To: BZA Chair
From: Sandra Maddox, Esq.

Please accept the attached Appellant's Proposed Findings of Fact and Conclusion of law. Counsel for Appellant called this office on April 23rd and requested an extension due to unexpected illness in the family and was told that she could have the extension and to get the document in ASAP. She spoke to someone in this office again on Friday April 27th and informed him that she would turn the document in by the close of business on Monday April 30, but the office was closed when she arrived. Attached is the document. Please excuse the delay.

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

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 No. 109753, date September 12, 2006, for a Dry Cleaning Pick-Up Only establishment. The subject property is located at 1312 13th Street, N.W.

HEARING DATE: March 20, 2007

DECISION DATE: May 1, 2007

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came before the Board of Zoning Administration on Appellant's appeal from the Office of Zoning Administration's revocation of certificate of occupancy number 109753. Based upon the evidence adduced at a hearing on March 20, 2006, the Board of Zoning Administration makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Edward Rooths and Nancy Dao purchased the property located at 1312 13th Street on January 12, 2000 with the intent of using it as a commercial property.

2. They purchased it for $275,000.00 from Ha Ok Kim and Yon Sook Kim. (See Appellant's Exhibit 1). The building has 3 floors and a basement. The first floor and basement are zoned for nonconforming commercial use and the second and third floors are zoned for conforming residential use. Mr. and Mrs. Kim used the basement as a commercial cleaners and shoe repair.

3. OZA never notified Mr. and Mrs. Kim that the nonconforming use of the first floor and basement discontinued in 1970 nor did OZA revoke their certificate of occupancy to use the premises as an industrial laundry.

4. After Mr. Rooths and Mrs. Dao purchased the property, Mr. Rooths was diagnosed with cancer and was not able to apply immediately for a Certificate of Occupancy ("CO") to start a business.

5. When Mr. Rooths' health improved, Mrs. Dao applied for a CO to use the first and lower levels as a laundry service. The Office of Zoning Administration ("OZA") in District of Columbia Regulatory Affairs ("DCRA") issued her Certificate of Occupancy ("CO") No. 25923 on December 19, 2001 to operate a laundry service. (See Appellant's Exhibit 2a).

6. Mr. Rooths, however, had a relapse in his health and Mrs. Dao was not able to start the business within the required six-month time frame from the issuance of the CO. Consequently, CO No. 25923 lapsed.

7. On June 28, 2002 Mr. Rooths and Mrs. Dao applied for and OZA issued them CO No. 36543 to operate a laundry and consulting service. (See Appellant's Exhibit 2b). Mr. Rooths, however, was still not able to start his business because his health continued to decline.

8. On July 12, 2002 Mr. Rooths and Mrs. Dao applied for and OZA issued CO No. 37193 for the premises and they leased it to Bar Legal Services. (See Appellant's Exhibits 2c and 3). Bar legal services operated a copy center for law firms and the general public for two (2) years.

9. On June 13, 2003 Mr. Rooths and Mrs. Dao applied for a new certificate of occupancy because of a "load change" in Bar Legal Services. OZA issued CO No. 56426 for the premises, and Mr. Rooths and Mrs. Dao continued to lease it to Bar Legal Services. (See Appellant's Exhibit 4a).

10. On November 7, 2003 Mr. Rooths and Mrs. Dao applied for and OZA issued CO No. 64701 to operate a Dry Clean Pick-Up on the premises. (See Appellant's Exhibit 4b). Mr. Rooths leased the premises to Floyd Smith to operate Arnold's Pick-Up Laundry. A pick up laundry is a valet service for laundry. There is no cleaning done on site and there is no use of chemicals or heavy machinery. Clothing is taken offsite to a cleaning facility in Virginia. Most of the clientele is on foot so traffic is not affected in the area.

11. Mr. Smith was not able to open up the pick up laundry because his neighbors harassed him by calling the fire department and police to prevent him from opening.

12. Mr. Rooths wanted to use the premises as a pick up laundry, so, he applied for another CO on December 22, 2005 based on a change of ownership of the business from Mr. Smith to him.

