

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

KOO L. YUEN
Appellant

v.

**DISTRICT OF COLUMBIA DEPARTMENT
OF CONSUMER & REGULATORY AFFAIRS**
Appellee

BZA Appeal No. **17988**

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APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Comes now Appellant and moves for summary judgment on the grounds that the undisputed facts of this case, based on the public records, definitively establish that the Appellant is entitled to proceed under the Building Permit which had been issued for the premises, and that the proposed revocation of this Building Permit by the Zoning Administrator is not proper.

None of the facts stated below is subject to a *bona fide* dispute.

PREMISES

This appeal relates to the premises commonly known as 5010 Benning Rd. SE, Washington DC, Lot 68 in Square 5340.

The premises is currently zoned C-1.

PROCEDURAL HISTORY

By letter dated April 30, 2009, Matt Legrant, Zoning Administrator, notified Appellant of intent to revoke Building Permit No. 85608. A copy of this letter is attached to the Appeal.

On June 29, 2009, the Appellant ("Yuen") filed a timely appeal to this action, which was accepted by the Board by letter dated September 3, 2009. A hearing was set for November 17, 2009 at 1:00 PM.

BOARD OF ZONING ADJUSTMENT
District of Columbia

-1-

CASE NO. 17988
EXHIBIT NO. 17

Board of Zoning Adjustment
District of Columbia
CASE NO. 17988
EXHIBIT NO. 17

HISTORY OF THE SITE

By Certificate of Occupancy dated January 20, 1967, James Epps was permitted to use the premises located at the premises as a gasoline service station, pursuant to BZA No. 8427 (special exception granted by BZA No. 8427). A copy of this Occupancy Permit is attached hereto as Exhibit A.

There is a certificate of occupancy dated May 28, 1993 for a coin-operated laundry. A copy of this Occupancy Permit is attached hereto as Exhibit B.

At the time the property was acquired by Yuen, it was vacant.

Yuen was issued Building Permit No. 85608 on March 12, 2008. A copy of the Permit is attached to the Appeal. The Building Permit is issued for, "Renovation of existing gas station bldg., new fixtures where required, new roof, store front material D.P.C. and install new island w/gas pumps." A copy of the Permit is attached to the Appeal.

In connection with the application for the Building Permit, Yuen submitted a set of plans, copies of which were submitted with the Appeal. These plans show that the site consists of a vacant building with no existing gas tanks or gas pumps, and no existing gas station business.

The Notice of Intent to Revoke Building Permit, a copy of which was attached to the Appeal, states that, because the most current approved use of the premises is as a coin-operated laundry, plans requiring a new footing, new roof and store front and installation of a new gas station island require a special exception. The Notice of Intent to Revoke states as follows on page 2:

Here, the facts indicate that Certificate of Occupancy No. B165654 was issued for a coin-operated laundromat at the Property. The record further revealed that no change in the original business operations has been noted since issuance of the Certificate of

Occupancy.

The letter from the Zoning Administrator does not reference the special exception granted to James Epp in 1967, or the status of the site as a conforming use since that date.

APPLICABLE LAW AND ARGUMENT

1. The granting of a certificate of occupancy permitting the use as a gasoline service station on January 20, 1967 was not restricted as to time. Therefore, using the site as a gasoline service station at the present time is a conforming use.

In the case of Appeal No. 17591 of MLW, LLC, (copy of opinion attached as Exhibit C) the Board interpreted this regulation to allow an applicant to construct a five unit apartment building, overruling the Zoning Administrator's determination that this use was non-conforming and had been abandoned for more than 3 years.

The Board in that case held that approval of the apartment building site without time limitation in 1962 rendered the apartment building use which was the functional equivalent of a conforming use. The Board analyzed §2005.1, and held that once a site in the District of Columbia has been approved for a zoning classification, without time restrictions on that use, the use becomes either a conforming use, or a use which cannot be said to be a nonconforming use.

11 DCMR §2005.1 reads as follows; it relates only to a use which is a nonconforming use:

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.

The Board in Appeal No. 17591 of MLW, LLC noted that, “[r]egardless whether the use of the subject property . . . is considered a conforming use, it is undisputed that the use is not a nonconforming use”

As an approved use, whether strictly conforming or whether not-nonconforming, the zoning classification becomes a vested right which runs with the land, according to the opinion in that case.

In the instant case, the grounds of revocation of the Building Permit by the Zoning Administrator is that the use of the premises as a gasoline service station is a nonconforming use. However, this determination by the Zoning Administrator is clearly erroneous.

