DISTRICT OF COLUMBIA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN BOARD OF ZONING ADJUSTMENT APPEAL NO. 17581
Edward B. Rooths

Appeal No. 17581 of Edward B. Rooths pursuant, to 11 DCMR § 3100.2, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs to revoke Certificate of Occupancy Permit No. CO 109753, dated September 12, 2006, for a Dry Cleaning Pick-Up Only establishment. The subject property is located in the R-5-C District at premises at 1312 13th Street, N.W. (Square 243, Lot 12).

HEARING DATE: March 20, 2007

DECISION DATE: May 1, 2007

DECISION AND ORDER

INTRODUCTION

Edward B. Rooths ("Appellant") filed this appeal with the Board of Zoning Adjustment challenging the decision of the Zoning Administrator (ZA) for the Department of Consumer and Regulatory Affairs to revoke Certificate of Occupancy Permit No. CO 109733 (the "CO") for the basement and first floor of the subject property on the grounds that the Appellant was attempting to change the use of the property from a conforming use to a non-conforming use. Additionally, the ZA determined that the property had not been used in a non-conforming manner in the three years prior to issuance of the CO.

Appellant contends that the ZA erred in determining that a nonconforming use had been discontinued. Moreover, any enforcement of the discontinuance regulation is barred by estoppel and laches. The Appellant also argues that he made no material misrepresentations in his application for the CO, and if there was any wrongdoing, it was by the staff of the ZA for giving incorrect instructions regarding how to complete the application. For the reasons set forth below, the Board finds Appellant's contentions regarding the ZA's decision without merit and accordingly denies the appeal.

The Board held a public hearing on March 20, 2007. At the close of the hearing the Board set a decision date of May 1, 2007. At the decision meeting, the Board voted ___-___ to deny the appeal and uphold the decision of the ZA.

PRELIMINARY MATTERS

Party Status. The subject property is located within the area served by Advisory Neighborhood Commission 2F ("ANC"), which is automatically a party to this Appeal.

FINDINGS OF FACT:

1. The property is located at 1312 13th Street, N.E. (Square 243, Lot 12) and is zoned R-5-C.

2. The property is improved by a three-story building, with a basement and a sub-basement. *See* Transcript of the March 20, 2007 Hearing ("Transcript") at 354.

3. Square 243 is landlocked and does not provide any vehicular access to the rear of the buildings. *See* Transcript at 502.

4. On August 20, 1947, a Certificate of Occupancy ("CO"), No. 114676, was issued for a "Barber-valet shop."

5. Subsequently, Certificates of Occupancy were issued on November 3, 1947, No. 116264, for a "Cleaning and dyeing agency"; on November 5, 1947, No. 116318, for a "Barber shop"; December 12, 1947, No. 117090, for a "Shoe repair shop"; and November 1, 1949, No. A909, for a "Pressing establishment – Not more than five persons employed."

6. On October 5, 1970, a CO, No. B73932, was issued Horace L. Prillaman to use "All & Basement" as an "Apartment House – (4 Apts.)."

7. The use of the basement and first floor of the property for apartments was in conformance with the zoning regulations applicable to an R-5-C. *See* 11 DCMR § 350.4(c).

8. Subsequently, Certificates of Occupancy were issued on June 3, 1977, No. B101582, to Joseph B. Thornton, Jr. to use all floors as an "Apartment House – 4 Units"; and on March 27, 1979, No. B111487, to Joseph Benjamin Thornton, Jr. to use the Basement & First floors as a "2 family flat, 1 unit Basement, 1 unit on 1st floor."

9. At some time after March 27, 1979, the property was sold to Ha Ok Kim. Mr. Kim was issued CO No. B146149 on August 20, 1986, to use the second and third floors of the property as an "Apartment House --- 4 units, Not sexually oriented." On June 23, 1989, CO No. 1890948 was issued to Ha Ok Kim to use the basement as an "Industrial Laundry Service < 2500 sq ft (also shoe repair)."

