

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

KOO YUEN

Appellant,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER
AND REGULATORY AFFAIRS,

Appellee.

BZA Case No. 17988

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OFFICE OF ZONING

**D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' SUR-
REPLY TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT**

Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, files its Sur-Reply to Appellant's Reply to Appellee's Opposition to the Motion for Summary Judgment filed by Koo Yuen ("Appellant or Koo Yuen"). This instant pleading focuses on the new arguments that the Appellee advances in his latest filing. Specifically, the Appellant is incorrect and the special exception was extinguished when the use was changed from a gas station to a carryout/deli and subsequently to a coin-operated laundry service. Additionally, DCRA rebuts the Appellant's assertions regarding the pump enlargement, canopy and service. Notwithstanding these new arguments and DCRA's response, DCRA remains steadfast that the Appellant fails in his appeal because he did not first seek this Board's approval prior to constructing a gas station.

SUMMARY OF FACTS

DCRA refers the Board to a recitation of the facts as it appears in DCRA's Opposition to Appellant's Motion for Summary Judgment filed on November 9, 2009.

BOARD OF ZONING ADJUSTMENT

District of Columbia

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EXHIBIT NO. 24

Board of Zoning Adjustment
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ARGUMENT

1. The Building Permit application and Plans contained false statements and were misleading.

The building permit application and plans submitted to the District on March 12, 2008 show an existing¹ gas station at 5010 Benning Road, Southeast ("Property") that requires renovation to its building. (See Statement of Facts in Dispute No. 7) It is the duty and responsibility of the applicant at the time of filing a building permit application to provide the agency with accurate information. At the time of filing this building permit application, the Applicant attested that the information provided in the application is true, but it was not.

In Appellant's latest filing, he tries to shift the burden to submit accurate and true building permit applications and plans onto DCRA. The law does not require DCRA to review prior Certificates of Occupancy to ascertain if the Appellant is truthfully reflecting the prior approved usage. The law does require the Appellant to show that the property is vacant and not being used as a gas station. Appellant knows what is required because he just completed the process by receiving approval from this Board to construct another gas station at a different location. His current argument is less than credible and should be rejected.

2. The 1965 Special Exception does not run with land in this case because of the intervening nonconforming uses Appellant's right to use the Property as a gasoline station terminated when the C of O was changed by a previous owner.

In 1965, a previous owner obtained Board approval to operate a gasoline station at the Property. Appellant incorrectly argues that the Board's decision in George

¹ Webster New World Dictionary, 2nd Edition, (2002), defines Exist in part as: "to have reality, being; be, occur or present, continue being."

Washington University vs. D.C. Board of Zoning Adjustment, 429 A.2d 1342 (D.C. 1981)

is applicable. What distinguishes this case from the *George Washington University* case is the fact that the nonconforming use remained in the hands of the original owner of the property. In *George Washington University* the Board concluded “that when pursuant to earlier Board authorization, a property owner has undertaken a change from one nonconforming use to another and made related physical alterations in the building, the Board reasonably may conclude that the owner has not abandoned the nonconforming use.” The nonconforming use went from a tailor shop to a restaurant. The change involved two separate lessees. Each lessee rented or proposed to rent space from the owner to use as a restaurant.

In the instant matter, there was a break from usage as a service station for 20 years to a deli for 10 years to a coin-operated laundry services for 10 years. Now the Appellant is attempting to revive a long abandoned service station. Appellant’s argument is akin to a new resident of the Capitol Hill neighborhood wanting to revive his property’s use as a chicken farm because an owner thirty years ago used the property as a chicken farm. Appellant’s argument is nonsense and should be rejected.

Appellant also incorrectly argues that the Board’s decision in *MLW, LLC*, BZA Order No. 17591, issued in 1962, is applicable in this matter. (Exhibit 38) Like the current matter, *MLW, LLC* was an appeal of the Zoning Administrator’s action. But that is where the similarities end. In *MLW, LLC*, the property had been consistently used as a five unit apartment house for decades. Furthermore, in *MLW, LLC*, all C of Os issued since the Board granted the original 1962 appeal authorizing the use of the property as a five unit apartment building, also reflected the use of “five unit apartment building.” By

contrast, the Property in the current case has been used as both a carry-out/deli and a coin-operated laundry. Additionally, C of Os issued for the Property has authorized the use as first a carry-out/deli and then a coin-operated laundry. Therefore, *MLW, LLC* must be distinguished from the current case. Once the owners of the Property changed the use from a gasoline station and began operations as first a carry-out/deli and then a coin-operated laundry, the Appellant's right to use the gasoline station terminated. He must seek a special exception from this Board to use the Property as a gasoline station as a result of the change of use. Accordingly, this is a material fact in dispute and Appellant's motion for summary judgment must be denied.

