GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17581 of Edward B. Rooths, pursuant to 11 DCMR §§ 3100 and 3101 from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to revoke Certificate of Occupancy 109753, for a Dry Cleaning Pick-Up Only establishment located in the R-5-C zone district at premise 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 ("BZA" or "Board") on November 13, 2006, pursuant to 11 DCMR §§ 3100 and 3101, challenging the September 12, 2006 administrative decision of the Zoning Administrator ("ZA"), Department of Consumer and Regulatory Affairs ("DCRA"), to revoke Certificate of Occupancy ("CO") 109753, issued on December 22, 2005, for a Dry Cleaning Pick Up Only establishment at 1312 13th St N.W. ("subject property" or "property"). The Notice of Revocation stated that the property had not been used in a nonconforming manner in the three years prior to the issuance of CO 109753 and that Appellant was attempting to change the use of the property from a conforming use to a nonconforming use.

Appellant contended that the ZA erred in determining that the nonconforming use had been discontinued. The Appellant also argued that any enforcement of the discontinuance regulation was barred by estoppel and laches and that he made no material misrepresentation in his application for CO 109753.

A public hearing on the appeal was duly noticed and held on March 20, 2007. The Board closed the record on April 24, 2007 except for those additional filings the Board specifically

requested.[1] After hearing from the parties to the matter, the Board rendered its decision at the BZA's Public Meeting on May 1, 2007, voting 3-0-2 to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Notice of Appeal was filed on November 13, 2006 by Edward B. Rooths. The Office of Zoning scheduled a public hearing on the appeal for March 20, 2007. In accordance with 11 DCMR § 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, DCRA, and ANC 2F04, and advertised the hearing notice in the *D.C. Register* at 54 *D.C.R.* 519 (January 19, 2007).

Parties

The Appellant in this case is Edward B. Rooths, the owner of the subject property. DCRA is the Appellee. The Zoning Administrator, Bill Crews, as well as neighbors Helen Kramer, Barry Johnson, and David Chianese, testified in support of Appellee's position. Advisory Neighborhood Commission 2F ("ANC"), the ANC within which the subject property is located, is automatically a party to this appeal.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 1312 13th Street, N.W. (Square 243, Lot 12) and is zoned R-5-C.

2. The R-5-C zone district is a medium height and density Residence District. Commercial uses such as laundries and dry cleaners are not permitted as of right. *See*, 11 DCMR §§ 350.1 – 350.6.

3. The property is improved with a three-story building, with a basement and a sub-basement.

4. Certificates of Occupancy were issued specifically and only for the Basement floor of the building on the property on: August 20, 1947, CO 114676, "Barber-valet shop;" November 3, 1947, CO 116264, for a "Cleaning and dyeing agency;" November 5, 1947, CO 116318, for a "Barber shop;" December 12, 1947, CO 117090, for a "Shoe

[1]The Board waived its deadline and allowed the Appellant's late filing of its Findings of Fact and Conclusions of Law into the record.

repair shop;" and, November 1, 1949, CO A909, for a "Pressing establishment – Not more than five persons employed." *See,* Exhibit ("Ex.") 22.

5. Certificates of Occupancy were issued for "All and Basement" on October 5, 1970, CO B73932, as an "Apartment House – (4 Apts.);" June 3, 1977, CO B101582, to use all floors of the property as an "Apartment House – 4 Units;" and, March 27, 1979, CO B111487, to use the Basement and First Floors as a "2 family flat, 1 unit Basement, 1 unit on 1st floor." *See,* Ex. 22.

6. A use of the basement and first floor of the property for residential apartments would have been in conformance with the Zoning Regulations applicable to an R-5-C zone district. *See* 11 DCMR § 350.4(c).

7. At some time after March 27, 1979, the property was purchased by Ha Ok Kim. On June 23, 1989, CO 1890948 was issued to Mr. Kim to use the basement as an "Industrial Laundry Service < 2500 sq ft (also shoe repair)." *See,* Ex. 22.

8. A property owner in an R-5-C zone may not operate an Industrial Laundry Service as a matter of right. *See,* 11 DCMR § 350. No special exception was granted by this Board to Mr. Kim to operate such a business.

9. There was no evidence presented to establish 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.

10. Long-term neighbors testified that they had not observed any indicia of the operation of such a business. *See,* Tr. at 370, 492 – 495, 499 – 503, 504 – 509.

