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September 3, 2010

Via E-Mail

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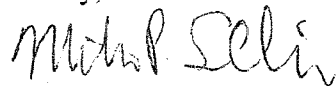
Re: Motion for Reconsideration; Appeal No. 18031.

Dear Members of the Board,

Enclosed please find a Motion for Reconsideration of the decision in Appeal No. 18031,
being filed on behalf of West End Citizens Association.

Thank you for your consideration of this Motion.

Sincerely,



Martin P. Sullivan

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18031

EXHIBIT NO. 23

2010 SEP -7 AM 8:48

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

**APPEAL OF WEST END CITIZENS ASSOCIATION
BZA APPEAL NO. 18031**

MOTION FOR RECONSIDERATION OF DECISION

I. Factual and Procedural Background.

On February 23, 2010, the Board held a hearing on BZA Appeal No. 18031 (the “Appeal”) of West End Citizens Association (the “Appellant”). The Appeal, made pursuant to 11 DCMR §§ 3100 and 3101, appealed a November 4, 2009, decision of the Zoning Administrator to approve the issuance of Certificate of Occupancy No. CO1000323 (the “Certificate of Occupancy”) to Foggy Bottom Grocery, LLC (“FoBoGro”), purportedly authorizing grocery store use on the basement, first, and second floors of the building (the “Building”) located at 2140 F Street, N.W., in Square 81, Lot 811 (the “Property”). Following the hearing, the Board decided, also on February 23rd, to deny the Appeal.

Pursuant to 11 DCMR § 3126.2, any party may file a motion for reconsideration of a decision of the Board, provided that the motion is filed within 10 days from the date of issuance of a final written order by the Board. BZA Order No. 18031 was issued on August 24, 2010.

Pursuant to 11 DCMR § 3126.4, a motion for reconsideration shall state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought. In accordance with this regulation, the Appellant hereby submits this motion for reconsideration of Appeal No. 18031 (this “Motion”).

II. Summary of Argument.

The decision (the “Decision”) in BZA Order No. 18031 (the “Order”) did not consider or follow the applicable D.C. law concerning nonconforming uses, including the applicable statute and the well-established case law which controls nonconforming uses in the District. The specific areas of error are as follows: (1) the Decision did not consider or follow well-established Court of Appeals precedent which requires that the party asserting the right to the continuation of a nonconforming use has the burden of proof to establish – at the administrative level – the lawful existence of a nonconforming use; and (2) the Decision did not consider or follow D.C.

Code §6--641.06a (and the case law behind it), which provides that the party asserting the right to continue a nonconforming use must conclusively prove two facts before the Zoning Administrator can lawfully issue a certificate of occupancy: (1) that the use existed prior to and at the time of enactment of the restrictive zoning regulation, and (2) that such use was lawful at that time. In order for a use to be lawful, it must be authorized by a valid certificate of occupancy. It is very clear from the record (*i.e.*, Appellant has met its burden of proof) that FoBoGro failed to prove these two facts before the Zoning Administrator. The Zoning Administrator therefore was not authorized to issue a certificate of occupancy for 3 floors of grocery use in the Building, and the Certificate of Occupancy was issued in error. The Appeal, therefore, should be granted, and the Certificate of Occupancy should be revoked.

III. FoBoGro's Burden of Proof at the Administrative Level.

In the Order, the BZA ruled that the Appellant had a duty to prove that basement and second floor grocery use did not lawfully exist in 1958 (Order p. 6). This is directly in conflict with well-established D.C. Court of Appeals case law which provides that the burden of proof is, in fact, on the party requesting the continuation of a nonconforming use.

“Because nonconforming uses are not favored, this court has held that the party asserting the right to the continuation of a nonconforming use must carry the burden of proof. Petitioner must establish at the administrative level that his use existed at the time of the enactment of the restrictive zoning regulation, that it was a lawful use at that time, and that it was a use entitled to be protected and preserved.” *C & P Bldg. Ltd. Partnership v. District of Columbia Bd. of Zoning Adjustment*, 442 A.2d 129,133 (1982), citing *Bernstein v. District of Columbia Board of Zoning Adjustment*, D.C.App., 376 A.2d 816, 819 (1977); *Vogl v. Baltimore*, 228 Md. 283, 287, 179 A.2d 693, 696 (1962). [Emphasis added.]