3. The Gas Station was Enlarged

Appellant must get this Board's approval before *any* pumps can be installed. Appellant keeps asserting that C of O B106803 authorizes him to install 6 or more pumps. He is incorrect. The change of use of the Property from a gas station prevents him from installing any pumps until this Board approves his design pursuant to a Special Exception application – which he has not sought. Additionally, the Appellant's drawings indicate 4 islands which would be greater than 6 pumps. Under any scenario, the Appellant is incorrect and his argument should be rejected.

4. BZA Order No. 8427 dated November 24, 1965 did not approve a canopy, as an accessory use.

The Appellant does not have this Board's approval via a Special Exception to install a canopy. Any argument to the contrary must be rejected. DCRA has not changed its position that the owner intends to install a canopy without BZA approval. A canopy is an accessory use to the gas station pursuant to 11 DCMR 2500.2(b). On November 24, 1965, the BZA Order did not approve a canopy. (See Statement of Disputed Fact No. 8)

That order authorized the agency to approve a building permit, specifically for a gasoline station with 3 bays and 2 service islands. The current 2008 site plans having a canopy would be different than the BZA approved 1967 plan. This accessory use requires BZA approval.² (See, Statement of Disputed Fact No. 12)

In this case, there is a volume of material disputed facts that prohibit the Board from coming to a conclusion on a summary judgment motion. The Board's threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." In deciding whether there is a disputed issue of material fact, the Board must view the underlying facts and draw all reasonable inferences in favor of the non-moving party. *See, Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d. Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984). Since the parties have a material dispute regarding whether there was an abandonment of the use of the Property for the past 23 years, the Board cannot resolve the issue without an evidentiary hearing on the matter.

5. The Proposed Notice to Revoke Building Permit No. B85608 was served on the owner.

DCRA properly served the Proposed Notice to Revoke Building Permit No. B85608 on Koo Yuen, the Owner via Certified Mail and U.S. first class mail to the address at 4225 Connecticut Avenue, N.W., Washington, D.C. 20008-1159. (12A DCMR 105.6.3(3) (Exhibit 36) The Appellant's building permit application reflects that the owner's mailing address is 4225 Connecticut Avenue., N.W., Washington, D.C. (See #6, application). Applicant's notice was mailed to the address provided by the applicant.

² 11 DCMR 3104.2 provides in part: "In the case of a use that was originally permitted and lawfully established as a matter of right and for which the Zoning Regulations now require special exception approval from the Board of Zoning Adjustment, any extension or enlargement of that use shall require special exception approval from the Board"

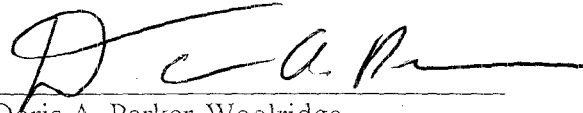
The notice was not returned to DCRA. The notice was also mailed to Leonard & Stephanie Carroll, the Agents for Mr. Yuen, at 820 Kentucky Avenue, Southeast, Washington, D.C. 20019-5838, pursuant to 12A DCMR 105.6.3(2). (Exhibit 36) This statement is a disputed fact. See, Statement of Disputed Fact No. 1. The Notice sent via regular mail was not returned to the DCRA, the presumption is that the owner and his agent received the notice. The Notice sent Certified Mail- Receipt to Mr. Koo Yuen was not returned, however, the Notice sent Certified Mail-Receipt to Mr. Leonard and Stephanie Carroll, the Agents was returned unclaimed. Further, the Appellant indicated in his argument, page 1, Procedural History, paragraph 1, that the Zoning Administrator notified the Appellant by letter dated April 30, 2009 of his intent to revoke the Building Permit No. B85608, which is the appeal pending before this Board. (Exhibit 37). Service of the Notice is a material disputed fact, for which the Summary Judgment should not be granted.

WHEREFORE, for all of the foregoing reasons, the Appellant has failed to meet its burden and the Appellant's Motion for Summary Judgment should be denied.

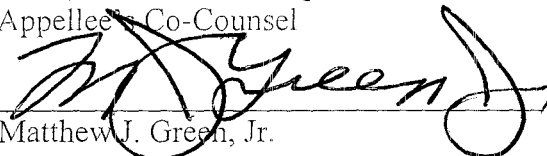
Respectfully submitted,

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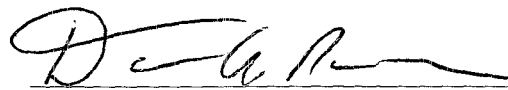
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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2009, a copy of the District's Opposition to the Appellants's Motion for Summary Judgment was sent electronically to tfd@erols.com and postage pre-paid to:

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