11. Appellant Rooths and his wife purchased the property on January 12, 2000. *See,* Tr. at 307.

13. On December 19, 2001, CO 25923 was issued to Appellant. The stated reason for the CO was a change of ownership. The listed previous use and proposed use were a laundry housed in the basement (*See,* Ex. 2).

14. Appellant never operated a laundry or dry-cleaning operation of any type at the property. *See,* Tr. at 385. (*But See,* Finding of Fact No. 33.)

15. Unless an application for a CO proposes a change in use or an increase in load, the Zoning Administrator issues the CO without inspecting the property. *See,* 12A DCMR § 110.1.2.

16. On February 1, 2002, Appellant entered into a two-year lease with his brother and two others to operate a commercial copy center on the property named Bar Legal Services and Consulting. *See,* Tr. at 371.

17. On June 28, 2002, approximately five months after that Bar Legal Services and Consulting allegedly began operations, CO 36543 was issued to Appellant, trading as N & E Services. The stated reason for the CO was a change in ownership. The listed previous use was for a laundry. The listed proposed use was for a "laundry service (laundry & consulting)." *See,* Ex. 22.

18. It is unclear whether Bar Legal Services and Consulting, a commercial copying service, ever operated on the property, but it is clear that no CO was ever issued for such a use on the property.

19. On July 12, 2002, CO 37193 was issued to Appellant. Again, the stated reason for the CO was a change in ownership. The listed previous use was for a laundry. The listed proposed use was for a "laundry service (laundry & consulting)." *See,* Ex. 22.

20. On June 13, 2003, CO 56426 was issued to Appellant. The stated reasons for requiring a new CO were a change in load and use. *See,* Ex. 22. While Line 9 in the Application for Certificate of Occupancy was checked for Load change, Line 12, Proposed Occupancy Load, was marked "N/A." There was a use change noted from Laundry Service (Laundry & Consulting) to Laundry Service (Laundry & Office Space). *See,* Ex. 22.

21. In 2003, Appellant filed an application with this Board for a special exception to allow a change from one nonconforming use (laundry) to another nonconforming use (office space). The application was withdrawn on April 16, 2004. *See,* BZA Special Exception Application, No. 17071.

22. The District of Columbia Office of Planning ("OP") investigated the property in 2003 pursuant to the above-noted application for a special exception. As stated in its memo to this Board, OP could find no evidence "to document that a nonconforming use has actually been in operation on the property [from January 2001 to January 28, 2004]" (the date of OP's Report). *Id,* Ex. 26, (Report of the Office of Planning), at 1 – 2, 3 – 4, and 5.

23. On September 29, 2003, while the Appellant's application for a special exception was pending before this Board, CO 62687 was issued to Floyd A. Smith, Sr. for use of the property's basement. The stated reason for the CO was a change in ownership. The listed previous use and proposed use were for a laundry. *See,* Ex. 22.

24. On November 7, 2003, while the Appellant's application for a special exception was still pending before this Board, a second CO, CO 64701, was issued to Floyd A. Smith, Sr. 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. *See,* Ex. 22.

25. Consistent with his second CO, Mr. Smith apparently intended to operate a pick-up laundry and dry cleaning business. *See,* Tr. at 317.

26 Due to circumstances not relevant here, Mr. Smith never operated any kind of business on the property. *See,* Tr. at 320 – 321.

27. On December 22, 2005, CO 109753, the subject of this appeal, was issued to Appellant. The stated reason for the CO was a change in ownership. The listed previous use was a dry clean collect/pickup. The listed proposed use was a dry cleaning pick-up only. *See,* Ex. 22.

28. During the spring and summer of 2006, DCRA received complaints about commercial use on the property. DCRA investigated the circumstances whereby CO 109753 had been issued. As part of the investigation, the ZA reviewed the prior zoning records for the property, including BZA Special Exception Application, No. 17071.

29. DCRA placed a Stop Work Order ("SWO") on the property on March 22, 2006. It is unclear whether this SWO was lifted, but DCRA placed a second SWO on the property on June 14, 2006, and a third on June 28, 2006, the latter specifically for allegedly not having a permit to erect a sign.

30. At some time within a month before September 12, 2006, the Zoning Administrator met with the Appellant and gave the Appellant an opportunity to provide documentation of his assertions that the basement of the property had recently been, and/or was currently being, used as a dry cleaning pickup and/or collection business.

31. The Appellant did not provide any documentation to contradict the conclusion reached by the ZA on the completion of his investigation – that the property had not been

used as a laundry or dry cleaning pick-up since at least December 22, 2002, that is, for at least the previous three years.