10. A property owner in an R-5-C zone may not operate an Industrial Laundry Service as a matter of right. *Cf.* 11 DCMR § 350*ff.*

11. Operation of an Industrial Laundry requires a Business License. *See* D.C. Official Code § 47-2851.03a(o).

12. No business license for an Industrial Laundry was ever issued to Mr. Kim, and there is no evidence that such a business was operated on the property other than Appellant's testimony that heavy machinery of some type was housed in the basement when Appellant visited the property. On the other hand, long-term neighbors testified that they had not observed any indicia of such a business operating. Having *Seen* no direct evidence that an Industrial Laundry was operated on the property, we find that Mr. Kim did not operate an Industrial Laundry on the property. *See* Transcript at 370, 492-495, 499-503, 504-509.

13. Mr. Rooths and his wife purchased the property on January 12, 2000. *See* Respondent's Exhibit ("REx. 1").

14. On April 14, 2000, CO No. 187182 was issued to Appellant approving apartments on the second and third floors.

15. On December 19, 2001, CO No. CO25923 was issued to Appellant. The stated reason for the CO was a change of ownership. The listed previous use and proposed use was for a laundry.

16. Appellant testified that he never operated a laundry at the location. *See* Transcript at 385.

17. Unless an application for a CO proposes a change in use or an increase in load, the ZA shall issue the CO without inspecting the property. *See* 12A DCMR § 110.1.2.

18. On February 1, 2002, Appellant entered into a two-year lease with his brother and two others to operate a commercial copy center named Bar Legal Services. *See* REx. 4; Transcript at 371.

19. On June 28, 2002, approximately five months after Bar Legal Services and Consulting began operations, CO No. CO36543 was issued to Appellant, trading as N & E Services. The stated reason for the CO was a change of ownership. The listed previous use was for a laundry. The listed proposed use was for a "laundry service (laundry & consulting)."

20. On July 12, 2002, CO No. CO37193 was issued to Appellant. Again, the stated reason for the CO was a change of ownership. The listed previous use was for a laundry. The listed proposed use was for a "laundry service (laundry & consulting)."

21. Appellant offered no documentary evidence that a commercial copying service operated on the property. However, the Appellant did testify that the commercial copying service operated from 6:30-7:00 a.m. to 9:30-10:00 p.m. *See* Transcript at 416-417. Appellant also testified that the front door to the basement was open for walk-in customers during business hours. *See* Transcript at 387.

22. Neighbors of the property testified, however, that there was no commercial activity visible to the public and the basement door was kept locked. *Cf.* Transcript at 370, 492-495, 499-503, 504-509.

23. Appellant testified that he had never operated a laundry on the property. *See* Transcript at 385.

24. On June 13, 2003, CO No. CO56426 was issued to Appellant. The stated reason for this CO was a change in load from 2,500 sq. ft. to 2,500 sq. ft.

25. In 2003, Appellant applied to this Board for a special exception to allow a change from one nonconforming use (laundry) to another nonconforming use (office space).

26. The District of Columbia Office of Planning ("DCOP") investigated the property in 2003 pursuant to the special exception application. As stated in its memo to this Board, DCOP could find no evidence "to document that a non-conforming use has actually been in operation on the property [from January 2001 to January 2004]." *See* Memorandum from McGettingan to BZA of January 28, 2004 ("Office of Planning Report") at 1-2, 3-4, 5.

27. On September 29, 2003, while the Appellant's application for a special exception was pending before this Board, CO No. CO62687 was issued to Floyd A. Smith, Sr. The stated reason for the CO was a change of ownership. The listed previous use and proposed use was for a laundry.

28. On November 7, 2003, while the Appellant's application for a special exception was still pending before this Board, CO No. CO64701 was issued to Floyd A. Smith, Jr. The stated reason for the CO was a change of use. The listed previous use was a laundry. The listed proposed use was a dry clean collect/pickup.

29. The Appellant testified that Mr. Smith never intended to operate a laundry. Consistent with his second CO, Mr. Smith intended to operate a pick-up laundry and dry cleaning business. *See* Transcript at 317.

30. The Appellant also testified that Mr. Smith never operated any kind of business on the property. *See* Transcript at 320-321.