13. OZA employees provided guidance to Mr. Rooths in filling out the application, as they had done each time before.

14. They instructed Mr. Rooths to indicate that the previous use for the premises was a dry clean pick up and the approved use was a dry clean pickup.

15. Mr. Frank Moody, a Supervisor in the Permits Office of OZA, also reviewed Mr. Rooths' application and approved it.

16. OZA issued Mr. Rooths CO No. 109753 on December 22, 2005 to operate his Dry Clean Pickup. (See Appellant's Exhibit 14).

17. In an effort to open his business, Mr. Rooths made numerous expenditures, including, but not limited to, purchasing a computer, clothing rack, security

system, new floor, security gate, hand rails, overhead sign, and paying for the commercial utilities associated with the property. He invested over Twenty Thousand Seven Hundred Twenty Six Dollars ($20,726.00) into the business. (See Appellant's Exhibits 7-13).

18. The costs of converting the premises to a private property are prohibitive. Moreover, there is no adverse impact on the community such as traffic, fire, pollution.

19. Neighbors complained that Mr. Rooths was operating a dry cleaners.

20. OZA and BLRA Representatives, including Juan Scott and Ed Ball, inspected the premises and found no violations of any ordinances.

21. On March 22, 2006 OZA issued Mr. Rooths a Stop Work Order ("SWO") asserting that Mr. Rooths was working without a permit or without one posted, despite the fact that the Rooths had a permit. (See Appellant's Exhibit 15).

22. The permit was posted in a window but the inspector did not see it. The inspector did not come back to inspect the premises until May 2, 2006. He lifted the SWO after the inspection.

23. When the SWO was lifted Mr. Rooths only had to purchase his sign and clothing rack in order to open up for business.

24. OZA issued Mr. Rooths another SWO on June 14, 2006 for working without a building permit. (See Appellant's Exhibit 16).

25. No one from OZA came to inspect the premises so Mr. Rooths called OZA on July 10, 2006 and the OZA agent that he spoke to informed him that there was no SWO in the system.

26. Mr. Rooths timely opened his dry clean pick-up on September 12, 2006 and remained opened for only two (2) weeks.

27. On September 12, 2006, OZA and BLRA issued Mr. Rooths a letter revoking CO No. 109753 and his permits stating: 1) that the premises ceased its non-conforming use as a commercial property in 1970 when it changed to a conforming use as an apartment building. In 1989 it erroneously changed from a conforming use back to a nonconforming use as an "Industrial Laundry Service"; 2) the CO contained material misrepresentations as to the previous use of the location, that DCRA records show no business license issued to use the location for any purpose, and that no dry cleaners operated on the premises within the previous 3 years; and 3) Mr. Rooths and Mrs. Dao did not put the premises to use within six months of the date of issue of the CO. (See DCRA Letter of Revocation).

28. Mr. Rooths filed an appeal of the revocation of CO No. 109753 on November 13, 2006 and a hearing was held at the Board of Zoning Administration ("BZA") on March 20, 2007. At that hearing Bill Crews admitted that a pick-up laundry does not require a license to operate.

CONCLUSIONS OF LAW

For estoppel to apply a party has to show that he: 1) acted in good faith; 2) on affirmative acts of a municipal corporation; 3) made expensive and permanent improvements in reliance thereupon; and 4) the equities strongly favor the party invoking the doctrine. *Paul Weick v. District of Columbia Board of Zoning Adjustment.* 383 A.2d 7 (1978). Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvement that it would be highly inequitable and

unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. *D.C. v. Cahill*, 54 F.2d 453 (1931).

In *Cahill*, the District of Columbia issued a CO to the property owner after going to the property, inspecting it and allowing a nonconforming use of a garage to continue. A little over a year later, after complaints from adjacent property owners, the District of Columbia revoked the owner's certificate of occupancy stating that it was issued under a "mistake of fact." The court permanently enjoined the revocation and the court of appeals affirmed that decision finding that when the appellee in good faith presented his application to the inspector, it became the duty of that officer to ascertain whether the facts justified the granting of the application.

