

Law Offices
STEPHEN N. GELL
A Professional Corporation

1101 30th St. N.W.
Fifth Floor
Washington, D.C. 20007
Telephone: (202) 625-8311
Facsimile: (703) 522-5503

May 5, 2009

Mark D. Loud, Chairman
District of Columbia
Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington, DC 20001

Re: 1179 Third Street, N.E., Sq. 773, Lot 277
BZA Case No. 17902

Reply to "Appellee's response Re: Estoppel" and Motion to Strike

Dear Mr. Loud:

On or about April 21, 2009, the Office of Attorney General (Appellee) submitted its response to our letter of April 24, 2009. It is clear from their 5 page argument that no reply was warranted or appropriate.

Our letter was merely a restatement of the arguments we made and the cases we cited at the hearing on the subject case. We cited no new cases and made no new arguments. It was done solely as an aid to the Board, since transcripts were not yet available. The Board had closed the record for all but some tax information so we were careful not to provide additional facts or arguments. The Attorney General's submission is not so constrained. Its memorandum went way beyond anything it had presented at the hearing and, therefore, its memo should be stricken from the record.

The Attorney General could have made its estoppel arguments at the hearing. We alerted the Board that it would be part of our defense in our Prehearing Statement filed on March 31, two weeks earlier. The Attorney General chose not to respond at the hearing or to ask for additional time to do so. In our view, it has forfeited the right to make such a submission and any consideration of it would be inappropriate.

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If, notwithstanding our motion, the Board is constrained to accept the Attorney General's response, we would respectfully urge the Board to consider that it seriously misstates both the law and Appellant's argument. We agree that if you shut down a business for more than three years, there is a prima facie case for abandonment and loss of rights as a nonconforming use. But a prima facie case is only a presumption -- a rebuttable presumption. The Attorney General concludes that no rebuttal can be heard unless one can show that the government impeded access to the premises. Not so. The phrase "except where governmental action impedes access to the premises" means that where there is such governmental action, a prima facie case cannot be made out. It leaves wide open the possibility that where a prima facie case is made out, the owner can show by rebuttal evidence that he or she did not intend to abandon the use. Our citing of *Woodrow D. Malone* (BZA Appeal No. is 15893 is directly on point. In that case, the Board adopted Mr. Malone's legal argument that § 2005.1 requires the owner

to come forward to prove that it was not his intention to abandon the use. ... if the owner comes forward, then the result will depend on whether there was evidence to support the intention to continue the nonconforming use. ... The Board must weigh the "prima facie" evidence of discontinuance against the owner's evidence, by overt acts or otherwise, of his intention to continue the use. ... the rule as adopted only provides that nonuse for three years will be "construed as prima facie evidence," not conclusive evidence, of intent to abandon. The owner has the right to present contrary evidence. (Pages 4 and 5)

In the *Malone* case, the Board found that the owner had not met his burden of proving that he wanted to continue the use of the property for a grocery and delicatessen, partially because he had, during the three years of cessation, sought a certificate of occupancy for a flower shop. By contrast, we provided evidence that Mr. Park had kept inventory in the store, had kept his liquor license in force, had continued to solicit and consider offers to purchase or rent the store and the business, and that his efforts culminated in a lease with a prospective lessee and the granting of a certificate of occupancy.

Appellee also fails to rebut Appellant's argument regarding estoppel. It states that Mr. Park did not act in good faith because he began work without a building permit. Mr. Park admits that he was mistaken in that and paid a fine for his folly. Nevertheless, he would not have undertaken the work initially without the Certificate of Occupancy, not pursued it later without the building permit, which were both issued by DCRA.

Appellee admits that Mr. Park obtained a certificate of occupancy but states that there was a mistake in noting the zoning classification. Mr. Park should be forgiven his ignorance of the rezoning of the block since the District, which had far more resources at its disposal, was also confused. See *D.C. v. Cahill*, 60 app. D.C. 342; 54 F.

2d 453; 1931 U.S. App. Appellee does not deny that there was reliance and substantial work done to renovate the property. It only responds that Mr. Park was not required to tear down his building. However, it is not the tearing down of a building that triggers a finding of estoppel, but the expenditure of substantial funds in reliance on the governmental action. See *Bannum v. DC BZA*, 894 A.2d 423, (DC App. 2006).

For these reasons, Appellee's Response should be stricken from the record and Appellant's appeal should be granted. Even if Appellee's Response is allowed in the record, the Board, for the reasons cited, should recognize that Appellant has made out its case for a favorable ruling on the appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen N. Gell", written in a cursive style.

Stephen N. Gell