

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

Appeal of Joseph Park

BZA Appeal No. 17902
ANC 6C
Public Hearing April 14, 2009

**APPELLEE'S RESPONSE TO APPELLANT'S LETTER TO
BOARD RE ESTOPPEL**

Appellee, the District of Columbia Department of Consumer and Regulatory Affairs, ("District"), by and through undersigned counsel, respectfully files with this Board of Zoning Adjustment ("Board") its response to the Appellant's Letter to Board re Estoppel. As a basis for the District's Response, the District contends that the Appellant's arguments are unsupported by "reliable, probative and substantial evidence in the whole record." See *Saah v. D.C. Board of Zoning Adjustment*, 433 A.2d (D.C. 1981). In accordance with the Board's directions at the public hearing held on April 14, 2009, the District shall base its response solely on evidence submitted during the April 14, 2009 hearing.¹

I. THE OVERWHELMING EVIDENCE SUPPORTS A FINDING THAT THE APPELLANT HAS DISCONTINUED THE NONCONFORMING USE OF THE PROPERTY LOCATED AT 1179 3RD STREET, N.E.

DCMR 11-2005.1 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

¹ At the conclusion of the April 14, 2009, the Board indicated that the record was closed and the only additional submissions it would accept from the parties were franchise tax returns for the business located at 1179 3rd Street, N.E. for the years 2003 through 2008. On April 24, 2009, Mr. Park appeared at the office of the Counsel for the Appellee with copies of the franchise tax returns. (This office immediately contacted Counsel for the Appellant to notify Mr. Gell that Mr. Park was present). Despite this directive, Counsel for the Appellant has now filed what appears to be a brief regarding an estoppel claim. However, as of the date of this Response, Counsel for the Appellee has not received any submissions from the Appellant indicating that the franchise tax returns were or would be submitted to the Board.

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.

During the April 14, 2009 hearing, the District provided overwhelming evidence that the Appellant has discontinued the nonconforming use of his property at 1179 3rd Street, N.E. for a period of more than three years. This evidence included testimony from the Zoning Administrator regarding the reason for the revocation of the Certificate of Occupancy, the results of the District's investigation, property tax records, information from WASA regarding water service to the property, information regarding the Appellant's basic business license², admissions from the Appellant regarding the status of the store since 2003, and testimony from numerous individuals who lived in the neighborhood. The majority of this testimony went uncontested and was mostly admitted by the Appellant on cross-examination. All of this evidence supports a clear finding that the nonconforming use was abandoned from 2003 through 2008. Therefore, the current use must conform to the regulations of the district in which the use is located.

The Appellant also makes a rather confusing statement in point one (1) of his Letter re Estoppel. Appellant states:

Even if the BZA finds that the use as a liquor store was discontinued for 3 years, that is only prima facie evidence of the intent to abandon the use and said finding that only shifts the burden to the applicant to show by other evidence that he did not intend to abandon. The rule is stated fully in Appeal No 15893 of Woodrow D. Malone.

However, BZA Appeal No. 15893 (Woodrow D. Malone 1996) does not state that DCMR 11-2005.1 establishes any type of burden shifting analysis. Both DCMR 11-2005.1 and the BZA Order in Appeal No. 15893 indicate that the burden is on the

² The Appellant admitted he failed to renew his basic business license after it expired in July of 2003. Therefore, if in fact he was operating after that date, he was doing so in violation of District law.

Appellant to demonstrate his intent to continue his nonconforming use. BZA Appeal No. 15893 p. 8. In addition, the Appellant appears to be relying on case law decided by the D.C. Court of Appeals before the adoption of DCMR 11-2005.1. BZA Appeal No. 15893 pp. 4-5. In the present case, the Appellant had the opportunity but failed to submit any evidence at the April 14, 2009 hearing demonstrating his intent to continue the nonconforming use from July 2003 (when his basic business license expired) until May 2008 (when the new Certificate of Occupancy was granted). Instead of addressing the issue regarding the three-year discontinuance, the Appellant made arguments relevant to his application for a variance, a matter not relevant to this appeal. For these reasons, the Board has sufficient evidence to make a finding that the Appellant has discontinued his non-conforming use for a three-year period.

