

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

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Appeal of MLW, LLC

BZA Appeal No. 17591
ANC 2E
Public Hearing: May 1, 2007

APPELLANT'S PRE-HEARING STATEMENT

The Appellant, MLW, LLC ("MLW"), by and through undersigned counsel, respectfully submits this Pre-Hearing Statement in further support of its Appeal of the Department of Consumer and Regulatory Affairs and/or the Zoning Administrator's October 19, 2006 Notice of Revocation of Certificate of Occupancy Number CO61776 (dated September 9, 2003) (the "Notice") for the five (5) unit apartment building located at 3256 N Street, N.W. (Square 1218, Lot 104) (the "Property") alleging on "information and belief, the Zoning Administrator has determined that the nonconforming use was discontinued for a period of three (3) or more years" and as a result, under 11 DCMR § 2005.1, "the current use as a five unit apartment building is not allowed by the Zoning Regulations." See, Appeal Exhibit 1.

MLW expressly incorporates by reference its Statement of Appeal, including Exhibits 1 through 28 ("Appeal Exhibits"), and Motion For Summary Judgment And/Or An Expedited Hearing.

I. BASIS FOR APPEAL

The Zoning Administrator has attempted to usurp the authority of the Board and overrule its earlier decision. In BZA Order No. 6885, the Board expressly authorized use of the Property as a five unit apartment building without time limitation or other conditions. See, Appeal Exhibit 2. It is well-established that a use approved by the Board runs with the land and is not a

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nonconforming use. Accordingly, the approved use as a five unit apartment building is not subject to the discontinuance provisions of 11 DCMR § 2005.1.

Additionally, under the compelling and well documented circumstances of this case, the Zoning Administrator and/or DCRA are estopped from revoking the Current Certificate of Occupancy and such action is also legally barred by the doctrine of Laches.

II. EXECUTIVE SUMMARY

This Appeal is not an isolated occurrence, but only the latest in a series of unsubstantiated, unauthorized and unsuccessful attacks by Mr. Bill Crews, the Zoning Administrator ("Mr. Crews"), against the Property and MLW. On two prior occasions, Mr. Crews has exceeded his authority and, without justification, issued two (2) different Stop Work Orders for the authorized construction occurring at the Property.¹ When challenged, both Stop Work Orders were withdrawn by DCRA.

In good faith reliance on its right to proceed with the renovation of the Property under several DCRA issued building permits and the Current Certificate of Occupancy, MLW has obtained Two Million One Hundred Ninety-Eight Thousand Three Hundred Forty 38/100 Dollars (\$2,198,340.38) in construction financing, expended Two Million One Hundred Twenty Five Thousand Dollars (\$2,125,000.00) to date. The DCRA authorized work at the Property is now ninety-five percent (95%) complete with substantial completion scheduled to occur before May 1, 2007. The total estimated cost of the project is Two Million Three Hundred Fifty Thousand Dollars (\$2,350,000.00).

¹ In his December 21, 2006 deposition, Mr. Crews, under oath, admitted that he was not authorized to issue either the first or the second Stop Work Orders. The District government, in response to a Request for Admissions, has also acknowledged that Mr. Crews was not authorized to issue the Stop Work Orders.

Having twice been rebuked for invalid Stop Work Orders and exposed DCRA and himself to substantial monetary damages, Mr. Crews has now attempted to revoke a valid certificate of occupancy, flagrantly disregarding a prior order of the Board authorizing the use of the Property as a five (5) unit apartment building. See, Appeal Exhibit 1.

The following is an outline of the major events preceding the issuance of the Notice, each of which is discussed at greater length below, but collectively clearly justify MLW's request for granting this Appeal:

August 21, 1962: BZA Order 6885 issued authorizing the use of the Property as a five (5) unit apartment building;

Early 1970s: Mr. Jerome Wagshal acquired the Property;

November 30, 1978: DC issued Certificate of Occupancy No. B111434 to Mr. Wagshal authorizing use of the Property as a five (5) unit Apartment Building;

April 30, 2001: Mr. Wagshal passed away;

May 29, 2001: Planning for complete renovation of the five unit apartment building already in progress and proceeding.

August 20, 2002: The Estate of Jerome Wagshal transferred title to the Property to Mrs. Mary Wagshal, Mr. Wagshal's widow;

September 6, 2002: Ms. Wagshal transferred the Property to MLW;

June 2003: MLW hired architect for substantial rehabilitation and renovation of the apartment building;

March 31, 2003: Last tenant, Mr. Thomas Wallick, vacated the Property in preparation for planned substantial rehabilitation and renovation of the apartment building;

September 9, 2003: DCRA issued Certificate of Occupancy No. CO61776 authorizing continued use of the Property as a five (5) unit apartment building;

June 4, 2004: Application for building permit for interior renovation of the Property filed with DCRA;

July 20, 2004: Commission of Fine Arts/Old Georgetown Board ("CFA/OGB") approves conceptual design plan for exterior work.