The court found that trusting in the official affirmative acts of the inspector who allowed the nonconforming use of a garage to continue, the appellee was induced to expend a large sum of money upon the building, and to enter into the several 5 year leases of the premises for garage purposes. Neither the appellee nor the lessees would have entered into such leases except for the official permits and certificates issued. The court found that there are cases where under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvement that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel is applied.

In this case the Office of Zoning staff's affirmative acts created a situation that has ultimately resulted in Mr. Rooths' and Mrs. Dao's detriment. OZA not only issued the CO converting the conforming use of the premises to nonconforming use back in

1989, they continued to issue COs for nonconforming commercial uses for sixteen (16) years until 2005. OZA issued: CO No. 1890948 on June 23, 1989 for use as an industrial laundry service; CO No. 25923 on December 19, 2001 for use as a laundry service; CO No. 36543 in June 28, 2002 for use as a laundry and consulting service; CO No. 37193 on July 12, 2002 for use as a laundry and consulting service; CO No. 56426 on June 13, 2003 for use as a laundry service and office space; CO No. 64701 on November 7, 2003 for use as a dry clean pick up only; and CO No. 109753 on December 22, 2005 for use as a dry clean pick up only. (See Exhibits 2a-2c, 4a-4b, and 14).

Each time OZA issued a certificate of occupancy to Mr. Rooths, its employees, including Supervisor, Frank Moody provided guidance on how to fill out the applications for the COs. For CO 109753, OZA employees instructed Mr. Rooths and Mrs. Dao to indicate that the structure was previously used and would continue to be used as a "dry clean collect/pick up" and to indicate previous use as "dry clean collect/pick up" so Mr. Rooths could maintain the right to operate as a "dry clean collect/pick up".

In addition, with regard to CO No.109753, OZA representatives, including but not limited to, Juan Scott and Ed Ball, inspected the premises numerous times and concluded that operating the pickup laundry on the premises was not in violation of any ordinances. Despite having ample time and opportunity to do so, at no time over a period of 16 years from 1989 to December 22, 2005 did any one at DCRA question the validity of any of the seven (7) certificates of occupancy for the premises. Given the guidance the Rooths received from OZA's agents and OZA's continued issuance of certificates of occupancy for over a decade, the Rooths certainly acted in good faith when they submitted their

applications, purchased the property, and spent money on repairs to the property in order to establish a business.

Because of these affirmative acts of issuing the COs from 1989 to 2005 by the Zoning Administration, the Rooths purchased the property, leased it out at times, and invested well over $20,726.00 into it for commercial purposes that fit the nonconforming use. The OZAs argument that this CO should be revoked because a CO was improperly issued back in 1989 fails. It would be highly inequitable and unjust to destroy the rights acquired and the doctrine of estoppel prevents revocation of the CO at issue.

Even if estoppel does not apply in this case the doctrine of laches should apply. In *Wieck*, the court defined laches as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches. *Weick*, at 11. It is often claimed where the inactivity of the officials charged with the enforcement of the ordinance has misled the owner into acts in violation of the ordinance, or has misled persons into purchasing the property in ignorance of the illegality of the use of the structure. *Id.*

For over 16 years OZA has not revoked a certificate of occupancy for the premises at issue, even after the nonconforming use went to conforming and back to nonconforming. Five of those years OZA provided guidance to and issued certificates of occupancy to Mr. Rooths. OZA did not notify the previous owner in 1989, (who operated an actual industrial laundry service on the premises from 1980 - 2001), that the nonconforming use was discontinued in 1970 and it did not revoke the previous owner's certificate of occupancy. Each of the six times Mr. Rooths renewed the CO, OZA did not

notify him of the discontinuance of the nonconforming use of the property but instead permitted the use for commercial purposes.

Furthermore, Mr. Rooths and Mrs. Dao were specifically looking for a commercial or mixed use property to purchase. If at any time prior to January 2000, when Mr. Rooths and Mrs. Dao bought the 1312 13th street property, the zoning officials had followed up on the certificates of occupancy issued from June 23, 1989 – December 12, 2000, as they so aggressively have done so now the property would not have been used or zoned as a commercial property. Mr. Rooths and Mrs. Dao would not have been induced to purchase the property if it were not zoned as commercial.