The Zoning Administrator relies on 11 DCMR §706.1 for the proposition that a the gasoline station at issue is “established” or “enlarged” after May 12, 1958. However, this regulation is not applicable for the reasons stated above. The site has already been approved for a gasoline service station use and this use cannot be withdrawn or terminated. It is a vested right which runs with the title to the real estate and becomes an attribute of the land. It is not a “grandfathered” use under §706.1, but rather a separately approved use, approved without reference to its status as conforming or nonconforming.

The Zoning Administrator may be implying that the grant of an Occupancy Permit to establish a coin-operated laundromat in 1993 discontinued the conforming gas station use. However, according to the ruling in Appeal No. 17591 of MLW, LLC, the discontinuance of a conforming use has no bearing on whether the site may be used for the same conforming purpose in the future. Since the use as a gas station is treated for these purposes as a conforming use, no further zoning proceedings are required to allow the same use currently.

2. The application for the Building Permit is not so misleading so as to invalidate the Permit.

The Zoning Administrator bases revocation on the grounds that the Building Permit describes the site as an “existing gas station.” However, it is clear from the site drawings submitted with the Building Permit application that the site is vacant and that the building is not occupied. Page 1 of the plans describes the site as being improved with an existing one story brick building with commercial store. The plans do not show any existing gasoline storage tanks, gas pumps, gas island or other gasoline station infrastructure. It is impossible that the officials who reviewed these plans and issued the Building Permit were under any misapprehension as to the character of the site.

Moreover, the site had been used as a gasoline station beginning in 1967. Therefore, calling the site an “existing” gasoline station is not misleading. Had, for example, the permit used the term “operating” instead of “existing,” this would possibly provide some support to the Zoning Administrator’s position.

3. The site plan is not an “establishment” or “enlargement.”

As set forth above, the gasoline station use was “established” conclusively when the Occupancy Permit was issued in 1967 by BZA No. 8427. The plans in the instant case provide for at best a rebuilding of a gas station on the site where a gas station is subject to the special exception granted back in 1967.

The scope of work in this case does not involve any enlargement or extension to the site. A canopy is to be installed and no other construction is planned for the site other than installation of the gas station tanks and pumps. The changes to the building are in the nature of repairs and

do not increase the area of the building.

11 DCMR §2500 defines an accessory use for a gasoline service station as any accessory use located on the same lot. Clearly, the canopy, and the tank and pump islands, which are the sole installations involved at 5010 Benning Rd. SE, are accessory uses to a gasoline service station.

11 DCMR §2500.2(b) states that a canopy and kiosk for the service station attendant may be considered an accessory uses not requiring special exception if they meet the requirements of that provision. Since the canopy meets the requirements, it does not require a special exception. Had the canopy not met the requirements, the Building Permit would not have been issued.

CONCLUSION

The gasoline service station for which the Building Permit was issued is a conforming use, or, in the alternative, it is to be treated for zoning purposes as if it were a conforming use. In any event, given the approval of the site as a gas station in 1967, the site may not now be treated as if it were a nonconforming use.

The documentation submitted with the Building Permit, including the plans, establish that the gas station is being rebuilt on the site. The application, taken as a whole as it must be, and not out of context, clearly states the character of the site and the scope of the work, and there is nothing false or misleading in the plans or other submission.

Since there is no issue as to the propriety of the zoning on the site, the gas station cannot be said to have been newly “established” by the Appellant. Since the scope of the work does not expand the existing building, the gas station cannot be said to be “expanded” by the Appellant.

For these reasons, the Building Permit should be allowed to stand and not be revoked.

Respectfully submitted,



/S/ Thomas F. DeCaro, Jr.

Thomas F. DeCaro, Jr.
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CERTIFICATE OF SERVICE

I, Thomas F. DeCaro, Jr. do hereby certify that on October 12, 2009, I did mail, postage prepaid, a copy of the foregoing

Matthew Green
Office of the General Counsel
Consumer & Regulatory Affairs
Suite 9400
9410 North Capitol St. NE
Washington, DC 20003

Doris Parker Woolridge
District of Columbia Attorney Genl
Suite 9400
941 North Capitol St. NE
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Mary D. Jackson
Chairperson of ANC #7E
5001 Hanna Pl. SE
Washington, DC 20019



/S/ Thomas F. DeCaro, Jr.

Thomas F. DeCaro, Jr.