August 9, 2004: Application for building permit for exterior renovation of the Property filed with DCRA;

September 24, 2004: CFA/OGB approves final design for exterior work;

March 16, 2005: DCRA issued first Building Permit (exterior work);

June 21, 2005: DCRA issued second Building Permit (interior work);

October 3, 2005: Mr. Bill Crews starts as Zoning Administrator;

November 3, 2005: Construction commenced on Property;

December 7, 2005: Mr. Crews illegally issued a Stop Work Order, alleging violation of 11 DCMR §2002 [Nonconforming Uses Within Structures];

January 20, 2006: MLW initiated lawsuit against District of Columbia, Dr. Patrick Canavan and Mr. Bill Crews;

January 23, 2006: Stop Work Order lifted by DCRA and first lawsuit dismissed;

March 28, 2006: Mr. Crews illegally issued a second Stop Work Order, alleging violation of 11 DCMR §2005.1;

April 10, 2006: MLW initiated second lawsuit against District of Columbia, Dr. Patrick Canavan and Mr. Bill Crews;

April 11, 2006: District of Columbia, through Office of Attorney General, indicated second Stop Work Order will be lifted by close of business;

April 12, 2006: Second Stop Work Order lifted at approximately 12:00 p.m.;

October 19, 2006: Mr. Crews issued Notice of Revocation of Certificate of Occupancy Number CO61776, alleging violation of 11 DCMR §2005.1;

November 2, 2006: MLW, through counsel, requested immediate rescission of the Notice of Revocation, which was denied by District of Columbia

III. FACTUAL BACKGROUND

MLW is the owner of the Property, a three (3) story with basement, five (5) unit apartment building, located at the corner of N Street and Potomac Street, N.W., in the heart of the Georgetown Historic District. See, Appeal Exhibits 3 and 6.

A. BZA APPEAL NO. 6885

In the early 1960's, the prior owners of the Property, Mr. and Mrs. Aubrey W. Williams (the "Williams"), noted an appeal² to the Board of Zoning Adjustment, seeking to change a nonconforming use from a rooming house to an apartment house. After a public hearing on this appeal, the Board granted the Williams request to use the Property as an apartment house, and the Property was thereafter permitted to be used and occupied as a five (5) unit apartment house. See, Appeal Exhibit 2. The BZA Order limited the apartment house to five (5) units, but did not impose any time limitation or other conditions. Id.

B. TRANSFER OF OWNERSHIP

After BZA Order No. 6885, the Property was acquired by Mr. and Mrs. Richmond Harris, under the name of Georgetown Chateaux, Inc.

Mr. Jerome Wagshal ("Mr. Wagshal") acquired the Property in the early 1970's. On November 3, 1978, the District of Columbia issued Mr. Wagshal Certificate of Occupancy No. B111434 for the Property (the "1978 C of O"). See, Appeal Exhibit 4. The 1978 C of O authorized "All Floors" of the Property to be occupied as a five (5) unit apartment house, the same as the prior Certificate of Occupancy for the Property. Id.

On April 30, 2001, Mr. Wagshal passed away. On August 22, 2002, the Estate of Jerome Wagshal executed a deed to the Property in favor of Ms. Mary Wagshal, his widow ("Ms. Wagshal"). See, Appeal Exhibit 5. On September 6, 2002, Ms. Wagshal transferred ownership of the Property to a limited liability corporation, MLW. See, Appeal Exhibit 6. On September 9, 2003, the District of Columbia issued the Current C of O to MLW. See, Appeal Exhibit 7. The

² In 1962, a BZA appeal was the functional and legal equivalent of a modern "use variance" and/or "special exception" granted by the Board. See, 11 DCMR §§ 3103 and 3104.

Current C of O was issued based on a change of ownership with continued use authorized of the "Basement, 1st 2nd & 3rd" Floors as a five (5) unit apartment building. Id.

C. RENOVATION OF THE PROPERTY

Planning for the rehabilitation and renovation of the existing five (5) unit Apartment Building began prior to Mr. Wagshal's death, but gained renewed momentum after his passing. At all times, the plan was to renovate the existing five (5) unit apartment building. See, Pre-hearing Exhibit A. MLW hired an architect in June 2003 and the specific plans for the total renovation project were developed. Given the scope of the proposed renovation, the work could not be undertaken while the building was occupied by tenants. The last tenant, Mr. Thomas Wallick, did not vacate the building until March 31, 2003. On June 4, 2004, MLW submitted a Building Permit application for "Interior Work Only – Rehabilitation and Alteration of Existing 5-unit Apartment Building." See, Appeal Exhibit 8 (emphasis in original).

On August 9, 2004, MLW submitted a Building Permit application for exterior "Rehabilitation of Existing 5 Unit Apartment Building." See, Appeal Exhibit 9. The U.S. Commission of Fine Arts/Old Georgetown Board granted conceptual design approval for the exterior work on June 20, 2004 and final approval on September 24, 2004.

On March 16, 2005, the DCRA issued Building Permit No. B470714 (the "March 2005 Permit") authorizing the exterior "Rehab. of Exist'g 5-Unit Apt. Bldg." located on the Property. See, Appeal Exhibit 10.

On June 21, 2005, DCRA issued a second permit, Building Permit No. B474036 (the "June 2005 Permit") authorizing "Interior Work Only Rehab. and Alteration of Existing 5-unit Apt. Bldg." See, Appeal Exhibit 11.

