

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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RECEIVED
BOARD OF ZONING ADJUSTMENT
DISTRICT OF COLUMBIA

D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS'
BRIEF ON EQUITABLE ESTOPPEL AND LACHES

Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("District/DCRA"), by and through undersigned counsel, respectfully submits its brief asserting that the doctrine of equitable estoppel is not applicable to the appeal because Koo Yuen ("Appellant") cannot meet the elements of estoppel. Since the doctrine does not apply, this Board should deny Appellant's appeal as DCRA is not prohibited by the doctrine of equitable estoppel from halting Appellant's unlawful construction.

SUMMARY OF FACTS

Before November 17, 1965, Eli Busa, et al., filed a Special Exception application for use of the property as a gasoline service station. On November 24, 1965, the Board granted a Special Exception for 5010 Benning Road, Southeast as a gasoline station in BZA Case No. 8427. (Exhibit 2)¹ The Board approved a gasoline station with 3 bays and

¹ All exhibits referenced in this Brief were previously submitted with Appellee's Opposition to Appellant's Motion for Summary Judgment on November 9, 2009.

BOARD OF ZONING ADJUSTMENT
District of Columbia
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EXHIBIT NO. 25

2 service islands.² On or about November 4, 1966, James Epps filed an application to obtain a Certificate of Occupancy (“C of O”) for use of the first floor of the building for grease and oil changes, and to operate a gasoline service station. (Exhibit 3) The 1966 C of O application reflects that the previous use of the property was unknown to Mr. Epps. On January 20, 1967, DCRA issued to James Epps a C of O for use of the property as a gasoline station in accordance with the decision rendered by the Board, in BZA Order No. 8427. (Exhibit 4) On September 4, 1969 and June 16, 1970, the property changed business owners, but the use as a gasoline station remained the same. (Exhibits 5, 6, 7, 8) Subsequently, on March 26, 1978, DCRA approved C of O No. B106803 for a gasoline service station with 6 pumps. (Exhibit 9, 10) Again on April 11, 1979, the property changed business owners, but the use as a gasoline station with 6 pumps remained the same until July 29, 1982. (Exhibits 11, 12, 13)

On or before July 29, 1982, a business owner filed an application for a change of use of the first floor of the property to a Delicatessen. On July 29, 1982, DCRA approved C of O No. B129794 for use of the first floor of the building as a Delicatessen. (Exhibit 14) On April 21, 1986, Joey Suter filed an application for a C of O to change the use of the first floor to a coin operated laundry business. (Exhibit 15) The 1986 application indicated the previous use was a “Carry-out.” On April 21, 1986, the District approved the use change and issued C of O No. B145184 to Joey Suter to use the first floor of the property as a coin operated laundry. (Exhibit 16) On September 16, 1986, February 7,

² The Board granted a Special Exception in BZA Case No. 8427. In its 1965 Opinion, the Board held “the 3 Bay and 2 Island gasoline station would not create a dangerous or objectionable traffic conditions; the station will not create any serious increase in traffic nor become a hazard to life and limb; the operation of the gas station would be in harmony with the general purpose and intent of the zoning regulations and maps; and will not tend to affect adversely the use of the neighboring property.”

1990 and May 28, 1993, the property changed business owners, but the use as a coin operated laundry business remained the same. (Exhibits 17, 18, 19, 20, 21, 22)

On or before March 12, 2008, Koo Yuen filed a Building Permit Application, plans and plat to renovate “an *existing gas station building*, new footing where required, new roof, store front material D.P.C. and install new island with gas pumps for the operation of a gas station.” (Exhibit 23, 24).³ The Appellant did not include installation of tanks in the building permit application. Installation of tanks was reflected on the plans. DCRA did not approve or issue a permit for installation of the tanks. Based on the information on the Appellant’s application and plans, which reflected an *existing* gas station, DCRA approved the issuance of Building Permit No. 85608. (Exhibit 25) On or about January 22, 2009⁴, DCRA received a complaint regarding the construction of a new gas station at the Property. In response, DCRA immediately conducted an investigation. The Zoning Administrator determined based on an inspection that there was no existing gas station at the Property and that Building Permit No. B85608 was issued in error. (Exhibit 26 – 34)