31. On December 22, 2005, CO No. CO109753, the subject of this appeal, was issued to Appellant. The stated reason for the CO was a change of ownership. The listed previous use was as a dry clean collect/pickup. The listed proposed use was a dry cleaning pick-up only.

32. The Appellant testified that, contrary to what was stated on his application for CO No. CO109753, the property had never been used for a dry cleaning pickup and collection business. *See* Transcript at 415.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(1) (2001 ed.) to hear and decide appeals where it is alleged that there is error in any order, requirement, decision, determination, or refusal made by the

Zoning Administrator in the enforcement of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR § 3100.2.

This Board is first required to determine the applicability of 11 DCMR §§ 2000.4 and 2005.1 to Certificate of Occupancy No. 1890948, issued on June 23, 1989 to Ha Ok Kim, and to CO No. B73932, issued on October 5, 1970 to Horace L. Prillaman.

Commercial activity does not conform to the regulations governing an R-5-C zone. However, any nonconforming use that was lawful on May 12, 1958, may be continued. *See* 11 DCMR § 2000.4. As a result, the commercial activity authorized on November 1, 1949, by CO No. A909, a "Pressing establishment – Not more than five persons employed," could have been lawfully continued as a nonconforming use after May 12, 1958. However, the right to continue the nonconforming use is limited by 11 DCMR § 2005.1. Section 2005.1 states:

> Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for a period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located.

Apartment buildings are allowed as a matter of right in an R-5-C zone. With the October 5, 1970 issuance of CO No. B73932, authorizing all floors and the basement of the property to be used as apartment units, the nonconforming use of the property ceased. As stated in § 2005.1, at that point, "[a]ny subsequent use shall conform to the regulations of the district in which the use is located."

Operation of an industrial laundry and shoe repair shop does not conform to the regulations governing an R-5-C zone. Therefore, once the nonconforming use of the property was discontinued on October 5, 1970, the ZA should not have issued any CO authorizing a nonconforming use. However, CO No. 1890948, issued on June 23, 1989, did authorize a nonconforming use. As a result, this Board concludes that CO No. 1890948 was issued in error and should have been revoked. Further, any subsequent CO, including No. CO109753, authorizing a use not in conformance with the zoning regulations was also issued in error and should be revoked.

The result would be the same even if CO No. 1890948 had been properly issued. The CO at issue in this matter, No. CO109753, was issued December 12, 2005. Therefore, if the nonconforming use was discontinued before December 12, 2002, § 2005.1 would prohibit any future nonconforming use.

The parties dispute whether or not Ha Ok Kim operated an industrial laundry and shoe repair shop prior to Mr. Rooths' purchase of the property. However, this Board need not resolve that question. For two reasons, this Board concludes that there was no authorized nonconforming use of the property from December 12, 2002, and December 12, 2004.

First, the Board notes that each CO issued to the Appellant for the basement and first floor of the property were to operate a laundry on the premises.[1] However, the Board concludes that no laundry was operated on the premises during the critical three-year period. The Appellant never secured a business license to operate a laundry business. Furthermore, the Appellant testified that he never operated a laundry business on the premises.

An argument that another nonconforming business, a consulting business, was operated during the critical three-year period also fails. The Applicant has testified that his brother and two others operated a commercial copying business on the property, beginning in February 2002. However, for four reasons the Board does not credit this testimony. First, during the time that the Appellant claims that a commercial copying service was operating, the related Certificates of Occupancy were for a laundry or a laundry and consulting business. This Board does not consider a commercial copying service to be either a laundry or a consulting business.

Also, even though the Appellant testified that the commercial copying service kept the front basement door open for walk-in customers, neighbors to the property have testified that the door was kept locked and that there was no evidence of normal business activity.

Additionally, when the Office of Planning investigated the use of the property in 2003, it found no evidence of commercial activity at the property.

Finally, the Appellant has not presented this Board with any documentary evidence confirming the operation of the commercial copying service. While the Appellant did provide a copy of a lease for a copying service, he also provided a copy of a lease that would allow Floyd Smith to operate a dry cleaning collection/pickup location. As the Appellant has testified, Mr. Smith never operated his business. Without some further form of evidence, this Board cannot credit testimony that a commercial copying business was in operation at the premises.

