated was destroyed by fire on or about August 9, 2016. Ed's is no longer in operation.

Ed's was a food service business in Dewey prior to the adoption of the Dewey Code and was deemed a non-conforming use by Dewey officials following the Code's adoption. In 2001, Ed's filed for a business license as an "Eatery" and that business license was granted by Dewey. See, Exhibit "A" attached. It is our understanding that such license was renewed annually until Ed's went out of business in 2016 following the destruction of the business premises by fire. It appears Ed's status as an "Eatery" was recognized as a non-conforming use insofar as the Town has not been able to locate any evidence that Dewey ever granted Ed's a conditional use as an Eatery.<sup>2</sup> While the Town's documents related to Ed's is fairly sparse, it appears that Ed's was

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<sup>1</sup> Your letter indicates the address of the property at issue is 2110 Coastal Highway but 911 addressing says the address is 2200 Coastal Highway as did the business application filed by Mr. Catts.

<sup>2</sup> The Dewey Code defines an "Eatery" as "[a] commercial enterprise located within a building or portion thereof set aside for the preparation and carry-out sale and/or eat-in service of food and beverages, excluding alcoholic beverages, and which has been approved by the Town Commissioners as a conditional use." Dewey Code §1-16 (Emphasis added).

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operated from a building that contained a kitchen and food storage facilities and food was prepared on site from these facilities. The facilities also had indoor and outdoor seating for patrons. It also appears that building permits were issued over the years that allowed additions to the Ed's structure. The structure burned down in August of 2016 and the structure has not been rebuilt. Moreover, we understand that Catts has not applied for a building permit or submitted any plans to reconstruct the structure which housed Ed's in accordance with §185-59 of the Dewey Code.

Section 185-25D of the Dewey Code differentiates between four separate and distinct types of food service "uses" which include: (1) a restaurant, with or without an ABCC license; (2) an entertainment or amusement facility, with or without an ABCC license; (3) any commercial, outdoor, open-air operation, or outside service area; and (4) eateries or cabarets. Dewey Code §185-25D(1)(a)[1]-[4]. Thus, the Dewey Code recognizes that a use as an Eatery is different from a use as an Open-air Operation.<sup>3</sup> For this reason, any use of the Catts Lot for the preparation and sale of food that does not involve operations from a building or a portion thereof cannot be justly characterized as a continuation of the non-conforming use of the property as an Eatery. However, based upon your letter it appears that Catts is of the belief that the Property is nonconforming for use as an open-air food service business based on its use of the property for out-door food preparation prior to the late 1980's which it purportedly continued through 2016 when indoor cooking facilities were not usable. Again, Ed's has been licensed with the Town as an Eatery since 2001. Since that time food has been prepared on the Property from a building with indoor cooking facilities. Thus, any outdoor cooking conducted by Ed's after 2001 was done in violation of its town business license and not condoned or sanctioned by the City. Moreover, pursuant to §185-61 of the Dewey Code, "[t]he casual, intermittent, temporary or illegal use of land or buildings shall not be sufficient to establish the existence of a nonconforming use, and the existence of a nonconforming use on a part of a lot or tract shall not be construed to establish a nonconforming use on the entire lot or tract."

In Dewey, "[a] nonconforming use may not be expanded, enlarged, or converted to another nonconforming use unless approved as a conditional use by the Town Commissioners in accordance with §185-74, Procedures for approval of conditional uses. Whenever a nonconforming use of land or buildings has been changed to a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restricted use." Dewey Code § 185-56 (A). The use of the Property has clearly changed over the years. Before the enactment of the Dewey Zoning Code the Property was used for outdoor food preparation. Over time

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<sup>3</sup> The distinction between food service uses and the qualifications placed upon each use suggests a recognition that each use presents different challenges to the health, safety and welfare of Dewey and the surrounding property owners. A food service business that has an enclosed kitchen not subject to patron access or public view presents different issues concerning health, safety and welfare than an Open-Air Operation where the cooking facilities are likely visible and potentially accessible to patrons and surrounding property owners.