On April 30, 2009, DCRA issued a Notice to Revoke Building Permit No. B85608 because the building permit application and plans contained misrepresentation and false statements, which resulted in a zoning violation. (Exhibit 1) On June 29, 2009, Koo Yuen appealed Notice to Revoke Building Permit No. B85608 to the Board. (Exhibit 35)

³ The Appellee is attaching the last page of the building permit application which appears to have been detached from Exhibit 23, filed with Appellee’s Opposition to Appellant’s Motion for Summary Judgment on November 9, 2009.

⁴ Appellee’s Opposition to Appellant’s Motion for Summary Judgment submitted on November 9, 2009 incorrectly stated on or before April 30, 2009 instead of January 22, 2009.

APPELLANT FAILS TO MEET THE ELEMENTS OF EQUITABLE ESTOPPEL

Appellant's appeal should be denied because Respondent cannot meet the elements of equitable estoppel. Estoppel is defined as "a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."⁵ There are six elements of an equitable estoppel claim: "(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) equities that strongly favor the petitioner." *Bannum, Inc. v. D.C. Board of Zoning Adjustment*, 894 A.2d 423, 431 (D.C. 2006); *See also Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000, 1003 (D.C. 1981). As the law requires Appellant to meet all six elements to prevail on an estoppel claim, this appeal should be denied as the Appellant cannot meet this burden.

ELEMENT ONE – EXPENSIVE AND PERMANENT IMPROVEMENTS

The Appellant fails to meet the first prong of estoppel because prior to issuing the Notice to Revoke on April 30, 2009, "expensive and permanent improvements" were not completed. Appellant alleges that a substantial amount of construction has occurred, including permanent improvements to the site. See, Appellant's Brief dated 11/13/09, p. 2, paragraph 1. By April 30, 2009, the Appellant had only completed a small portion of the construction at the site. See 1/22/09 Photo. A comparison of the work at the site before and after issuing the Building Permit on March 12, 2008 reflects minimal work at the site. See Photo. Appellant argues that DCRA is estopped from revoking its permit

⁵ Black's Law Dictionary, Seventh Edition (1999).

because over 60% of the construction is completed. The Board determined in *Saah v. D.C. Board of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981), that the District was estopped from revoking the building permit when 60% of the work had been completed. *Shah* is not applicable in this matter because Appellant has completed minimal work. Although all construction costs are arguably expensive, completion of less than 60% of improvements prior to the Notice do not support Appellant's estoppel argument. *Rice v. Van Vranken*, 232 NYS 506 (NY 1929). Additionally, expensive improvements are not included as a basis for estoppel when the construction is in violation of Zoning Regulations as is the case here. *San Antonia v. Humble Oil & Refining Co.*, 27 S.W. 2d 868 (TX 1930). Therefore, the Appellant fails to establish the first prong of estoppel and the appeal should be denied.

ELEMENT TWO – GOOD FAITH

The Appellant fails to meet the second prong of estoppel because continued construction at the site was not made in "good faith." Under this prong, the Appellant must show that construction continued in good faith reliance on the Building Permit issued by the District. *See, Bannum, Inc.* at 432. But the Appellant cannot meet this prong because the District gave the Appellant notice when the permit was issued that he must be in compliance with the Building and Zoning codes. The building permit application and plans submitted to the District on March 12, 2008 show an existing⁶ gas station at 5010 Benning Road that requires renovation to its building. It is the duty and responsible 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

⁶ *Webster New World Dictionary*, 2nd Edition, (2002), defines Exist in part as: "to have reality, being; be, occur or present, continue being."

application, the Applicant attested that the information provided in the application is true. In this case, the Appellant argues that the “Plans show a vacant site, with an unoccupied building.” Appellant argues that the building permit application clearly states that the scope of work is for renovation of a gasoline station building and for installation of *gasoline station tanks*, pumps, pump islands, canopy and other related installations. See Appellant’s Brief dated November 13, 2009, p. 1, paragraph 2. However, this plan failed to represent by appropriate architectural standards a denotation that show installation of new pumps and tanks, gas island, and other gasoline station infrastructure. The plans and the building permit application indicated an “existing gas station”. In the Appellant’s motion he indicates that the Agency should have known based on the drawings on the plans that there was no existing gas station at the property.

