

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17988 of Koo L. Yuen, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made April 30, 2009, to issue a Notice of Intent to Revoke Building Permit No. B85608, for a gasoline service station in the C-1 District at premises 5010 Benning Road, S.E. (Square 5340, Lot 68).

HEARING DATES: November 17, 2009 and December 1, 2009
DECISION DATES: December 15, 2009 and January 26, 2010

DECISION AND ORDER

This appeal was filed on June 29, 2009 challenging a decision of the Department of Consumer and Regulatory Affairs ("DCRA") to revoke a building permit which authorized the Appellant to renovate an existing gasoline station building. DCRA claims that the permit was issued in error because the gasoline station use had been extinguished, and under § 706.1 of the Zoning Regulations, special exception approval is required to establish a new gasoline service station. The Appellant claims that the gasoline station use was established by special exception in 1965, the special exception was not extinguished and is a conforming use which runs with the land, and therefore, the proposed revocation of the building permit is improper. Following a public hearing and decision meeting, the Board of Zoning Adjustment ("Board") ruled for the Appellant and granted the appeal but directed the Appellant to submit revised plans.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing

By memoranda dated July 2, 2009, the Office of Zoning ("OZ") provided notice of the appeal and public hearing to the property owner, the Office of Planning ("OP"), DCRA, the Councilmember for Ward 7, Advisory Neighborhood Commission ("ANC") 7E (the ANC in which the subject property is located), and ANC Single Member District 7E01.

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BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17988
EXHIBIT NO. 30

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Parties

Mr. Koo L. Yuen, (“Appellant” herein) is the agent for the owner of the subject property. As the Appellant and the representative of the property owner, Mr. Yuen is automatically a party under § 3199 of the Zoning Regulations. The Appellant was represented during the proceedings by Thomas F. DeCaro, Jr., Esq. Appellee DCRA was represented by Matthew J. Green, Jr., Esq. and Doris A. Parker-Woolridge, Esq. Under § 3199, ANC 7E (as the affected ANC) was also an automatic party to the appeal. However, the ANC did not file a report or appear during the proceedings.

Motions for Summary Judgment and Enlargement of Time

The Appellant filed a motion for summary judgment on October 13, 2009, prior to the public hearing scheduled for November 17, 2009. (Exhibit 17). On October 30, 2009, DCRA filed a Motion for Enlargement of Time, requesting until November 9 to respond to the Appellant’s motion. The Appellant did not oppose DCRA’s request to enlarge its time, and the parties agreed to continue the November 17 hearing to December 1, 2009. DCRA then filed its opposition to the Motion for Summary Judgment. (Exhibit 20). The Appellant filed a reply thereto (Exhibit 22), and DCRA filed a “Sur-Reply” to the Appellant’s Reply. (Exhibit 24).¹ The Board heard argument on the motion on December 1, 2009 and rendered its decision on January 26, 2010.

FINDINGS OF FACT

The use at the property

1. The subject property is located at 5010 Benning Road, S.E., Washington, D.C., Lot 68 in Square 5340.
2. The property is currently zoned C-1.
3. On or about November 17, 1965, the Board granted a special exception to establish a gasoline station at the property. At the time, requests for zoning exceptions were known as “appeals” and this application was processed as Appeal No. 8427. The special exception provided approval for a three-bay gasoline station with two service islands. (Exhibit 19, Attachment 3, Finding of Fact No. 3 of Appeal No. 8427). The approval authorized the gasoline station use without time limitations or any other conditions.
4. On or about January 20, 1967, DCRA issued a certificate of occupancy (“C of O”) to James Epps for use of the property as a gasoline station in accordance with the order in Appeal No.

¹ The Zoning Regulations do not include a general motions practice. However, the Board does not ordinarily accept “sur-replies”, but did so here because DCRA was responding to new matters raised in the Appellant’s “Reply”.

8427. (Exhibit 20, Tab 4).