During the one (1) year period it took MLW to obtain the March 2005 Permit and June 2005 Permit, both permit applications were exhaustively reviewed and approved by DCRA, the U.S. Commission of Fine Arts and D.C. Historic Preservation Review Board. The Zoning Administrator expressly approved both permit applications. See, Appeal Exhibits 8 and 9, and Affidavit of Mr. Olutoye Bello, attached as Pre-hearing Exhibit B; Appeal Exhibit 12. Under 11 DCMR § 3203.11(c), the issuance of a building permit shall constitute a “provisional certificate of occupancy” and vests the party’s right to a final certificate of occupancy upon completion of the permitted work.

After obtaining all necessary permits and approvals, construction at the Property began on or about November 3, 2005 and has continued uninterrupted, except for the two invalid Stop Work Orders issued by Mr. Crews and then rescinded. See, Bowen Affidavit, Appeal Exhibit 13.

The following is a summary of the permits issued in conjunction with the Property.

<u>Permit No.</u>	<u>Date of Issuance</u>	<u>Purpose</u>
1. B470714	March 16, 2005	Rehabilitation of existing five (5) unit apartment building. Work includes window restoration, excavation of rear courtyard and construction of new brick garden walls. Porch roof will be added to the entrance of the rear basement apartment. <u>Exhibit 10.</u>
2. B474036	June 21, 2005	Interior work only. Rehabilitation and alteration of existing five (5) unit apartment building. <u>Exhibit 11.</u>
3. PA15617	October 24, 2005	Occupy roadway with dumpster 20' x 10".
4. EL107336	November 7, 2005	Outlets, lights, electric range, garbage disposal, dish washer, hot water heater, service meter, motor/generator.
5. EL107516	November 9, 2005	Stingers, temporary quad outlet.
6. PLBG107613	November 9, 2005	Bath tubs, water closets, sinks, basins, garbage disposal, water heaters, gas range, gas oven, gas furnace.
7. AC107812	November 9, 2005	Refurbish air conditioning.

D. THE FIRST STOP WORK ORDER ISSUED BY MR. BILL CREWS

On December 7, 2005, DCRA issued a Stop Work Order (the "First Stop Work Order"), citing "DCMR11 [sic] 2002 Nonconforming use structure without BZA Approval." See, Appeal Exhibit 14. The First Stop Work Order was not signed by the issuing official, containing only a hand-printed note that it was issued "per Bill Crews." Id.

On December 21, 2005, MLW, through counsel, sent a letter to Mr. Lennox Douglas, Acting Administrator of BLRA ("Mr. Douglas"), pursuant to 12 D.C.M.R. §112.1, appealing the First Stop Work Order. See, Appeal Exhibit 15. Mr. Douglas did not respond to the appeal within the required three (3) days or at anytime thereafter.

Having received no response from Mr. Douglas, MLW, through counsel, on December 30, 2005 sent a letter to Dr. Patrick J. Canavan, Director of DCRA ("Dr. Canavan"), pursuant to 12 D.C.M.R. §112.1.2, appealing the First Stop Work Order. See, Appeal Exhibit 16. Dr. Canavan did not respond to the appeal within the three (3) days permitted. Based on Dr. Canavan's failure to respond, on January 9, 2006, MLW, through counsel, submitted a Supplementary Statement in Support of Appeal of the First Stop Work Order (the "Supplementary Statement") to Dr. Canavan. See, Appeal Exhibit 17. Dr. Canavan did not respond to the Supplementary Statement within the three (3) days required, or at any time thereafter.

Based on the repeated failure of DCRA to respond to the three (3) letters, MLW on January 20, 2006, filed a Complaint and Motions for Temporary Restraining Order ("TRO") and for Preliminary Injunction ("PI"), captioned *MLW, LLC v. District of Columbia et al.*, 06-ca-0000360 in the Superior Court for the District of Columbia (the "First Litigation"). See, Appeal Exhibit 18, (Complaint;) and Appeal Exhibit 19, (TRO and PI.) A hearing on the TRO was scheduled for before the Judge-in-Chambers on January 23, 2006 at 3:00 p.m.

The basis for the First Litigation was, *inter alia*, that a Stop Work Order authorized by the Construction Codes does not apply to alleged zoning violations; that Mr. Crews, in his capacity as the Zoning Administrator, lacked the authority to issue the First Stop Work Order; and the First Stop Work Order itself was technically deficient and therefore a nullity. See, Appeal Exhibits 18 and 19. In a January 12, 2006 e-mail to a third party and obtained through Discovery, Mr. Crews acknowledged that based on BZA Order No. 6885 and the Current C of O there was no "legal basis" for a Stop Work Order and "I have no alternative than to lift the stop work order." Mr. Crews also stated that he had "no evidence of any discontinuance of the non-conforming use." Pre-hearing Exhibit C. Although admitting the invalidity of the Stop Work Order, Mr. Crews took no steps to lift the order.