Throughout the Order, the Board has made findings and conclusions that effectively prove that FoBoGro did not meet - and could not have met – its burden of proof before the Zoning Administrator. Specifically:

The Board found in Finding of Fact No.21 that “[t]here is no evidence as to whether the basement or second floor was devoted to a grocery store use when the use became nonconforming.” Without the benefit of evidence, FoBoGro could not have met its burden of proof to establish to the Zoning Administrator that the basement or second floor grocery use existed prior to May 12, 1958.

The Board, on page 6 of the Order, completely reverses the required presumption *against* nonconforming uses:

“The Appellant, who has the burden of proof on this issue, presented no evidence as to which portions of the building were devoted to the grocery store use on the date the use became nonconforming. DCRA and the Intervenor did not demand that such evidence be presented, but instead accepted the assumption that whatever proof of past operations might exist would accurately reflect the extent of the use on the date the use became nonconforming.” [Emphasis added.]

There are three key errors in this statement: (a) As explained herein, Appellant does not have a burden to prove which portions of the building were, or were not, devoted to grocery use prior to 1958; this would turn the presumption *against* nonconforming uses on its head, and would provide a precedent whereby anybody that claims nonconforming use is automatically entitled to such use, unless another party can prove the negative that the use did not lawfully exist in 1958. This burden is misplaced, and virtually impossible to satisfy; (b) the paragraph states that DCRA did not demand such evidence of the existence of the nonconforming use in 1958. But DCRA, in the person of the Zoning Administrator, is *required* to demand that such evidence be provided (by FoBoGro, not the Appellant); (c) the paragraph highlights that DCRA’s determination that a nonconforming use existed prior to 1958 was based on an assumption. If the determination is based on an assumption, then FoBoGro could not be said to have proven the point.

The Appellant does not deny that it has a burden of proof pursuant to 11 DCMR § 3119.2, but that burden is limited to proving that the Zoning Administrator erred in issuing a certificate of occupancy for the continuation of a nonconforming use when FoBoGro had not proven that the nonconforming use existed lawfully prior to May 12, 1958.

The Board should also consider the precedent of reversing the long-standing presumption against nonconforming uses.¹ The Court of Appeals has consistently expressed the District’s interest in strictly regulating nonconforming uses:

¹ Assuming the Court of Appeals consents to such a reversal of its well-established jurisprudence, this Decision would open the door to conversions of first floor mom-and-pop grocery stores into mini-Dean and Deluca operations. This is especially true when combined with the Board’s continued expansion of items included in the definition of grocery use, which WECA believes the Board should also reconsider as part of its consideration of this Motion, since this change effectively amends the Zoning Regulations by permitting Prepared Food Shops in zone districts where Prepared Food Shops are not permitted.

Both this court and the Zoning Commission have stressed that nonconforming uses are not favored and must be regulated strictly so that the goals of the districting scheme established by the Zoning Commission are not undercut. See *Wood v. District of Columbia*, D.C.Mun.App., 39 A.2d 67, 69 (1944). In *Silverstone v. District of Columbia Board of Zoning Adjustment*, D.C.App., 372 A.2d 1286, 1290 (1977)

and

Thus, we have stressed that any interpretation of the zoning regulations which expands the prerogatives of nonconforming users is generally undesirable. See *George Washington University v. District of Columbia Board of Zoning Adjustment*, D.C.App., 429 A.2d 1342, 1345 (1981); *Lenkin v. District of Columbia Board of Zoning Adjustment*, D.C.App., 428 A.2d 356, 358 (1981); *Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment*, *supra* at 963.

IV. Two Facts Must Be Proven In Order to Establish a Nonconforming Use.

District of Columbia Code Section 6-641.06a provides that:

The lawful use of a building or premises as **existing** and **lawful** at the time of the original adoption of any regulation heretofore adopted under the authority of § 6-621.01, or, in the case of any regulation adopted after June 20, 1938, under this subchapter, at the time of such adoption, may be continued although such use does not conform with the provisions of such regulation, provided no structural alteration, except such as may be required by law or regulation, or no enlargement is made or no new building is erected. The Zoning Commission may in its discretion provide, upon such terms and conditions as may be set forth in the regulations, for the extension of any such nonconforming use throughout the building and for the substitution of nonconforming uses. [Emphasis added.]