5. The property was used as a gasoline station from 1967 until July 29, 1982. Although the property changed hands in 1969 and 1970, the gasoline station use remained the same. (Exhibit 20, Tabs 5, 6, 7, and 8).
6. On March 26, 1978, DCRA approved C of O No. B106803 for a gasoline service station with six pumps. (Exhibit 20, Tabs 9 and 10). Again, on April 11, 1979, the property changed hands, but the use as a gasoline station with six pumps remained the same until July 29, 1982. (Exhibit 20, Tabs 11, 12, and 13).
7. A C of O to operate a delicatessen on the property was issued in 1982 (Exhibit 20, Tab 14), and a subsequent C of O to operate a coin-operated laundry business was issued in 1986. (Exhibit 20, Tabs 15 and 16). The property changed hands between 1986 and 1993, but its use as a coin-operated laundry business remained the same. (Exhibit 20, Tabs 17, 18, 19, 10, 21, and 11).
8. The Gasoline Service Station use was discontinued for at least three years.
9. The site was vacant in 2005 when the Appellant acquired the property. At the time, a dilapidated gasoline service station office building was at the site, with a trailer attached to the front of it. (Exhibit 22).
10. On or about October 25, 2005, the Appellant filed an application for a building permit to renovate an existing gasoline service station building as a convenience store and “install [a] new island w/ gas pumps.” (Exhibit 20, Tab 23). The site plans attached to the application show that the site consisted of a vacant building with no existing gas tanks or gas pumps, and no existing gasoline service station business. (Exhibit 5 and Exhibit 17, p. 2).
11. On or about March 12, 2008, DCRA approved the issuance of Building Permit No. B85608 allowing the Appellant to, among other things, renovate an existing gasoline service station building and install a new island with gas pumps. (Exhibit 20, Tab 25).

The Notice of Intent to Revoke

12. On April 30, 2009, DCRA issued a Notice of Intent to Revoke Building Permit No. B85608 (the “Notice”). (Exhibit 4). It stated that the permit was issued in error, stating two grounds for this conclusion. The first ground was that the most current approved use at the property was for a coin-operated laundry. Therefore, a gasoline service station is a new use, which requires special exception approval under § 706.1. The second ground was that the building permit application contained misrepresentations and false statements inasmuch as it conveyed that there was an existing gasoline station at the property. The Notice indicated that the revocation would become effective 10 days after the Notice was served.

The Appeal

13. On June 29, 2009, the owner filed an appeal to the Board challenging the Notice. (Exhibits 1

and 3).² He alleged that the gas service station use is a lawful conforming use, the Notice was never served on the owner, and the revocation of the building permit is barred by estoppel and laches.³

14. The Appellant filed the Motion for Summary Judgment described above (Exhibit 17) and also filed a pre-hearing submission (Exhibit 19) setting forth the documents and legal theories on which he intended to rely.
15. DCRA filed responsive pleadings, including its Opposition to Appellant's Motion for Summary Judgment (Exhibit 20), its Sur-Reply to Appellant's Reply (Exhibit 24), and its Brief on Equitable Estoppel and Laches. (Exhibit 25).

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), to hear and decide appeals where it is alleged by the Appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations.

The questions before the Board are purely legal in nature. The Zoning Administrator ("ZA") revoked a building permit to renovate a gasoline station because he believed that the use, which had been authorized by a special exception, lapsed when a new use was established on the site. The Board concludes instead that a special exception, for which no term is established by the Board, never expires.⁴

The revocation notice also alleged that the Appellant misled the ZA into believing that the gasoline station use still existed, which led to the purported erroneous issuance of the building permit. The Board found that no such misrepresentation was made, and that, in any event, the permit was not issued in error.

However, because the plans submitted with the building permit call for a larger gasoline service station than was approved, no construction may proceed on the premises until the Appellant submits and DCRA approves revised site plans depicting no more than three bays and two

² The filing of the appeal did not stay the effectiveness of the revocation.

³ The Appellant withdrew the service of process issue during the proceedings (Hearing Transcript of December 1, 2009, ("Hearing Transcript") at 195), but did not withdraw his claims relating to estoppel and laches (Meeting Transcript of January 26, 2010 at 32). Because the Board finds herein that the proposed revocation was erroneous on one ground, i.e. because the original special exception use was not extinguished and is a lawful conforming use, it is not necessary to determine whether the proposed revocation is also barred by equity. Therefore, the Board will not reach the question whether the proposed revocation is also barred by estoppel and/or laches.

⁴ The Board is aware that the Zoning Commission ("Commission") believes otherwise and has adopted text amendments that will result in special exceptions expiring if different uses are established after October 8, 2010, the date that Zoning Commission Order No. 10-08 becomes effective. The Commission has the absolute right to amend the Zoning Regulations in this manner and nothing in this order should be construed as concluding otherwise.

service islands and an amended permit is issued. The Appellant may of course file an application to modify the original special exception to comport with the existing plans.