On the morning of January 23, 2006, only hours prior to the Superior Court hearing on the TRO, Ellen A. Efros, Esq., Assistant Attorney General, Equity Section I, Civil Litigation Division, Office of the Attorney General for the District of Columbia ("Ms. Efros"), contacted counsel for MLW, by telephone, and advised that the First Stop Work Order had been rescinded by Mr. Crews, and that MLW was allowed to immediately recommence work under the previously issued buildings permits. This conversation was confirmed in an email sent by Ms. Efros. See, Appeal Exhibit 20. Mr. Crews, also in a telephone conversation with MLW's counsel, confirmed that the First Stop Work Order had been rescinded. Based on the rescission of the First Stop Work Order, on January 31, 2006, MLW filed a Notice of Dismissal without prejudice as to the First Litigation. See, Appeal Exhibit 21.

E. THE SECOND STOP WORK ORDER ISSUED BY MR. BILL CREWS

On March 28, 2006, DCRA issued a second Stop Work Order (the "Second Stop Work Order"), citing "11 DCMR §2005.1 = See attached letter sent March 22, 2006 to Ms. Mary Wagshal – Must provide proof of rental of all 5-units for past 10 years" as the violation. See, Appeal Exhibit 22. The Second Stop Work Order was signed by "Juan Scott" with a hand-printed note stating "Bill Crews." Id. The Second Stop Work Order had the box next to the pre-printed label of "Construction" checked off. Id. Also, the Second Order contained a hand-written label or box marked "Office of Zoning Administrator" checked off. Id.

The Second Order was accompanied by a letter from Mr. Crews dated March 22, 2006 (the "SWO Letter"). See, Appeal Exhibit 23. Despite the fact that the SWO Letter was dated March 22, 2006 and had a handwritten note by Mr. Crews that the "original" was mailed on March 23, 2006, the postmark on the envelope showed that it was mailed on March 27, 2006. Id. The SWO Letter acknowledged that use of the Property as a five (5) unit apartment was authorized by order of the Board of Zoning Adjustment in Appeal No. 6885. Id. The SWO Letter further stated that "a question arises as to the continuation of the nonconforming use" and referenced 11 D.C.M.R. 2005.1.³ Id. The SWO Letter also contained a handwritten note that read "Stop Work Order place [sic] by Mr. Bill Crews, authorization of the Director, DCRA will be lifted upon verification of requested documentation" and signed by "Bill Crews" and dated March 28, 2006. Id.

³ In the SWO Letter, Mr. Crews requested rental information for the property be provided by April 7, 2006 for his review before deciding whether there was any basis for issuing the Stop Work Order. However, instead of waiting to receive the requested information, Mr. Crews acted unilaterally to issue the Second Work Order on March 28, 2006 without any factual information to support his action.

As required, on or about March 29, 2006, MLW, through counsel, sent a letter to Mr. Douglas, pursuant to 12 D.C.M.R. §112.1, appealing the Second Stop Work Order. See, Appeal Exhibit 24. Again, Mr. Douglas did not respond to the appeal within the three (3) days required, and, to date, no response has ever been received from Mr. Douglas.

On April 10, 2006, having received no response from DCRA, MLW filed a second Complaint and Motions for Temporary Restraining Order ("TRO") and for Preliminary Injunction ("PI"), captioned *MLW, LLC v. District of Columbia et al.*, 06-ca-2790 in the Superior Court for the District of Columbia (the "Second Litigation"). See, Appeal Exhibit 25. Counsel for MLW once again contacted the District of Columbia regarding the Second Stop Work Order. At the behest of Ms. Efros, several messages were left with Mr. Crews seeking to discuss the lifting of the Second Stop Work Order, but Mr. Crews did not return any of the telephone calls. See, Appeal Exhibit 26.

On April 11, 2006, after several additional conversations by telephone with Ms. Efros and Andrew Saindon, Esq., Assistant Attorney General for the District of Columbia ("Mr. Saindon"), the District indicated the Second Stop Work Order would be rescinded before the close of business that day. See, Appeal Exhibit 27. However, the Second Stop Work Order was not lifted until approximately noon on the following day, Wednesday, April 12, 2006. See, Appeal Exhibit 28. Based on the lifting of the Stop Work Order, MLW withdrew its request for temporary and preliminary injunctive relief, but the Second Litigation was not dismissed due to the significant and continuing financial harm incurred by MLW as direct result of the unjustified actions of the District and Mr. Crews.

The Second Litigation remains pending as of the date of this Appeal, with the parties currently conducting discovery. The deposition of Mr. Crews was taken on December 21, 2006,

but the District has consented to MLW's request for leave to amend the Complaint in the Second Litigation to include the most recent actions undertaken by Mr. Crews in revoking the Current C of O.

F. NOTICE OF REVOCATION OF CURRENT CERTIFICATE OF OCCUPANCY

On October 19, 2006, Mr. Crews issued the Notice which revoked the Current C of O as of October 29, 2006. See, Appeal Exhibit 1. In the Notice, Mr. Crews alleged that on "information and belief, the Zoning Administrator has determined that the nonconforming use was discontinued for a period of three (3) or more years" and as a result, under 11 DCMR § 2005.1, "the current use as a five (5) unit apartment building is not allowed by the Zoning Regulations." See, Appeal Exhibit 1.