Form LT-P-607

CERTIFICATE OF OCCUPANCY

No. **B** 58922Washington, D.C., **JAN. 20TH**, 19 **67**Permission is hereby granted to **JAMES EPPS**to use the **FIRST** floor(s) of the building located on lot **66** Square **5340**known as premises **5010 BENNING ROAD, N.E.** for the followingpurpose(s): **GASOLINE STATION****B-2A-8427**

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

DEPT. OF LICENSES & INSPECTIONS, GOVT. OF DIST. OF COL.

ZONE **C-1**FEE \$ **12.00**

Chief, Permit Branch

Mary Savage
Permit Clerk

OFFICE COPY

Exhibit A



District of Columbia Government
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration Zoning Division
P.O. BOX 37200 — Washington, D.C. 20013-7200

No.B 165654

May 28, 1993

(date)

CERTIFICATE OF OCCUPANCY
MOON SOO LEE

Permission is hereby granted to _____
to use suite(s) _____ on the first floor(s) _____
of the building located on lot(s) 68 square 534
known as premises 5010 Benning Road, S.E. for the following
purpose(s) Coin Operated Laundromat
Not sexually oriented. []

BZA # _____ EXPIRATION DATE: _____

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

ZONE C-1 FEE \$ 27.00

Aubrey H. Edwards, Director

By _____ Designee

OFFICE COPY

Exhibit B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17591 of MLW, LLC pursuant to 11 DCMR § 3112, from the October 19, 2006 administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to revoke Certificate of Occupancy Permit No. CO 61776, dated September 9, 2003, that approved a five (5) unit apartment building. The subject property is located in the R-3 District at premises 3256 N Street, N.W. (Square 1218, Lot 104).

HEARING DATE: May 1, 2007

DECISION DATE: May 1, 2007

DECISION AND ORDER

INTRODUCTION

MLW, LLC ("Appellant") filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board") on December 1, 2006, pursuant to 11 DCMR § 3112, challenging the October 19, 2006 administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), to revoke Certificate of Occupancy Permit ("CO") 61776, dated September 9, 2003, approving a five-unit apartment building. The Zoning Administrator revoked the CO pursuant to 11 DCMR § 2005.1 on grounds that the use was non-conforming and had been discontinued for more than three years.

Appellant alleged that the Zoning Administrator erred in revoking the CO because the use of the subject property as a five-unit apartment building was not a nonconforming use for the following reasons: First, use of the property as a five-unit apartment building was approved by the Board in BZA Order No. 6885 (1962) without time limitation or other conditions. Second, use of the property does not fall within the definition of nonconforming use as set forth in 11 DCMR § 199. Therefore, the approved use as a five-unit apartment building is not subject to the discontinuance provisions of 11 DCMR § 2005.1. Appellant also argued that there was no discontinuance of the use for more than three years and that DCRA is estopped and barred by the doctrine of laches from revoking CO 61776.

A public hearing on the appeal was duly noticed and held on May 1, 2007. On the day of the hearing, counsel for DCRA submitted a Praeceptum to the Board that indicated that DCRA had notified MLW in writing that the revocation of CO 61776 would be withdrawn; this Withdrawal of Notice of Revocation would affirm the validity of the CO; and, the Withdrawal would be delivered to Appellant's counsel by that afternoon. See, Exhibit 14. DCRA sought postponement of the hearing on the basis that the issues would become moot. Appellant opposed postponement. Finding that the issues were not moot and that DCRA had

Exhibit C

not provided good cause for the requested delay, the Board denied the request for postponement and proceeded with the hearing.

Upon hearing from the parties to the matter, the Board rendered its decision, voting to grant the Appellant's Motion for Summary Judgment and, thereby, to grant the appeal.

An explanation of the facts and law that support that conclusion follows.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Notice of Appeal, as well as a Motion for Summary Judgment and/or an Expedited Hearing, was filed on December 1, 2006 by MLW, LLC. The Office of Zoning scheduled a public hearing for May 1, 2007. In accordance with 11 DCMR § 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 2E03, and DCRA. The Office of Zoning advertised the hearing notice in the D.C. Register at 54 D.C. Reg. 1873 (March 2, 2007).

Motion for Summary Judgment

On December 1, 2006, the Appellant simultaneously filed this Appeal and a Motion for Summary Judgment and/or an Expedited Hearing. See, Exhibit 1, Tab 28. The Motion was heard on May 1, 2007. The Board, upon determining that there was no genuine issue as to any material fact, granted the Motion for Summary Judgment and thereby granted the appeal as a matter of law on the grounds that the five-unit apartment building that was approved by BZA Order 6885 is not a nonconforming use and therefore is not subject to discontinuance under § 2005.1. The Board expressly did not reach the issues of estoppel or laches, as such a determination was not necessary to granting the relief in this case. See, Tr. at 113.