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buildings were constructed on the Property and the Property has been used for indoor food preparation for the last 16+/- years and accordingly has been licensed as an Eatery for that period. Once Catts permitted structures and indoor cooking facilities to be constructed on the Property and allowed its tenant, Ed's, to operate as an Eatery with indoor food preparation, Catts effectively abandoned or relinquished the use of the Property for outdoor food preparation. Its act of permitting construction of the indoor kitchen or its failure to oppose the construction of the indoor kitchen is overt evidence of its intent to abandon the prior nonconforming use. Insofar as Catts abandoned the prior nonconforming use for outdoor food preparation, it cannot now assert its right to the former use. Abandonment of an existing nonconforming use prevents re-establishment of such use thereafter. *See, Auditorium v. Board of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 534 (1952)( Court found that where petitioner had not used a building for sporting exhibitions for over 2 years but instead used the building for furniture exhibitions, the petitioner had abandoned prior nonconforming use for sporting exhibitions). Further, once Catts agreed to the conversion of the Property's use to an Eatery it is precluded from returning the Property to the less restrictive use of an open-air operation by virtue of §185-56 of the Dewey Code.

The Property has not been used as an Eatery since August 9, 2016. Under §185-58 of the Dewey Code, the Property's use as a nonconforming Eatery will terminate if the Property remains idle or unused for a continuous period of one year and six months. The City does not recognize a nonconforming use of the Property which permits open-air food preparation. Thus, Catts cannot use the Property for outdoor food preparation without securing a conditional use in accordance with §185-25D, §185-39, and §185-74 of the Dewey Code.

Sincerely,



Veronica O. Faust

VOF/mrw  
enclosures

TOWN OF DEWEY BEACH  
APPLICATION FOR BUSINESS LICENSE  
FOR THE 1/1/2001 TO 12/31/2001 LICENSE YEAR

Remittance is enclosed in the amount of \$ 200.00

Payable to: **TOWN OF DEWEY BEACH**  
105 RODNEY AVENUE  
DEWEY BEACH, DE 19971  
(302) 227-6363

PERMIT NO. 413

ISSUED 5/3

BUSINESS NAME, MAILING ADDRESS AND TELEPHONE NUMBER:

(List any and all corporate entities, limited liability companies or limited partnerships that have an interest in this business.)

Ed's (Rig. Gen's HD TA (B's))  
P.O. Box 549 Rehoboth Beach DE 19971 302 227 9484

IF THIS LOCATION IS LEASED WITHIN THE TOWN LIMITS, NAME, ADDRESS AND PHONE NUMBER OF PROPERTY OWNER:

BUSINESS TELEPHONE NO. 302-227-9484 STATE OF INCORPORATION DE

STATE LICENSE NO. 1989025524 TAX I.D. NO. 51 0285293

SPECIFIC TYPE OF TRADE, CONTRACTOR, BUSINESS OR SERVICE FOR WHICH LICENSE IS

REQUIRED: Eatery

IF MOTEL OR HOTEL - NO. OF ROOMS: \_\_\_\_\_

IF RESTAURANT WITH A LICENSE TO SERVE ALCOHOL, YOU MUST SUBMIT (ATTACHMENT "A") AND DEPT. OF HEALTH CERT. # \_\_\_\_\_

IF AN EATERY, YOU MUST SUBMIT (ATTACHMENT "B") AND DEPT. OF HEALTH CERT. # 5980383

APPLICANT'S NAME Ed's  
(Please Print)

APPLICANT'S SIGNATURE: H. Edwin Riggins DATE: 4/26/01

SEE FEE SCHEDULE ON REVERSE SIDE OF THIS APPLICATION

Applicant's Statement

- I. The EA's is in compliance with all the above provisions and is applying for a Dewey Beach Business License as an eatery or non-alcohol serving restaurant. Fee is \$200.00

Signed: W. Edwin Rydman

- II. The \_\_\_\_\_ is not in compliance with all the above provisions and is applying for a Dewey Beach Business License as an eatery or non-alcohol serving restaurant. Fee is \$1,000.00

Signed: \_\_\_\_\_