32. The Zoning Administrator issued a Notice of Revocation of CO 109753 on September 12, 2006.

33. Appellant opened a dry clean collect/pick-up business on September 12, 2006, which remained open until closed by the ZA on September 28, 2006.

34. The Notice of Revocation indicates that CO 109753 was being revoked because it had been issued in error due to the fact that the nonconforming use as a laundry had been discontinued for over three years and no non-matter-of-right use had ever been approved by the BZA. Specifically, the Notice of Revocation states: "Even if the CO issued on June 23, 1989, had been properly issued, DCRA issued C/O No. CO109753 in error because the use of the location as a laundry had been discontinued for at least three years prior to issuance." *See,* Ex. 2 at 2-3, (Notice of Revocation Building Permits and Certificate of Occupancy, 9/12/06).

35. Further, the Notice of Revocation avers that the application for CO 109753 had contained a material misrepresentation insofar as the application had indicated that the location had been used, and would continue to be used, as a "Pick up Laundry." The Notice of Revocation states: "[T]his statement is not correct, and the statement materially misleads as to the previous use of the location. DCRA must revoke a CO issued on the basis of a material misrepresentation." *See,* 12A DCMR § 110.5.2.

36. The Notice of Revocation also asserts that pursuant to 11 DCMR § 3203.8(b), the property had to be put to the use for which the CO was issued within six months of the date of issuance. Certificate No. 109753 had been issued on December 22, 2005, for use as a "Dry Cleaning Pick-Up Only," but the property was not used for that purpose by June 22, 2006.

36. The Appellant filed this appeal on November 13, 2006.

CONCLUSIONS OF LAW

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Official Code § 6-641.07(g)(1)) 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.

The Positions of the Parties

The Appellant maintained that the ZA erred in issuing a Notice of Revocation of CO 109753, dated September 12, 2006, for a Dry Cleaning Pick-Up-Only establishment both because the use permitted was a continuation of an existing nonconforming use and because that there was no material misrepresentation in the Rooths' application for CO 109753. In the alternative, the Appellant argued that the ZA was estoppel from revoking the CO 109753.

DCRA responded that the Notice of Revocation of CO 109753 was proper, as the use of the premise at 1312 13th Street, N.W. (basement) had reverted back to a conforming use as an apartment dwelling in 1970. DCRA further contended that any Certificates of Occupancy issued subsequent to that date for nonconforming uses were issued in error, and, in any event, there was no evidence of lawful nonconforming commercial activity in the three years prior to the issuance of CO 109753.

The Nonconforming Use had been abandoned prior to the date on which the C of O was issued

The subject property is located in an R-5-C zone. In this residential district, the use of the property for a laundry or a Dry Cleaning Pickup Only establishment is not permitted as matter-of-right or by special exception. *See*, 11 DCMR § 350. Although this commercial activity does not conform to the regulations governing an R-5-C zone today, a use that was lawfully established as of May 12, 1958 may be continued, but is considered "nonconforming." 11 DCMR § 2000.4. As a result, the commercial activity authorized on November 1, 1949, by CO A909, a "Pressing establishment – Not more than five persons employed," could have been lawfully continued after a change in zoning had rendered it no longer a matter-of-right use.

The right to continue a nonconforming use, however, is limited. Section 2005.1 of the Zoning Regulations limits the right to continue a nonconforming use by creating a rebuttable presumption that if a nonconforming use has not operated for at least three years, it has been permanently abandoned. The revoked certificated of occupancy was issued on December 22, 2005. For the reasons stated below, the Board concludes that the Zoning Administrator did not err in concluding that the use has been discontinued for over three years prior to that date and that the Appellant failed to rebut the presumption of abandonment.

Appellant was first issued a CO for a basement laundry on December 19, 2001. Subsequently, DCRA issued several COs for the property, either to Appellant or to a Mr.

Smith, with the last being issued to Appellant on December 22, 2005. This CO, which is the subject of this appeal, as well as all the others issued after December 19, 2001, were all issued for some type of laundry or dry cleaning use, sometimes oddly combined with a consulting or office space use. Significantly, however, per Appellant's own testimony, no laundry or dry cleaning business operated on the property between at least December 19, 2001, the date of the first CO issued to Appellant, and December 12, 2005, the date of the CO in question here. Between December 19, 2001 and December 22, 2005 is a period of almost exactly four years – one more year than the three years necessary to presume abandonment of the nonconforming laundry use pursuant to § 2005.1.