Standard for Motion for Summary Judgment

Summary judgment is appropriate if there is "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Super. Ct. Civ. R. 56 (2005); see also, *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1001-02 (D.C. 1994). Only disputes over facts, viewed in the light most favorable to the non-moving party, which might legitimately affect the outcome of a trial, are "material" under Rule 56. See, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250; 106 S. Ct. 2505 (1986). Disputed material facts are those that might affect the outcome of the suit under governing law. *Clayton v. Owens-Corning Fiberglass Corp.*, 662 A.2d 1374, 1381 (D.C. 1995).

The United States Supreme Court has articulated a policy favoring the summary judgment procedure. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, *supra*; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). In *Celotex*, the U.S. Supreme Court stated:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of [Court Rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.

Celotex, 477 U.S. at 327.

The District of Columbia Court of Appeals has also noted that summary judgment is a valuable tool, and that public policy favors disposing of issues summarily, where possible. *Hercules & Co., Ltd. v. Beltway Carpet Services, Inc.*, 592 A.2d 1069, 1075 (D.C. 1991); *Vessels v. District of Columbia*, 531 A.2d 1016, 1019 (D.C. 1987). In administrative proceedings, summary judgment is also a well-accepted practice. *District of Columbia Department of Consumer and Regulatory Affairs v. Vu*, CR-C-06-100009 (OAH, October 16, 2006.)

The Positions of the Parties

The Appellant maintained that there were no material facts in dispute and that, as a matter of law, the use of the subject property as a five-unit apartment building was not a non-conforming use under the definition set forth in 11 DCMR §2005.1; and based on BZA Order No. 6885, dated August 21, 1962, it became and continued to be a conforming use. Consequently, the regulations pertaining to discontinuance of a nonconforming use did not apply to the property and the Zoning Administrator erred in seeking to revoke CO 61776.

At the hearing, DCRA conceded that the regulations pertaining to discontinuance at § 2005.1 did not apply to the property, but argued that the Board could and should resolve the matter without reaching the question of whether the use of the property was conforming.

Material Facts Not in Dispute

1. The property that is the subject of this appeal is located at 3256 N Street, N.W. in the R-3 zone district of the Georgetown Historic District.

2. MLW, LLC is the owner of the subject property. *See*, Exhibit 1, Tabs 3 and 6.
3. In the early 1960's, the prior owners of the subject property, Mr. and Mrs. Aubrey W. Williams, filed an appeal¹ with the Board, seeking to change a nonconforming use from a rooming house to an apartment house. On August 21, 1962, the Board issued BZA Order No. 6885, authorizing the use of the subject property as a five-unit apartment building. While the BZA limited the apartment building to five units, it did not impose a time limitation or other conditions on the use. *See*, Exhibit 1, Tab 2.
4. Mr. Jerome Wagshal ("Mr. Wagshal") acquired the subject property in the early 1970's. On November 3, 1978, DCRA issued CO No. B111434 for the subject property (the "1978 CO"). The 1978 CO authorized the property to be occupied as a five-unit apartment house, the same as the prior Certificate of Occupancy for the subject property. *See*, Exhibit 1, Tab 4. On August 22, 2002, the Estate of Jerome Wagshal executed a deed to the subject property in favor of Ms. Mary Wagshal ("Ms. Wagshal"). *See*, Exhibit 1, Tab 5. On September 6, 2002, Ms. Wagshal transferred ownership of the subject property to MLW, LLC. *See*, Exhibit 1, Tab 6.
5. On September 9, 2003, DCRA issued the current Certificate of Occupancy No. 61776 to MLW, LLC based on a change of ownership and authorizing continued use of the subject property as a five-unit apartment building. *See*, Exhibit 1, Tab 7.
6. On March 16, 2005, DCRA issued Building Permit No. B470714 (the "March 2005 Permit") authorizing the exterior work on the subject property. *See*, Exhibit 1, Tab 10.
7. On June 21, 2005, DCRA issued a permit, Building Permit No. B474036 (the "June 2005 Permit"), authorizing interior work on the Subject Property. *See*, Exhibit 1, Tab 11.
8. Having received the necessary permits and approvals, MLW began construction at the property on November 3, 2005. (*See* Exhibit 1, Tabs 3 and 13.)
9. On December 7, 2005, DCRA issued a Stop Work Order (the "First SWO") at the subject property alleging a violation of 11 DCMR § 2002 (nonconforming uses within structures). *See*, Exhibit 1, Tab 14.
10. On January 23, 2006, DCRA lifted the First SWO and MLW resumed construction at the subject property. *See*, Exhibit 1, Tab 20.