The purpose of a building application is for the Applicant to provide the Agency with clear and concise drawings and truthful information of the current status of the property for which they are seeking an approval of a building permit application. When the Agency received a complaint in March 2009, regarding construction of a new gas station, an inspection was conducted that discovered the site consisted of a vacant building and no existing gas station. The Appellant provided the District with an application and plans of an existing gasoline station and that was a false statement and a clear misrepresentation of the facts.⁷ Unlike *Saah*, in this matter, Appellant did not begin in good faith, because the information in the building permit applications and plans failed to indicate a non-existing gasoline station at the time of filing. On October 5, 2004

⁷ 11 DCMR 3202.6 provides in part: “All applications for building permits authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date those orders are promulgated; provided, that all applications for building permits shall be accompanied by the plans and other information required by Section 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation.

a MAR photograph, and January 22, 2009, a photograph of the site was taken, which revealed that there was no existing gas station at 5010 Benning Road. (Exhibits 26 to 34).

The Agency relied on the information that was provided by the Appellant at the time of filing the building permit application and plans that a gasoline station existed at the property, for which the Agency approved the issuance of Building Permit No. B85608.⁸ A new gasoline station requires the plan reviewer to ensure that all disciplines have conducted the required review for approval of a new gas station. The Zoning Administrator would have disapproved a new gasoline station, unless it met all the requirements on its plans and application.

Appellant knew or should have known that the construction was in violation of both the Building Code and Zoning Regulations. Once the Appellant was on notice that the District determined that there were Building Code and Zoning Regulations violations at the site, it was unreasonable for the Appellant to continue to construct except at his own peril. Appellant's "good faith" construction efforts ended on or shortly after April 30, 2009. Therefore, the Appellant fails to establish the second prong of estoppel and the appeal should be denied.

ELEMENT THREE – JUSTIFIABLE AND REASONABLE RELIANCE

The Appellant fails to establish the third prong of estoppel because "justifiable and reasonable reliance" on the District's Building Permit because the owner filed a false application. Under this prong, the Appellant must show that construction continued with "justifiable and reasonable reliance" on the original Building Permit issued by the

⁸ 11 DCMR 3202.2(a)(2) provides in part: "To determine compliance with the provisions of this title, each application for a building permit shall be accompanied by any of the following that is deemed necessary: Plan, elevation, and location by dimensions of all existing and proposed structures, and the proposed use of those structures.

District. *Id.* at 431. However, the Appellant cannot meet this prong because it was unreasonable to rely on the original Building Permit when it filed a false application to obtain this permit in violation of the Building Code and Zoning Regulations. Appellant relies on the argument proposed by *Saah*, in which the Appellant's plans and permit included the floor area over the passageway must be included in calculating the percentage of the lot occupied by the structure, and the District was estopped from revoking the permit because in *Saah*, the applicant relied on the issuance of the permit to construct. Here, the Appellant ignored the facts and reality of the District's violation of the Building Code and Zoning Regulations. Instead, Appellant continued to construct and it is this flagrant disregard for the District's laws and regulations that has now produced this litigation. Therefore, it was unreasonable for the Appellant to rely on the original Building Permit for continued construction after he filed a false application to obtain the permit in violations of the Building Code and Zoning Regulations.

ELEMENT FOUR – AFFIRMATIVE ACTS OF THE DISTRICT

The Appellant fails to establish the fourth prong of estoppel because the Appellant did not rely on the District's subsequent affirmative act, the Notice to Revoke. Unlike *Saah*, here DCRA is alleging that the Building Permit issued was based on false statement and misrepresentation on the building permit application. The permit violates Building Code and the Zoning Regulations. *See, Interdonato* at 1004. The Appellant ignored the laws of the District and continued to construct in violation of District laws and regulations. Additionally, continued construction was performed prior to the issuance of the Notice to Revoke without the required inspections, in violation of District laws and regulations. The Appellant cannot satisfy the fourth prong because he filed an

application containing false statements and did not obtain the necessary inspections for each phase of the construction. Therefore, the fourth element of estoppel cannot be met and the appeal fails.