Mr. Rooths showing of injury from the loss of income producing property, is sufficient to find substantial prejudice to Mr. Rooths and Mrs. Dao as a result of the zoning officials' inexcusable delay. In addition, Mr. Rooths testified that he spent well over $20,726.00 in repairs in repairs of the premises and in preparation to open his business, and prior to that he entered into two (2) lease agreements that neither party would have done absent the sanctioned nonconforming use of the building. The substantial prejudice that would be imposed also includes the high price of commercial utilities that that he must pay. Furthermore, the costs to convert to a residential property are prohibitive. Moreover, there is no adverse impact on the community such as fire, pollution or traffic because the clothing is cleaned at another location in Virginia and most of the business is foot traffic from the neighborhood. Any conceivable harm to the general public interest from not enforcing the zoning regulation in this case is not sufficient to outweigh the inequity of substantial prejudice to Mr. Rooths and Mrs. Dao.

While courts are reluctant to impose the sanction of laches on governmental divisions, equity cannot close its eyes to the sloth, indifference or official neglect of municipal body any more that it can to the neglect of an individual where such neglect harms an innocent person. *Weick*, at 12, citing *In Re Heidorn's Appeal*, 412 Pa. 570, 195 A.2d 349 (1963), (where the Pennsylvania Supreme Court affirmed the lower courts holding that since the Township had allowed approximately 10 years to pass without objecting to the ordinance violation, it was guilty of laches and could not now sustain a violation on the basis of the original ordinance in 1942) Any conceivable harm to the general public in this case from not enforcing the zoning regulation is not sufficient to outweigh the inequity of substantial loss of an income producing property and investment made by Mr. Rooths and his wife. Under both estoppel and laches theories OZA's decision to revoke CO 109753 must be reversed.

Exception II. There Is No Material Misrepresentation In The Rooths' Application For Certificate Of Occupancy No. 109753

The Rooths did not misrepresent the facts on the application for the Certificate of Occupancy No. 109753 when they indicated that the previous use of the property was a dry clean pick up and the change in ownership served as the reason for the new certificate to be issued. OZA representatives instructed Mr. Rooths to indicate on the certificate of occupancy application that a "change in ownership" was the only reason for a new certificate of occupancy to be issued because "Dry clean collect and pick-up" was the previously approved use for the site. After OZA provided guidance to Mr. Rooths on how to fill out the application for the Certificate of Occupancy, and Mr. Rooths' reliance upon that guidance, it would be unjust for OZA to now revoke the certificate of occupancy.

In addition, OZA asserts that DCRA records show no business license issued to use the location for any purpose, and that neighbors attest to the fact that no dry cleaners operated on the premises within the previous 3 years. In the BZA hearing, Bill Crews admitted that this business does not require a license. Therefore, no license had been issued for that purpose and is not in the OZA record. The BZA will not affirm OZA's revocation of CO No. 109753 based on these grounds.

Exception III. BZA Prevented The Business From Being Put To Use Within A Six Month Period After The Issuance Of The Certificate OF Occupancy No. 109753

Mr. Rooths was issued the CO on December 22, 2005 and was required to open by June 22, 2006. During that 6 month time period OZA issued several SWOs that took several months to lift. Mr. Rooths testified that he was issued a SWO on March 22, 2006 that was not lifted until May 2006, after no violations were found. At that time Mr. Rooths only had to put up his sign and obtain his clothes rack in order to open by June 22nd. However, he was issued another SWO on June 14, 2006 that he learned was not in effect in July. But for OZA issuing the SWOs and lifting them months later, Mr. Rooths could have opened his business by the June 22, 2006 deadline. The BZA will not affirm OZA's revocation of CO 109753 based on these grounds.

In view of the foregoing, the Board concludes that the OZA was incorrect in revoking CO No. 109753, on the grounds that 1) that the premises ceased its non-conforming use as a commercial property in 1970 when it changed to a conforming use as an apartment building, then back to a nonconforming use in 1989 as an "Industrial Laundry Service"; 2) the CO contained material misrepresentations as to the previous use

of the location; and 3) Appellants did not put the premises to use within six months of the date of issue of the CO.

Accordingly, it is ORDERED that this appeal is sustained:

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.