IV. LEGAL ANALYSIS

A. THE FIVE UNIT APARTMENT BUILDING APPROVED BY THE BOARD IS A CONFORMING USE

The Notice is fatally flawed based on the unsupported assertion that the use of the Property as a five unit Apartment Building is a "nonconforming use" and therefore subject to the three-year discontinuance provisions of 11 DCMR § 2005.1. By this action, Mr. Crews has attempted to usurp the authority of the Board, demonstrated a fundamental and continuing misunderstanding and disrespect for the Zoning Regulations and the proper role of the Zoning Administrator, and caused great harm to a law-abiding property owner.

It is undisputed that the Board expressly authorized, without time limitation or any other condition, use of the Property as a five unit Apartment Building. It is also well established that any use approved and authorized by the Board runs with the land and is NOT a "nonconforming

use" as that term is defined in the Zoning Regulations. ANDERSON, AMERICAN LAW OF ZONING, §20.2 (4th Ed); see also, Affidavit of Mr. Olutoye Bello (former D.C. Zoning Administrator), Pre-hearing Exhibit B; Appeal Exhibit 12. In 1962, the Board's granting the "appeal" was in all respects the functional and legal equivalent of a what is now known as either a "use variance" or a "special exception" and that approval must be clearly distinguished from a "nonconforming use." Courts throughout the country have firmly embraced the concept that a use approved by a variance or special exception "becomes a conforming use and otherwise partakes to a large degree the character of a vested right running with the land." ANDERSON, AMERICAN LAW OF ZONING §§ 6.1, 20.2 citing Industrial Lessors, Inc. v. Garfield, 119 NJ Super 181, 290 A.2d 737 (1972), cert. den, 61 NJ 160, 293 A.2d 390. Accordingly, a use authorized through such zoning relief is not a "nonconforming use." See, Pre-Hearing Exhibit B; Appeal Exhibit 12.

Additionally, a careful analysis of the "nonconforming use" definition demonstrates that the Board approved 5-unit apartment building use is conforming. Under the Zoning Regulations, a "nonconforming use" is defined as:

[A]ny use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective, that does not conform to the use provisions for the district in which the use is located. A use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use. That nonconforming use shall be considered a conforming use, subject to the further provisions of §§ 3104.2 and 3104.3.

11 DCMR §199.1.

Specifically, the 5-unit apartment building use was not a use "lawfully in existence" when the Zoning Regulations were adopted in May 1958, or amended. Significantly, the apartment building use was first authorized by the Board four (4) years after the Zoning Regulations were

adopted, not by operation of law as the result of being "grandfathered" by the subsequent adoption of new or amended Zoning Regulations.

In addition, this definition also clearly establishes and contemplates the role of the Board and its special exception approval authority in distinguishing between nonconforming and conforming uses. An otherwise nonconforming use would be considered a conforming use if that use could be approved by the Board as a special exception. Thus, under the current Zoning Regulations in the R-3 Zone where the Property is located, the prior nonconforming use as a rooming house could be changed to another nonconforming use as an apartment building with a special exception under § 2003.1.

Section § 2003.1 provides:

If approved by the Board of Zoning Adjustment, as authorized in §§ 3103 and 3104 for variances and special exceptions, a nonconforming use may be changed to a use that is permitted as a matter of right in the most restrictive district in which the existing nonconforming use is permitted as a matter of right, subject to the conditions set forth in this section.

In applying § 2003.1 to this case, the Board would be authorized to grant a special exception to allow a rooming house (first permitted in the R-4 zone) to be changed to an apartment house (also, first permitted in the R-4 zone). And as a result, the approved apartment building would be a conforming use under the clear definition of "nonconforming use."

B. A CONFORMING USE IS NOT SUBJECT TO DISCONTINUANCE UNDER § 2005.1

The discontinuance restrictions under § 2005.1 are by definition only applicable to a "nonconforming use." Section 2005.1 provides:

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.

11 DCMR § 2005.1 (Emphasis added).

As a conforming use, the 5-unit Apartment Building at the Property is not subject to the discontinuance restrictions of § 2005.1. See, Affidavit of Mr. Olutoye Bello, Pre-hearing Exhibit B; Appeal Exhibit 12.

Not only is Mr. Crews incorrect in applying the discontinuance restrictions to this conforming use, but he has no factual basis to substantiate his allegation of discontinuance. Previously, Mr. Crews acknowledged he had “no evidence of any discontinuance,” See, Pre-hearing Exhibit C, but proceeded to issue the Notice based on unspecified “information and belief.” See, Appeal Exhibit 1.

In fact, all the evidence clearly establishes that the five (5) unit Apartment House use has been continuous and uninterrupted since at least 1962. Further, MLW has demonstrated a clear intention and substantial investment in maintaining and improving that use. The certificates of occupancy and building permits issued by DCRA and the more than \$2 Million Dollars spent on the renovation project are undisputed evidence that the five (5) unit Apartment House has not been discontinued and MLW has every intention of continuing the BZA approved use.

C. THE DISTRICT IS ESTOPPED FROM REVOKING THE CURRENT CERTIFICATE OF OCCUPANCY

The District of Columbia is estopped from revoking the Current C of O. MLW has already acted in reliance, to its detriment, on the Current C of O, as well as the construction and other permits issued by the District of Columbia.