While not necessary for this decision, the Board determines that the Appellant did make material misrepresentations on the applications for the Certificates of Occupancy for the basement and first floor of the property. The Appellant has testified that he was aware that no laundry was in operation at the property, but he consistently stated on the application that a laundry was in operation at the property. The staff of the Zoning Administrator relied upon these misrepresentations in issuing the Certificates. Therefore, the Board considers the misrepresentation to be material.

The same analysis applies to the representation on the application for CO No. CO109753. In that instance, the Appellant stated that the property was currently being used as a "dry clean collect/pikup." The Appellant has admitted that no such business was in operation, but, again, the staff of the Zoning Administrator relied upon this misrepresentation in issuing the Certificate.

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[1] The referenced Certificates of Occupancy are numbered CO25923, CO36543, CO37193, CO56426, and CO62687.

The Appellant also claims that if material misrepresentations were made on the application for CO No. CO109753, the government is estopped from revoking on grounds of material misrepresentation. Estoppel is claimed because the government, through staff members in the Office of the Zoning Administrator, allegedly instructed the Appellant to make those material misrepresentations. Even if CO No. CO109753 can itself be construed as a government "representation," Appellant's reliance on the CO cannot be considered "reasonable." As he has testified, the Appellant knew at the time of the application that the information submitted was not correct. Moreover, prohibiting all government challenges to the permits would clearly *not* be in the public interest and would not prevent injustice. *See Georgetown Entertainment Corp.*, 496 A.2d at 591–92. Even assuming arguendo that the government acquiesced in the misrepresentation, despite the absence of such evidence, the Board does not agree that a claim of estoppel is justified here..

The Supreme Court has issued "powerful cautions against the application of the doctrine to the government." *Rann v. Chao*, 346 F.3d 192, 197 (D.C. Cir. 2003) (*citing OPM v. Richmond*, 496 U.S. 414, 419–24 (1990) *and Deaf Smith County Grain Processors, Inc. v. Glickman*, 162 F.3d 1206, 1214 (D.C. Cir. 1998)). *See also ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988) (the doctrine's "application to the government must be rigid and sparing."); *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant.").

Successful invocation of equitable estoppel requires—at least—a showing of the traditional elements of estoppel. *Rann*, 346 F.3d at 197 (showing of traditional elements of estoppel "would certainly be necessary before the court even considered whether to apply estoppel against the government here.").

> The case for estoppel against the government must be compelling, and will certainly include proof of each of the traditional elements of the doctrine—"'false representation, a purpose to invite action by the party to whom the representation was made, ignorance of the true facts by that party, and reliance,' as well as . . . 'a showing of an injustice . . . and lack of undue damage to the public interest.'"

ATC Petroleum, 860 F.2d at 1111 (*quoting International Org. of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 551 (D.C.Cir.1983)). *See also Schweiker v. Hansen*, 450 U.S. 785, 788–90 (1981)). *Cf. Georgetown Entertainment Corp. v. District of Columbia*, 496 A.2d 587, 591–92 (D.C. 1985) (elements of equitable estoppel are: (1) a government "promise," (2) plaintiffs suffered injury due to (3) a reasonable reliance on the promise, and enforcement of the promise would (4) be in the public interest and (5) prevent injustice).

The rationale for this heightened burden to apply equitable estoppel against the government is that "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Philip Morris, Inc.*, 300 F.Supp.2d at 70 (*quoting Heckler*).

The Appellant cannot come close to making this showing. Here, there was no false representation (at most an erroneous interpretation), there was no ignorance of the true facts by Appellant (whom has knowledge of the law imputed to him), there was no "reasonable" reliance (as discussed below), nor can there be any showing of an injustice and lack of undue damage to the public interest, considering the compelling public interest in upholding the laws. *See New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State [or local government] is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury.")