During the spring and summer of 2006, the ZA investigated the circumstances surrounding the issuance of the CO on appeal here. He searched databases and files to find old building permits, CO's, and zoning categories for the property. He also consulted the Geographic Information System, spoke with the neighbors, looked at aerial photos and pictures of the property, and searched the Office of Zoning website to find any pertinent Zoning Commission or BZA cases or orders. Lastly, DCRA sent out an inspector to visit the property. *See, e.g.*, Tr. At 440, 443, 445-446, and 448.

After this thorough investigation, the ZA concluded that the nonconforming laundry/dry cleaning use had ceased for at least four years. He then afforded the Appellant an opportunity to rebut the presumption of permanent abandonment of the nonconforming use. The Appellant failed to come forth with any convincing evidence to rebut the presumption, and, based on the results of his investigation, the ZA concluded that the nonconforming use had been abandoned and revoked CO109753.

Appellant appealed that revocation to this Board, but has presented no new evidence to the Board to persuade it that the ZA erred in revoking his CO. Appellant has failed to demonstrate to this Board that the nonconforming laundry/dry cleaning use has not been abandoned. Therefore, the Board concludes that the Appellant has failed to rebut the presumption of § 2005.1 and further concludes that the nonconforming laundry use at the property has been abandoned. The ZA was not in error in revoking the Appellant's last-issued CO, number 109753.

Since the Board finds that certificate of occupancy was issued in error based upon the abandonment of the nonconforming use through a discontinuance of more than three years, it will not address DCRA's alternative theory that abandonment occurred upon the receipt of a certificate of occupancy for a residential use that apparently never began

Misrepresentations made in application

As to the misrepresentation ground, the Appellant does not contest making the material misrepresentations, but claims that he was encouraged by DCRA staff to do so. He therefore claims that DCRA should be estopped from revoking the permit based upon the misrepresentation it encouraged him to make. The Board need not address this question because it has already found a sufficient independent basis for the revocation.

Laches

This then leaves Appellant's laches defense. Laches, an equitable doctrine, is sometimes referred to as "sleeping on one's rights." It arises when a party tries to claim some right after an inordinate delay, which acts to the prejudice of other parties. The principal element in laches is the resulting prejudice to the "other" parties, rather than the delay itself, and the entire course of events leading up to a claim of laches must be reviewed to determine the validity of the claim. *Goto v. D.C. Board of Zoning Adjustment,* 423 A.2d 917 (D.C. 1980).

The Appellant claims that the District/ZA is barred from revoking his CO because COs for nonconforming uses had been issued for the property since June 23, 1989, when the CO for an "Industrial Laundry Service" was issued, nineteen years after the right to use the property for the prior nonconforming use arguably terminated due to the issuance on October 5, 1970 of a CO for a conforming apartment house use. The Zoning Regulations do not contain any provision indicating that the issuance of a C of O for a conforming use terminates a nonconforming use. Since there is no evidence that this use was ever begun, the ZA was without any notice that the nonconforming use had been terminated. In fact, the successive requests for non-residential C of Os would have led the Zoning Administrator to the opposite conclusion.

Once DCRA became aware of potential problems at the property, it issued a stop work order in March, 2006, only three months after the CO in question was issued, and began an investigation. After the investigation, DCRA acted quickly to revoke the CO on September 12, 2006. The Board does not find the approximate 9-month period between the issuance of the CO in December, 2005 and its revocation in September, 2006, to be unreasonably long. In addition, Appellant has not shown any significant prejudice from the revocation of the CO in 2006, particularly because the property is still available for many uses.

The Board concludes that the Appellant's laches claim fails.

Great Weight

The Board is required by § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Official Code § 1-309.10(d)(3)(A) (2001)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. Great weight means acknowledgement of the issues and concerns of the ANC and an explanation of why the Board did or did not find its views persuasive. On March 19, 2007, ANC 2F voted to affirm the Zoning Administrator's revocation of CO 109753 and the Board agrees with the ANC's position. *See*, Exhibit 18.

For the reasons stated above, the Board concludes that the Appellant did not meet his burden of demonstrating that DCRA erred in revoking CO number 109753. Accordingly, it is **ORDERED** that the appeal is **DENIED**.

Vote taken on May 1, 2007

VOTE: 3-0-2 (Curtis L. Etherly, Jr., John A. Mann II, and Michael G. Turnbull in support of the motion to deny; Ruthanne G. Miller and Marc D. Loud, not present and not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JAN 11 2008

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.