The Board's reasoning is set forth below.

This appeal can be decided on Motion for Summary Judgment.

This Board has held that 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." *BZA Appeal No. 17591 of MLW, LLC, 54 DCR 10675* (2007) (citing Super. Ct. Civ. R. 56 (2005)); *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1001-02 (D.C. 1994). 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).

Utilizing the standard of review cited above, the Board concludes that summary judgment is appropriate in this case. There are no material issues of fact which are in dispute. DCRA asserts that there are several material facts in dispute. The Board disagrees. The facts pointed to by DCRA are either immaterial, undisputed or both. For instance, DCRA points to the discontinuance of the gasoline service station for more than 20 years as a fact which is in dispute. (Hearing Transcript at 202). However, this fact is not disputed by the Appellant. Nor is it disputed that there was a change in use from a gasoline service station use to a deli use to a coin-operated laundry use. The Appellant concedes all of these facts. (Hearing Transcript at 206). As will be explained below, these facts are immaterial as well as undisputed. The lapse of the gasoline service station use is immaterial because the gasoline service station use is a conforming use, and a lapse of a use is only relevant to a nonconforming use.

This special exception use did not expire.

DCRA contends that the gasoline service station use was extinguished as a result of the intervening uses at the property established pursuant to C of Os. The Appellant argues that a special exception is a conforming use that never expires and cites the Board's decision in *MLW* in support of this claim. In response, DCRA asserts that *MLW* can be distinguished because it involved a use that was discontinued, but not replaced.

Although the Board agrees with the Appellant that the gasoline service use did not expire, the question is not entirely resolved by *MLW*.

In *MLW*, the ZA revoked a building permit to renovate an apartment house after concluding that the apartment house use had been discontinued for more than three years. The apartment house was located in an R-3 zone where such uses are disallowed; however, it was not in existence on the date that the regulations were amended to prohibit the use. Instead, the apartment house use was authorized by a 1962 Board order that allowed it to replace a nonconforming rooming house use, pursuant to what is now 11 DCMR § 2003.1. The ZA assumed that the replacement use

took on the nonconforming status of the rooming house. Therefore, the discontinuation of the apartment house use resulted in its termination.

The Board reversed, holding that the apartment house did not meet the definition of nonconforming use because it was not “in existence at the time” the Zoning Regulations were amended to disallow the use on the subject property. Although the Board also expressed its agreement with *MLW*’s view that special exceptions are conforming uses that run with the land, it did not appear to base its decision on that finding, but instead stated that:

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.

BZA Appeal No. 17591 of MLW, LLC , 54 DCR 10675, 10680 (2007).

Unlike the position it took in *MLW*, DCRA does not contend that the gasoline station use is nonconforming. If a use is not a nonconforming use, there is but one other possibility, which is that it is a conforming use. However, as this Board recognized in *MLW*, variances and special exception uses, though conforming, do not necessarily enjoy all of the attributes of matter-of-rights uses.

[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 N.J. Super. 181, 290 A.2d 737 (1972), cert. denied, 61 N.J. 160, 293 A.2d 390.

Id. (emphasis added).

To “a large degree” suggests some limitation on the rights vested, as becomes clear when the paraphrased quote from the cited New Jersey case is read in full:

Although a variance can perhaps be lost by abandonment, see North Plainfield v. Perone, 54 N.J. Super. 1, 12-13, 148 A.2d 50 (App. Div. 1959) cert. denied, 29 N.J. 507, 150 A.2d 292 (1959), *it otherwise partakes to a large degree of the characteristics of a vested right running with the land.* 2 Rathkopf, Op. cit.

Industrial Lessors, Inc., 290 A.2d at 738 (emphasis added).

The *North Plainfield* case cited did not involve a variance, but the same special exception use (gasoline service station) and same scenario (conversion to a different use) involved in this appeal. The court in *North Plainfield* found that the special exception had been abandoned as a result of the conversion, reasoning that the special exception should “be treated as a

nonconforming use, the right to continue which is ... defeated by the intervention of a conforming use.” 148 A.2d at 56.