There is a substantial body of case law applying estoppel to municipal corporations, including, specifically the District of Columbia. See i.e., District of Columbia v. Cahill, 54 F.2d

453, 454 (D.C. 1931) (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); Bannum, Inc. v. District of Columbia Board of Zoning Adjustment, 894 A.2d 423 (D.C. 2006); Saah v. District of Columbia Board of Zoning Adjustment, 433 A.2d 1114 (D.C. 1981); Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917 (D.C. 1980); Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7 (D.C. 1978); Smith v. District of Columbia Board of Zoning Adjustment, 342 A.2d 356 (D.C. 1975).

Most recently, the D.C. Court of Appeals has repeated the six part test required to successfully establish an estoppel claim against the D.C. government, including: 1) expensive and permanent improvements; 2) made in good faith; 3) in justifiable and reasonable reliance upon; 4) affirmative acts of the District Government; 5) without notice that the improvements might violate the Zoning Regulations; and 6) the equities strongly favor the petitioner. Bannum, Inc. at 431; District of Columbia Department of Consumer and Regulatory Affairs v. Vu, CR-C-06-100009, (OAH, October 16, 2006).

It is indisputable that MLW undertook the present action, including but not limited to, obtaining financing for construction, contracting with several contractors, allowing substantial work to be performed on the Property and making other expensive and permanent improvements to the Property, in reliance on not only the Current C of O, but two Building Permits and other permits and approvals issued by the District long before the issuance of the Notice.

As of the date of the Notice, MLW had incurred debt of \$1,300,000.00, including at least Nine Hundred Fifty Thousand Dollars (\$950,000.00) in construction costs over almost one year and Thirty Thousand Dollars (\$30,000.00) in interest on the construction loans. This substantial

financial investment, and the actions of MLW, were made in direct reliance on the affirmative acts of the District – issuance of the Current C of O, two (2) building permits and other approvals for work on the Property. MLW’s reliance on the repeated affirmative acts of the District were at all times in good faith, justified and reasonable under the circumstances for the purpose of renovating and investing in an aging property for continued use as a rental accommodation. In a matter recently decided by the Office of Administrative Hearings, captioned District of Columbia Department of Consumer and Regulatory Affairs v. Vu, *supra*, the District was estopped from revoking a building permit as the homeowner had debt of in excess of One Million Dollars (\$1,000,000.00) and the expenditure of the funds was in good faith and in justifiable and reasonable reliance on affirmative acts of DCRA. District of Columbia Department of Consumer and Regulatory Affairs v. Vu, CR-C-06-100009, (OAH, October 16, 2006).⁴

At no time prior to initiating the extensive and expensive construction at the Property did MLW have any notice that the Current C of O and/or the two (2) building permits and other approvals were in violation of the Zoning Regulations. Only after construction had begun did Mr. Crews raise a challenge to the approvals granted. In both instances, the illegal and unauthorized Stop Work Orders were promptly lifted and MLW had no notice or reason to believe that the work in progress could not be continued to completion and the Property occupied in accordance with the Current C of O and the approved construction. After the Second Stop Work Order was lifted on April 12, 2006, MLW restarted construction and continued

⁴ The Court of Appeals in Saah v. District of Columbia Board of Zoning Adjustment, *supra*, found that equitable estoppel applied against the District when significantly less money had been expended to complete less construction than in Vu. In Saah, the homeowner spent over one-quarter of a million dollars (\$225,000.00) for sixty percent (60%) completion.

uninterrupted and at great expense for more than six (6) months before, without warning, Mr. Crews unilaterally issued the Notice. After twice being rebuked for acting improperly, it was unconceivable to MLW, or its counsel, that Mr. Crews had any reasonable basis for objecting or was foolish or reckless enough to initiate yet a third unwarranted assault on MLW, the Property and numerous approvals from the District.

The equities in this case overwhelmingly favor MLW. The Current C of O is more than three (3) years old and has never before been challenged. On the basis of the Current C of O, MLW obtained building permits and numerous other approvals, incurred construction financing and construction began and reasonably continued for more than a year at cost exceeding \$1,300,000.00. Construction is now approximately ninety-five percent (95%) completed with an anticipated completion date of May 1, 2007, and revoking the Current C of O would have the domino affect of invalidating the building permits and leaving the Property with a partially completed and uninhabitable structure. As in the Vu case, this result would be "ruinous" to MLW precipitating a default in the construction loan and erecting a barrier to obtaining permanent financing and subjecting the Property to foreclosure. "In zoning, the equities can be so compelling as to favor the individual property owner." Wieck at 13.

D. REVOCATION OF THE 2003 C OF O IS BARRED BY THE DOCTRINE OF LACHES

The Notice is barred by the doctrine of laches, as the District "slept on its rights" with respect to any claim as to the Current C of O. See, 11 D.C.M.R. 3112.2(a); see also, Appeal No. 16849 of Robert Lehrman; Appeal No. 14110 of the Residential Action Coalition; Georgetown Residents Alliance v. District of Columbia Board of Zoning Adjustment, 816 A.2d 41 (D.C. 2003); Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment, 775 A.2d 1117 (D.C. 2001).