ELEMENT FIVE – NOTICE OF ZONING REGULATION VIOLATIONS

The Appellant fails to meet the fifth prong of estoppel because the Appellant refuses to acknowledge that a new gas station required a new building permit. Any construction by Appellant after he filed a false application for which a permit was issued was at Appellant's own peril. The building permit applications requires the applicant to comply with both Building Code and Zoning Regulations. The building permit and the subsequent notice to revoke gave the Appellant express notice of his violations.

Notwithstanding those notices, the Appellant is required to always follow the laws of the District. Finally, the Appellant is in the business of constructing and operating gas stations here in the District. He knew from previous proceedings before this very Board that he needed to seek prior approval, from this Board, prior to constructing a gas station. Therefore, Appellant cannot meet the fifth element of estoppel because the permit violated both the Building Code and Zoning Regulations.

ELEMENT SIX – EQUITY FAVORS DISTRICT NOT APPELLANT

The Appellant fails to meet the sixth and final prong of estoppel because equity strongly favors the District. Unlike *Saah*, the Appellant did not expend significant amounts of money on the construction of the gasoline station. Also, unlike *Saah*, the Appellant acted in bad faith when he filed his building permit application for an existing gasoline station, knowing that in fact the gasoline station was non-existing. The equities favor the District enforcing the Building Code and Zoning Regulations for the protection

of the public over allowing the Appellant to contradict the submitted plans and construct a structure in violation of District law. Therefore, Respondent does not meet the sixth element of equitable estoppel.

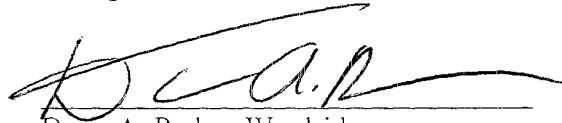
Conclusion

WHEREFORE, for all of the foregoing reasons, the District requests that the Appellant's appeal be denied as the construction violates the Zoning Regulations, and the District is not prohibited by the equitable doctrines of estoppel from halting Appellant's unlawful construction.

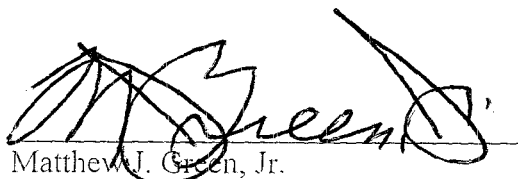
Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'D. A. P.', is written over a horizontal line.

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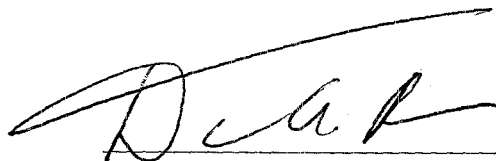
Appellee's Counsel

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2009, a copy of the District's Brief on Equitable Estoppel was served on tfd@erols.com and sent postage pre-paid to:

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APPROVALS (DO NOT WRITE ON THIS PAGE; OFFICIAL USE ONLY)

A. PERMIT CONTROL

C. PLANS AND APPLICATION APPROVAL

- ☐ 1. Fine Arts by: _____ Date: _____
- ☐ 2. Historic by: _____ Date: _____
- ☐ 3. Cap. Gateway by: _____ Date: _____
- ☐ 4. NCPC: _____ Date: _____
- ☐ 5. W.H./Obs. Precinct by: _____ Date: _____
- ☐ 6. Flood Control by: _____ Date: _____
- ☐ 7. WMATA by: _____ Date: _____
- ☐ 8. Condem. by: _____ Date: _____
- ☐ 9. Rental Accom. by: _____ Date: _____
- ☐ 10. Chinatown Distr. by: _____ Date: _____
- ☐ 11. Utility Clearance by: _____ Date: _____
- ☐ 12. General Liability Ins. Policy Clearance by: _____ Date: _____