II. THE DISTRICT IS NOT ESTOPPED FROM ENFORCING THE ZONING REGULATIONS AS IT CANNOT BE SAID THAT THE APPELLANT ACTED IN GOOD FAITH OR ACTED IN JUSTIFIABLE AND REASONABLE RELIANCE

In *Bannum v. D.C. Board of Zoning Adjustment*, 894 A.2d 423 (2006), the D.C. Court of Appeals stated that to succeed on a successful claim of estoppel a property owner must show:

(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 property owner.

Id. at 431. The D.C. Court of Appeals has repeatedly held that the doctrine of equitable estoppel is judicially disfavored in zoning cases because of the important public interest in the integrity and enforcement of the zoning regulations. See *Rafferty v. D.C. Zoning Commission*, 583 A.2d 169, 175 (1990); *Interdonato v. D.C. Board of Zoning*

Adjustment, 429 A.2d 1000, 1003 (1981); *Sission v. D.C. Board of Zoning Adjustment*, 805 A.2d 964, 972 (2002) (“application is limited to situations when the equities [are] strongly in favor of the party invoking the doctrine”). However, the D.C. Court of Appeals also held that the D.C. Zoning Commission erred when it failed to provide an “adequate and concrete factual context in which to render [a] decision” regarding the claim that the District was estopped from enforcing its zoning regulations. *Rafferty*, 583 A.2d at 175 (citing *Smith v. D.C. Board of Zoning Adjustment*, 342 A.2d 356 (1975)).

In the present case, however, there is sufficient evidence for the Board to make a determination that the District is not estopped from enforcing its zoning regulations. First, it cannot be said that the Appellant acted in good faith. During the hearing, the Appellant admitted that he began renovations on his property without a building permit. As a result, a Stop Work Order and Notice of Infraction were issued against the Appellant and he was fined. The Appellant applied for and obtained a building permit only after a stop work order was issued and he was fined. Furthermore, because he started renovations without a permit it cannot be said that he relied on DCRA-issued permits. See *Sisson v. D.C. Board of Zoning Adjustment*, 805 A.2d 964, 972 (2002). Second, it cannot be said that the Appellant acted in justifiable and reasonable reliance. Just as in *Sisson*, the Zoning Administrator pointed out that the Certificate of Occupancy was issued under the wrong zoning classification. *Id.* at 970. The zoning designation of the property on the Certificate of Occupancy was listed as CM-1. However, by Zoning Commission Order No. 821, the zoning designation for the property had changed from CM-1 to R-4 effective August 4, 1997. Therefore, it cannot be said that the Appellant acted in justified and reasonable reliance when he began work prior to obtaining a

building permit or based on a Certificate of Occupancy listing the wrong zoning designation.

Finally, the Appellant cites the case of *Saah v. D.C. Board of Zoning Adjustment*, 433 A.2d 1114 (1981) for the proposition that the equities strongly favor the Appellant in this case. Both during closing arguments and in Appellant's Letter re Estoppel, Appellant merely states "Equities favor the applicant" without providing any factual support for this assertion. In *Saah*, as well as in subsequent cases, the D.C. Court of Appeals applied this element to situations when strict application of the zoning regulations would require the property owner to undertake substantial reconstruction or tear down an existing structure. As the Court noted, equity, "which will not require a wasteful act, will not permit such a result where the public's interest in enforcement is only minimal." *Saah*, 433 A.2d at 1117. In the present case, the District has revoked the Certificate of Occupancy but has not asked the Appellant to tear down his building or substantially alter any renovations. The Appellant is free to continue using the property for the uses permitted under the current zoning designation or apply for a variance, which the Appellant has done.

III. CONCLUSION

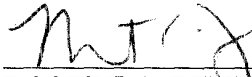
For the above stated reasons, the Appellant's arguments regarding its appeal are wholly without merit and the appeal should be denied.

Respectfully Submitted,

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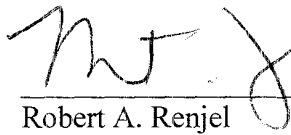


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CERTIFICATE OF SERVICE

I, Robert A. Renjel, hereby certify that on April 28, 2009, a copy of the Appellee's Response to Appellant's Letter re Estoppel filed by Appellee's Counsel was sent to Appellant's counsel by email to sgell@his.com and via first class mail to Stephen Gell, 1101 30th Street, N.W., Fifth Floor, Washington, D.C. 20007.

A copy has also been sent to Ms. Anne Phelps, ANC 6C by email at anne.phelps@anc.dc.gov.



Robert A. Renjel