"To prevail on the affirmative defense of laches, the party asserting the defense bears the burden of proving that (1) the claimant knew of the existence of the grounds for the claim; (2) the delay was unreasonable and must have worked to the disadvantage, injury or prejudice of the party asserting the defense; (3) the delay of time has resulted in some change in the condition of the property or in the relations of the parties; however, the mere passage of time is insufficient to support a finding of laches." Town of Cameron v. Woodell, 150 N.C. App. 174, 563 S.E. 2d 198 (N.C. App. 2002).

If the District had a viable claim against the Current C of O, it waited far too long in seeking recourse. See, Federal Marketing Company v. Virginia Impression Products Company, 823 A. 2d 513 (D.C. 2003); see also, Richards v. Mackall, 124 U.S. 183 (1888); Halstead v. Grinnan, 152 U.S. 412 (1894). The Court of Appeals in American University Park Citizens Association v. Burka, 400 A. 2d 737 (D.C. 1979), stated that "[l]aches is the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." Id. at 740 (internal quotations omitted).

The Current C of O was issued on September 9, 2003. See, Appeal Exhibit 7. In June and August, 2004, MLW submitted applications for construction permits with respect to the proposed renovations to the Property. See, Appeal Exhibits 8 and 9. On or about March 16, 2005 and June 21, 2005, the requested construction permits for the construction work authorizing the renovation of the existing five (5) unit apartment building located on the Property were issued. See, Appeal Exhibits 10 and 11. On or about November 3, 2005 construction on the Building commenced and has continued for more than a year at a cost of \$1,300,000.00. See, Appeal Exhibits 3 and 13. The District is barred by laches, as well as estoppel, discussed infra, from revoking the Current C of O over three (3) years after its issuance, more than one (1) year

after issuance of building permits and one (1) year after the start of construction. Given the level of sustained scrutiny, bordering on obsession, that Mr. Crews and DCRA has directed at the Property, it is inexcusable that the Notice was filed at this late date.

MLW, in reliance on the issuance of the Current C of O, combined with the subsequent issuance of the construction permits authorizing the substantial renovations to the Property, expending significant amounts of money on the Property. See, Appeal Exhibit 3. It is without dispute that a change in the condition of the Property has occurred since the time the Current C of O was issued, and that said change in condition is directly related to the issuance of the Current C of O and the construction permits. Clearly, the District's delay in acting on its alleged claim, without making a concession as to the merits of the same, has operated to the extreme prejudice of MLW. The Notice may result in MLW defaulting on its construction loans and other financial obligations as to the Property.

V. WITNESSES

In Support of this Appeal, MLW will introduce at least the following witnesses at the hearing:

1. Ms. Mary Wagshal, MLW, LLC
2. Mr. Olutoye Bello, Zoning Expert

VI. CONCLUSION

For the foregoing reasons, the Zoning Administrator's action is founded on a legally insufficient basis and barred by the doctrine of estoppel and/or laches, and therefore, the Appeal must be GRANTED and DCRA directed to reinstate Certificate of Occupancy Number CO61776 without further delay or interference.

Respectfully submitted,

GREENSTEIN DELOREME & LUCHS, P.C.

A large, bold, handwritten signature in black ink, appearing to be 'JPB', is written over the firm name.

John Patrick Brown, Jr, # 417566

Joshua M. Greenberg, # 489323

Stephanie A. Baldwin, # 463370

1620 L Street, N.W.

Suite 900

Washington, D.C. 20036

(202) 452-1400

Counsel for Appellant – MLW, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Pre-hearing Statement in Support of Appeal was served by electronic mail, this 17th day of April, 2007, upon the following:

Jill Stern, Esq.
General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Room 9400
Washington, D.C. 20002

Dennis M. Taylor, Esq.
Assistant General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
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Washington D.C. 20002

Andrew J. Saindon, Esq.
Assistant Attorney General
Office of the Attorney General for the District of Columbia
441 4th Street, N.W.
6th Floor South
Washington, D.C. 20001

Mr. Ed Solomon
Chairman
Advisory Neighborhood Commission 2E
3525 S Street, NW
Washington, DC 20007

Mr. Bill Starrels
Single Member District Representative 2E05
Advisory Neighborhood Commission 2E
1045 31st Street, NW
Washington, DC 20007



John Patrick Brown, Jr.

EXHIBIT A

FAX TRANSMITTAL SHEET

FAX TRANSMISSION TO: Mr. Stephen N. Jacoby
Real Estate Appraiser
9203 Wadsworth Dr.
Bethesda, MD 20817

Sent to the following number: (301) 907-4766
voice(301) 530-7256

From: Mary Wagshal, 5920 Empire Way, Rockville, MD 20852
at(301) 770-0770, Fax (301)770-1760

Date: May 29, 2001(Tuesday) 9:00 A.M.

Total number of pages including this sheet: 5 page(s)

Message: Re: 3256 N St. NW, Washington DC

Dear Mr. Jacoby:

As promised I have attached a drawing an architect did a while ago before my husband became ill that shows the building as it currently exists as well as two different possible configurations for the main level.

Based on the scale the architect used the building is 64 feet long and 26 feet wide at the bump outs. I suppose this means roughly 1500 square feet on each level.