Appellant presented no evidence to support his allegation that a government staff member make an erroneous interpretation of the zoning regulations. However, even proof of the allegation would not estop the District from enforcing its zoning regulations in this case. It is well-settled that a government employee cannot estop the government beyond his lawful authority. *Waukesha State Bank v. Nat'l Credit Union Admin. Bd.*, 968 F.2d 71, 74 (D.C. Cir. 1992). *See also ATC Petroleum*, 860 F.2d at 1109 ("As a general rule, the government is not bound by the statements or assurances of its officers where the actual authority to make such statements is lacking.") (*citing Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)). The Appellant has not and can not prove that the unnamed staff members have the actual authority to interpret the zoning regulations.

The Appellant had at least constructive knowledge of the zoning regulations. As the Supreme Court has written, "[P]arties dealing with the Government 'are expected to know the law and may not rely on the conduct of government agents contrary to the law.'" *Id.* at 1111 (*quoting Heckler*). Furthermore, "[T]here is no grave injustice in holding parties to a reasonable knowledge of the law." *Id.* at 1112.

At worst, the District's actions in the issuance of the CO was arguably negligent from the Appellant's perspective; by no means could the District's behavior be construed as "affirmative misconduct." In fact, it can be argued that, rather than "reasonably rely" on legitimate government conduct, Appellant relied on the assumption that the misrepresentations on the application would escape the District's notice. Appellant cannot hedge his reliance now by asserting that the District should have caught him earlier.

Resolving this matter in Appellant's favor would effectively enjoin the District from enforcing its zoning regulations. "[A]ny time a State [or local government] is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). *See also District of Columbia v. Greene*, 806 A.2d 216, 223 (D.C. 2002) (*quoting New Motor Vehicle Bd.*). The Appellant cannot prove that allowing a possible staff misinterpretation of the discontinuance regulation would be in the public interest.

The Appellant may not avail himself of the doctrine of laches because the District Government has not engaged in an inexcusable delay, and because the Appellant is the aggressor in this matter.

The Court of Appeals has well-settled the necessary elements for application of the doctrine of laches: inexcusable delay, resulting in substantial prejudice. *See Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978). As the *Wieck* court stated, "Due to the important general public interest in the integrity and enforcement of zoning regulations, the affirmative defenses of estoppel and laches are not judicially favored." *Id.* at 10. The Appellant cites the inexcusable delay was in not taking action against the prior owner of the property by revoking the 1989 CO prior to Appellant's purchase of the property in 2000. *See* Transcript at 535-536. In contrast, the inexcusable delay in *Wieck* was "that the District had issued two enforcement orders relating to the violation against the prior owner of the property in the six years prior to its action against the subsequent homeowner, but had never followed up on these orders." *Wieck* at 13 (emphasis added). In the instant matter, the ZA had no previous orders to allow to lie fallow.

Moreover, the Appellant is not in a position to assert laches in his appeal because he is affirmatively challenging the Notice of Revocation of the CO. The Court of Appeals has adopted the principle that, "Laches may be used as a shield, but not as a sword by one seeking affirmative relief." *See LaPrade v. Rosinsky,* 882 A.2d 192, 198 (D.C. 2005) *citing 118 East 60th Owners, Inc. v. Bonner Properties, Inc.*, 677 F.2d 200, 204 (2d Cir. 1982) (as party *Seeking* declaratory relief is "aggressor" in litigation, equity precludes use of time bar as sword) and *Corona Properties of Florida, Inc. v. Monroe County*, 485 So. 2d 1314, 1318 (Fla. Dist. Ct. App. 1986) (laches acts as shield to action and has no application to case where it is intended to be used as sword). As the party seeking relief, Appellant is the aggressor in this matter and is precluded from application of laches.

In view of the foregoing, the Board concludes that the Zoning Administrator was correct in revoking Certificate of Occupancy No. CO109753, on the grounds that the previous nonconforming use from 1949 had been discontinued, the use of the premises as apartments was a conforming use which precluded future nonconforming uses, any previous nonconforming use had been discontinued more than three years prior to the issuance of the CO, and the application for the CO contained material misrepresentations.

Accordingly, it is ORDERED that this appeal is DENIED:

VOTE: __-__-__ (_____, to deny the appeal;
_____, to sustain the appeal)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring Board member approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

FINAL DATE OF ORDER: _____, 2007

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.