¹ In 1962, a BZA appeal was the functional and legal equivalent of a modern "use variance" and/or a "special exception" granted by the Board. *See*, 11 DCMR §§ 3103 and 3104 and Tr. at 84.

11. On March 28, 2006, DCRA issued a Second Stop Work Order (the "Second SWO"), alleging a violation of 11 DCMR § 2005.1 (discontinuance of nonconforming use). *See*, Exhibit 1, Tab 22.
12. The second SWO was accompanied by a letter from the Zoning Administrator dated March 22, 2006, acknowledging that the use of the subject property as a five-unit apartment was authorized by order of the BZA in Appeal No. 6885. The letter required the Appellant to "provide proof of rental of all 5 units for past 10 years" and 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." *See*, Exhibit 1, Tab 23.
13. On April 12, 2006, DCRA lifted the Second SWO and MLW resumed construction at the Property. *See*, Exhibit 1, Tab 28.
14. On or about October 19, 2006, the Zoning Administrator sent a Notice of Revocation of CO 61776 to MLW. *See*, Exhibit 1, Tab 1. The Zoning Administrator 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." *Id.*

Legal Analysis

Revocation of Appellant's certificate of occupancy was based on the Zoning Administrator's determination that the apartment building was a nonconforming use and therefore subject to the discontinuance of nonconforming use provision set forth in § 2005.1. As set forth below, and based on the undisputed facts in this case and the law governing nonconforming and conforming uses, the Zoning Administrator erred in this finding.

The term "nonconforming" use is specifically defined under the Zoning Regulations as follows:

[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 3102.3.

11 DCMR § 199.1.

It is undisputed that use of this building as an apartment building was authorized by the Board in 1962 – after the Zoning Regulations that require special exception approval from the Board for this use were adopted in 1958. (See Undisputed Material Fact #3.) Accordingly, this use was not lawfully in existence prior to the adoption of the zoning regulations and, therefore, does not fall within the definition of nonconforming use.

Further, it is undisputed that the Board expressly authorized this use without time limitation or other conditions. See, Finding of Fact # 3. The Appellant argued that because the use was approved and authorized by the Board, it became a “conforming use” and use of the property runs with the land. Although the District’s courts have not addressed this precise question, courts in other parts of the country have upheld 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.” See, Anderson, American Law of Zoning, §§ 6.1, 20.2 (4th Ed.) citing *Industrial Lessors, Inc. v. Garfield*, 119 NJ Super 181, 290 A.2d 737 (1972), cert. den., 61 NJ 160, 293 A2d 390. The Board concurs with this reasoning.

Regardless of whether the use of the subject property as a five-unit apartment building as authorized by BZA Order No. 8665 is considered a conforming use, it is undisputed that the use is not a nonconforming use and it thereby is not subject to the discontinuance restrictions of § 2005.1. The discontinuance restrictions under § 2005.1 are by definition only applicable to a “nonconforming use.” Subsection 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).

Grant of Motion for Summary Judgment

The Board finds that there was not a nonconforming use in this case. The undisputed facts show that use of this five-unit apartment building was not in existence prior to 1958 and, thereby, it does not fit the definition of a "nonconforming use" as set forth in the regulations. That section of the regulations specifically requires that the nonconformity be in existence at the time the title or an amendment became effective, which was not the case in this instance. See, 11 DCMR § 199.1.

Further, the Board finds use of the subject property as a five-unit apartment building was authorized in 1962 by BZA Order No. 6885. As a result, use of the subject property, as a five-unit apartment building pursuant to that order is a conforming use.

Finally, the Board finds as a matter of law that there was no discontinuance of a nonconforming use under § 2005.1 because the use of the subject property as a five-unit apartment building was not a nonconforming use.

Accordingly, DCRA erred when it issued the Notice of Revocation of the Certificate of Occupancy.

For the reasons discussed above, it is hereby **ORDERED** that:

The Motion for Summary Judgment and the appeal of the Notice of Revocation are **GRANTED**.

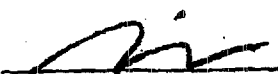
Vote taken on May 1, 2007

VOTE: 3-1-1 (Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann II to grant; Marc D. Loud to deny. No Zoning Commission member participating or voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Three Board members have approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

BZA APPEAL NO. 17591
PAGE NO. 8

FINAL DATE OF ORDER: OCTOBER 18, 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.