My plan is to keep the building as a five-unit rental since I have a valid certificate of occupancy for five units. The probable configuration is to keep two small units on the top floor, reconfigure the main level to a two-bedroom/den unit with two baths and keep the English basement unit and separate unit accessed on Potomac Street as they are.

I plan to do a complete renovation including upgrading all electrical, mechanical and plumbing systems and obviously bring the building up to code. The units will be separately metered for utilities and will include individual washer/dryers, dishwashers and a good grade of appliances, cabinets and bath fixtures. I do not plan to gold plate the units but they will be very nice.

I would appreciate a call with your thoughts about what the building would be worth fully renovated.

Sincerely yours,

Mary Wagshal

EXHIBIT B

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

Appeal of MLW, LLC

BZA Appeal No. _____
ANC 2E

AFFIDAVIT

I, Olutoye Bello, duly sworn, depose and state as follows:

1. I am over twenty one (21) years of age and make this Affidavit based on personal knowledge of the facts set forth herein.
2. I am the Managing Member of Bello, Bello & Associates, LLC, a Washington, D.C. based zoning consulting and code compliance, plans review and certified third-party inspection company, and am authorized to make this Affidavit in support of the above-captioned BZA appeal on behalf of the appellant, MLW, LLC ("MLW").
3. I have previously served as the Zoning Administrator for the District of Columbia (October 2004 through May 2005), and was employed by the District of Columbia government for approximately fifteen (15) years in a variety of zoning related positions, including at DCRA and the Office of Zoning. As a result, I have extensive knowledge and understanding of the duties, responsibilities and limitations of the authority of the Office of the Zoning Administrator and the process by which building permits and Certificates of Occupancy are applied for, reviewed, approved/denied, and enforced.
4. The Zoning Administrator for the District of Columbia, among other agencies within the District of Columbia government, reviews applications for construction permits and Certificates of Occupancy, and either approves or disapproves the same based on compliance with the Zoning Regulations. The Zoning Administrator is also responsible for

reviewing existing building permits and certificates of occupancy for continued compliance with the Zoning Regulations.

5. Both of the building permit applications submitted by MLW were reviewed and expressly approved by the Zoning Administrator's office before the issuance of those permits.

6. Certificate of Occupancy No. CO61776 (September 9, 2003) authorizing use of the Property as a five (5) unit apartment building was reviewed and approved by the Zoning Administrator's Office and remains valid.

7. Based on my extensive experience in the interpretation and enforcement of the Zoning Regulations, it is well established and beyond dispute that any use which is approved and authorized by the Board of Zoning Adjustment runs with the land, is not considered a "nonconforming use" as that term is defined in the Zoning Regulations for the District of Columbia, 11 DCMR § 199.1, and therefore is not subject to the discontinuance provisions of 11 DCMR §2005.1.

8. I have personally reviewed BZA Order No. 6885, and conclude that the Order authorized the use of the real property and improvements located at 3256 N Street, N.W. (Square 1218, Lot 104) (the "Property") as a five (5) unit apartment building without time limitation or other conditions.

9. In my experience, the Zoning Administrator does not have the authority to revoke Certificate of Occupancy No. CO61776 alleging that the use approved by the Board of Zoning Adjustment is "nonconforming" and that use has been discontinued pursuant to 11 DCMR 2005.1.

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Olutoye Bello

Subscribed and sworn to me this 30th day of November, 2006.


Notary Public

My Commission Expires:

302324v1

YVETTE D. MOORE
A Notary Public Of District Of Columbia
My Commission Expires January 1, 2008

EXHIBIT C

Crews, Bill (DCRA)

From: Crews, Bill (DCRA)
Sent: Thursday, January 12, 2006 10:35 PM
To: 'Cynthia_Giordano@aporter.com'
Subject: 3256 N. St NW

Ms. Giordano,

I have spent a considerable amount of time researching and contemplating the concerns you raised in your email of November 3, 2005 and our subsequent meeting on November 22.

I have studied BZA Order #6885, but find that the only enforceable provisions of a BZA order are the stated conditions contained in the order. BZA #6885 conditions the order only to limit the number of apartment units to 5 without specifying where they are in the building. The current owner has a valid Certificate of Occupancy (CO 61776) for 5 units on 4 levels. Therefore the BZA order and the certificate of occupancy do not provide a legal basis to stop work on this property.

I considered 11 DCMR 2002.3 but I have no evidence that any part of the building was a conforming use.

I also considered 11 DCMR 2002.5 prohibiting enlargement of a structure devoted to a nonconforming use. My interpretation of the zoning regulations lead me to state that lowering the floor of the lowest level which is below the grade of the structure is not considered an enlargement.

I also have no evidence of any discontinuation of the non-conforming use for the required time period.

Therefore I have no alternative than to lift the stop work order.

I appreciate your representation of your clients, but I can find no basis for relief that they are seeking.

Best regards,

Bill Crews

Zoning Administrator for the District of Columbia
Department of Consumer and Regulatory Affairs
941 N. Capitol St. NE Suite 2000
Washington, DC 20002
202.442.4576 Office
202.442.4871 Fax
bill.crews@dc.gov