In any event, the Board in *MLW*, notwithstanding its citation to contrary New Jersey case law, did not squarely address whether special exceptions should be treated as nonconforming uses when the use is discontinued. Having the opportunity to do so here, this Board rejects the reasoning of the *North Plainfield* case, which, as Rathkopf notes, “does not appear to be the general rule”:

The grant of an application for a special permit use is an official quasi-legislative, quasi-judicial determination that the use or structure is not offensive to the ordinance and conforms to the standards established thereby for the location and use approved. Because of the nature of the special exception use as thus expressed, it should not abate by lack of use any more than a permitted use might abate.

3 Rathkopf's *The Law of Zoning and Planning* § 61:50 (4th ed.). *Accord, Appeal of Barefoot*, 263 A.2d 321, 322 (Pa. 1970) (A special exception “is not abandoned in the absence of a time limitation in the exception itself or in the zoning ordinance”). The Board intends to follow the general rule and therefore holds that the ZA erred in revoking the building permit based upon the replacement of the use.

The Appellant made no misrepresentations and the issue is no longer relevant.

Similarly, the ZA erred in basing the proposed revocation on alleged false statements and misrepresentations. The ZA claimed that he issued the building permit in reliance upon representations that a gasoline service station continued to exist on the premises.

First, the Board concludes that the Appellant did not misrepresent the status of the use. While a portion of the application referenced an existing gasoline station, the drawings made clear that the property was not an operating gasoline station. The drawings did not show existing gas pumps, islands, or other gasoline service station infrastructure. On their face, therefore, the permit application and accompanying documents cannot support the proposed revocation on the basis of false statements or misrepresentation.

In any event, whether the use existed or not was irrelevant for the reasons stated above. The validity of this ground is tied to the DCRA premise that the building permit could have been properly denied had the truth of the matter been known. For the reasons stated above, that is not the case and therefore this second ground for revocation fails for the same reason as the first.

Construction may not proceed under the existing plans.

The Board agrees with DCRA in one respect. The Appellant cannot enlarge the gasoline service station special exception without Board authorization. While the 1965 special exception

authorizes a gasoline service station use, the current use must comport with all aspects of the Board's 1965 order. Without further approval from this Board, the Appellant is limited in scope to an operation consisting of three bays and two service islands. Accordingly, the building permit could not have lawfully permitted the construction contemplated in the approved plans. Although DCRA could have asked this Board to sustain the revocation on different grounds than cited in the Notice, *compare Appeal No. 17444 of Kuri Brothers, Inc.*, 55 DCR 4442 (2008), it did not do so. Nevertheless, the Board cannot allow the Appellant to engage in such unlawful construction. Therefore, no construction may proceed on the premises until the Appellant submits and DCRA approves revised site plans depicting no more than three bays and two service islands and an amended permit is issued.

With respect to the canopy, the Board agrees with the Appellant that a canopy is permitted as a matter of right as an accessory building to the gasoline service station use. See, 11 DCMR § 2500.2 (b). Therefore, the revised plans may depict a canopy which comports with the requirements of § 2500.2(b).

ANC Great Weight

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. D.C. Official Code § 1-309.10(d)(3)(A) (2001). In this case, ANC 7E did not submit a resolution recommending denial or support for the appeal. Therefore, there is nothing to which to accord great weight.

CONCLUSION

Based on the findings of fact and conclusion of law, the Board concludes that DCRA erred in the administrative decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, made April 30, 2009, to issue a Notice of Intent to Revoke Building Permit No. B85608 for a gasoline service station use on property located in the C-1 District at premises located at 5010 Benning Road, S.E. (Square 5340, Lot 68).

Accordingly, it is therefore **ORDERED** that the Motion for Summary Judgment is **GRANTED** and the Appeal is thereby **GRANTED** as a matter of law. And it is further **ORDERED** that no construction may proceed on the premises pursuant to Building Permit No. B85608 until the Appellant submits, and DCRA approves, revised site plans depicting no more than three (3) bays and two (2) service islands, and an amended permit is issued.

VOTE: **4-0-1** (Marc D. Loud, Shane L. Dettman, Meridith H. Moldenhauer, and Konrad W. Schlater to Grant the appeal; Nicole C. Sorg not participating)

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

A majority of the Board members approved the issuance of this order.

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ATTESTED BY:



JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: NOV 10 2010

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.