The statute provides that in order to establish a nonconforming use, two facts must be proven: (1) the use existed prior to and upon the enactment of the restrictive zoning regulation, and (2) such use was lawful at that time. As noted herein, the burden to prove these two facts rests with the party asserting the right to continue such use, *i.e.*, FoBoGro. From the Record, FoBoGro has not provided any probative evidence to satisfy this burden, either here or in its C of O application, which means that there was/is no evidence on which the Zoning Administrator could have concluded that a basement and/or second floor grocery use lawfully existed prior to 1958, or at any time thereafter.

Regarding the first requirement, the Board found that “[t]here is no evidence as to whether the basement or second floor was devoted to grocery store use when the use became nonconforming.” [Finding of Fact No. 21.] The Board also found that such a finding of the pre-1958 use was based on “assumption” (p.6) and “reasonable inference” (p.8), neither of which constitute proof.²

Regarding the second requirement, in order to prove that grocery use on all three floors was lawful prior to 1958, FoBoGro must produce a valid certificate of occupancy authorizing grocery use on all 3 floors prior to May 12, 1958. Section 3203.1 of the Zoning Regulations provides:

3203.1 Except as provided in §§ 3203.7, 3203.8, 3203.9, or the second sentence of this subsection, **no person shall use any structure, land, or part of any structure or land for any purpose until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title** and the D.C. Construction Code, Title 12 DCMR. The requirements of this subsection shall not apply to: (a) A one-family dwelling;³

Pursuant to this Section 3203.1, it is a violation of D.C. zoning law to use “part of any structure...until a certificate of occupancy has been issued to that person...”. If a person does not have a certificate of occupancy, the use is not lawful. The five successive C of Os effective between 1958 and 1977, and the lack of any C of O authorizing basement or second floor grocery use before 1977, conclusively prove that any use of the basement and second floors was unlawful. Furthermore, FoBoGro has presented no evidence (*i.e.*, no certificate of occupancy) to prove that the Building’s basement or second floor grocery use was lawful prior to 1958, as FoBoGro is required to do. It follows as well that the certificates of occupancy issued starting in

² Weighing evidence on this point is not necessary, since the lack of a C of O authorizing basement and/or second floor grocery use prior to 1958 is dispositive. However, if a couple C of Os starting in 1977 can support the “reasonable inference” that grocery use on the basement/second floors lawfully existed as of May 12, 1958, then the five earlier C of Os which did *not* authorize basement/second story use would provide a considerably more reasonable inference.

³ We note the exception for one-family dwelling, which dismisses DCRA’s argument that the second story could only have been vacant or devoted to grocery use. One-family dwelling use on the 2nd floor would not have required a C of O, and it would make sense that a one-floor mom-and-pop grocery would have residential use on the second floor.

1977 that identified basement or second floor grocery use were issued in error, and cannot result in a legally nonconforming use.⁴

In addition to the plain language of Section 3203.1, the D.C. Court of Appeals has confirmed that a party asserting the right to continue a nonconforming use must produce a valid certificate of occupancy to prove that the use lawfully existed prior to and upon enactment of the restrictive zoning regulation. In *Bernstein v. D.C. Board of Zoning Adjustment*, 376 A.2d 816 (1977), the pertinent facts were nearly identical to this case, and the Court of Appeals determined that the fact that a space was merely *used* for nonconforming purposes was not sufficient to establish that a nonconforming use resulted. Rather, a certificate of occupancy is the only evidence that can prove a *lawful* use. In fact, the lack of a certificate of occupancy is, in and of itself, a violation of law that causes that use to be unlawful. The Court stated that:

“aside from the unsupported statement of petitioner’s Vice President, there is no showing in the record that any such office use was ever sanctioned by an occupancy permit as required by the zoning regulations or that it was otherwise a legal use.” *Bernstein* at 818.