B. CLEARANCE TO FILE PLANS

- ☐ 1. Zoning by: _____ Date: _____
- ☐ 2. DDOT - Permit and Records Division
Access to Parking Street ☐ Street ☐ Alley
Cleared by: _____ Date: _____
- ☐ 3. DDOT - Consumer Engineer
Cleared by: _____ Date: _____
- ☐ 4. ERA - Erosion Control
Cleared by: _____ Date: 01/30/06

Restrictions of the Permit:

SEPARATE ELECTRICAL, PLUMBING AND MECHANICAL
INSTALLATION PERMITS ARE REQUIRED

TO REPORT WASTE, FRAUD,
OR ABUSE BY ANY D.C. GOVERNMENT
OFFICIAL, CALL THE D.C. INSPECTOR
GENERAL AT 1-800-521-1639

- ☒ 1. Information Counter by: SYA Date: 10-25-05
- ☐ 2. Information Center by: _____ Date: _____
- ☐ (a) ABRA by: _____ Date: _____
- ☐ (b) Noise Control by: _____ Date: _____
- ☐ (c) Industrial Safety by: _____ Date: _____
- ☐ (d) Vector Control by: _____ Date: _____
- ☐ (e) D.C. Animal by: _____ Date: _____
- ☐ (f) Police Dept. by: _____ Date: _____
- ☒ 3. Zoning by: _____ Date: _____
Zoning Update by: _____ Date: _____
Zoning Overlay approval by: _____ Date: _____
- ☐ 4. DDOT - Permit and Records Division/Deposit #
Sidewalk Deposit \$ _____ Driveway Deposit \$ _____
by _____ Date: _____
- ☐ 5. Water/Sewer Design Branch
Consumer Eng. by: _____ Date: _____
- ☒ 6. Environmental Regulation Administration
☐ Environmental Policy Review
Control No. _____ Date: _____
☐ Erosion Control by: RAB Date: 2/29/03
☐ Storm Water Mgmt. by: _____ Date: _____
Plan No. _____
- ☐ Air Quality by: _____ Date: _____
- ☐ Underground Storage by: R. Th. Miller Date: 2/29/08
- ☒ 7. Mechanical Eng. Review by: GRN Date: 11-11-05
- ☒ 8. Plumbing Eng. Review by: GRN Date: 11-11-05
- ☒ 9. Electrical Eng. Review by: MAA Date: 11-25-05
- ☐ 10. Health Plan Review
☐ (a) Food Plan Review by: _____ Date: _____
☐ (b) Medical X-Ray Plan Rev. by: _____ Date: _____
- ☒ 11. Fire Protection Plan Review
by: DA Date: 12/30/05
- ☒ 12. D.C. Fire Dept. (Fire Prevention Plan Review Section)
by: Th. Miller Date: 3-10-08
- ☐ 13. Elevator Plan Rev. Sec. by: _____ Date: _____
- ☐ 14. Plumbing Insp. Rev. by: _____ Date: _____
- ☐ 15. Construction Insp. Branch (Field Check)
by: _____ Date: _____
- ☐ 16. Historic Pres. Div. by: _____ Date: _____
- ☐ 17. EISF: RA Date: 10-27-05
- ☒ 18. Structural Eng. by: RA Date: 3/3/08
- ☐ 19. Permit and Certificate Insurance Counter
by: _____ Date: _____
- ☐ 20. QC By: RA Date: 3/3/08

ZONING

DDOT - PUBLIC SPACE

C of O Number B143810 Date 4/11/29
Existing Use(s) Gas Station (1st)
Proposed Use _____

- ☐ New Bldg
- ☐ P.O.D.
- ☐ File in room 2124

Street Name: _____
Street Width: existing
Road Width: existing
Sidewalk Width: _____
Parking: _____

Job No. _____ BEA Case No. _____ Plan Order No. _____

Restrictions:

POD for Gas Station
New Canopy for Adjunct 1st floor
11/11/05 Pump bleed as Com.