The Court ruled that if one does not have a certificate of occupancy, one does not have a lawful use, and if one cannot produce a certificate of occupancy, one cannot prove the existence of a lawful use. Therefore, any discussion of the *actual* use of the Building’s basement or second floors is irrelevant. Even if FoBoGro could prove the actual use (which the Board found it could not, per Finding of Fact No. 21), FoBoGro has not proven, and cannot prove, that such use has ever been lawful.

V. Abandonment of the Nonconforming Use.

We again assert that a nonconforming grocery use was not established in 1958 for the Building’s basement or second floors. However, *even if* the Board still believed that FoBoGro had somehow proven that grocery use lawfully existed on the basement or second floors prior to 1958, such use has certainly been abandoned by the overt act, or failure to act, of the five owners of the property that accepted the issuance of certificates of occupancy which all failed to authorize grocery (or storage or office) use on the Building’s basement and second floors.

⁴ The Court of Appeals has ruled that the illegal use of a property cannot be used to establish a legally nonconforming use. *Lange v. D.C. Board of Zoning Adjustment*, 407 A.2d 1058 (1979); *Sheridan-Kalorama Neighborhood Council v. D.C. Board of Zoning Adjustment*, D.C.App. (No. 12899, May 7, 1979, slip op. at 10).

"If, however, an owner evidences his rejection of that protection by discontinuing a nonconforming use, he "abandons" his right to that exemption and thereafter must comply with general zoning requirements." *Wood v. District of Columbia*. D.C.Mun.App., 39 A.2d 67, 69 (1944): To establish abandonment, one must demonstrate "(1) the intent to abandon and (2) some overt act or failure to act which carries the implication of abandonment." *Wood, supra* at 68.

The Appellant asserts that the five certificates of occupancy from five successive owners, from 1958 to 1977, is clear evidence of the intent to abandon, as well as a failure to act which carries the implication of abandonment.

VI. The De Facto Expansion of the Principal Use.

The Order is in error in concluding that storage and office use (defined in the Order as "part of the principal use") authorized on one floor are automatically authorized on other floors not mentioned on the certificate of occupancy. In the Order, the Board concluded "that a C of O issued for a grocery store need not specify that a particular floor, story, or part of a building be used for storage, *but may still be so used*, as such use would constitute a part of the principal use for which the C of O was issued." (Order p. 8) [Emphasis added.]

With the utmost respect for the Board, this statement may simply be an oversight, because it effectively provides that any nonconforming use (or any use, for that matter) that is confined to a particular floor of a building may now lawfully expand to any other floors in that same building, as long as those other floors are devoted to the "principal use." This would be a blatant violation of 11 DCMR §3203.1, which provides that "no person shall use any structure, land, *or part of any structure* or land for any purpose until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title...". Such a precedent would have the absurd result of allowing all first floor nonconforming grocers to use *all* floors of their respective buildings for their primary use (without a certificate of occupancy).

VII. Conclusion.

The Record shows that FoBoGro failed to establish – at the administrative level, as well as in this case – that grocery use lawfully existed on the basement and second floors of the Building prior to, or on, May 12, 1958. Therefore, such use is not permitted, and the Zoning Administrator erred in issuing Certificate of Occupancy No. 1000323. For this reason, and for

the other reasons provided herein, the Appellant respectfully requests that the Board reconsider its decision in Appeal No. 18031, grant the Appeal, and instruct DCRA to revoke Certificate of Occupancy No. CO 1000323 and refrain from issuing any certificate of occupancy for grocery or any other non-permitted use on the Building's basement and second floors. The Appellant further requests that the Board to instruct the Zoning Administrator that a nonconforming grocery use has not been established on the basement and second floors of the Building, and that such use is therefore not permitted, in accordance with the use provisions of the R-5-E zone district.

Respectfully Submitted on behalf of the Appellant
West End Citizens Association

A handwritten signature in dark ink, appearing to read "Martin P. Sullivan", is written over a horizontal line.

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Submitted September 3, 2010

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2010, a copy of this submission was mailed by U.S. Mail to the following:

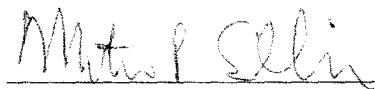
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