

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18031

EXHIBIT NO. 26

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington D.C. 20001

Appeal of the West End Citizen's Association

Appeal No. 18031

DCRA'S OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("Appellee" or "DCRA"), by and through undersigned counsel, respectfully submits its statement in opposition to Appellant's Motion for Reconsideration filed on September 3, 2010. The motion must be denied as Appellant has failed to show, as required by 11 DCMR § 3126.4, that the Board erred in its August 24, 2010 order ("Order").

1) Appellant incorrectly argues that Intervenor, and not Appellant, has the burden of proof

Appellant attempts to find error in the Board's Order by stating that it incorrectly placed the burden of proof on the Appellant and not Foggy Bottom Grocery ("Intervenor"). See Appellant's Motion for Reconsideration ("App. Mot.") at p. 2. Although this argument directly conflicts with the language of the Zoning Regulations, Appellant insists that this case is different because it concerns the continuation of a nonconforming use. See 11 DCMR § 3119.2 ("In all appeals and applications, the burden of proof shall rest with the appellant or applicant.").

In support of this argument, the Appellant points to language in case law stating "Petitioner must establish on the administrative level that his use existed at the time of the enactment of the restrictive zoning regulation[.]" *C & P Bldg. Ltd. Partnership v. District of Columbia Bd. of Zoning Adjustment*, 442 A.2d 129, 133 (1982). In that case, the Deputy Zoning

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Administrator denied a certificate of occupancy to C & P Bldg. *Id.* at 130. It then appealed that decision to the Board. *Id.* Thus, in that case, C & P Bldg. was the Appellant and had the burden of proving to the Board that the Deputy Zoning Administrator erred in denying it a certificate of occupancy. *See Appeal No. 13154 of C & P Building Limited Partnership* (April 2, 1980) at p.

3. Both the Board and the Court of Appeals held that C & P Bldg. failed to meet its burden. *C & P Bldg. Ltd. Partnership* at 132. This case does not stand for the proposition that in an appeal before the Board, some party other than the Appellant has the burden of proof.

Even in appeals concerning a nonconforming use, the Board has refused to engage in the burden shifting that Appellant demands. *See e.g. Appeal No. 15588 of the Brookland Civic Association and Advisory Neighborhood Commission 5A* (January 8, 1992) (appeal of building permit to renovate a nonconforming apartment building in an R-2 zone). In Appeal No. 15588, the Board flatly rejected appellants' assertion that the burden lies with the owner of the property and not the appellants, stating:

As a preliminary matter the appellants argue that the burden in this appeal should rest on S.O.M.E [the property owner] to prove that the conforming use existed when it purchased the property from Mr. Featherson. The Board denied appellants' request to shift the burden of proof to S.O.M.E based on 11 DCMR 3324.2 which provides that "In all cases before the Board the burden of proof shall rest with the appellant ..." Therefore the Board determined that the burden remains with the appellants to establish that the Zoning Administrator erred in deciding to issue the building permits.

See Id. at p. 2.

Appellant's argument that Foggy Bottom Grocery failed to prove to the Zoning Administrator that the grocery use existed prior to 1958 is factually untrue. Intervenor did convince the Zoning Administrator that the grocery use was lawfully in existence prior to 1958 and as a result, he issued Foggy Bottom Grocery a certificate of occupancy. The question that was before the Board in the Appellant's appeal was whether the Zoning Administrator erred in

making that decision. *See* 11 DCMR § 3100.2. The burden of proof as to that question lies solely with the Appellant. *See* 11 DCMR § 3119.2. Similarly, the Appellant now has the burden of proof in showing that the Board erred in its August 24, 2010 order. *See* 11 DCMR § 3126.4.

In presenting its case before the Board, the Appellant must affirmatively prove that the Zoning Administrator erred, i.e. it must provide evidence that the grocery use was not in existence as to the basement and 2nd floor. Under § 3119.2, neither the Zoning Administrator nor the Intervenor are required to put on any evidence in defense of the Zoning Administrator's decision. That provision states in part, "If no evidence is presented in opposition to the case, the appellant or applicant shall not be relieved of this responsibility [the burden of proof]." *See* 11 DCMR § 3119.2. At the conclusion of the hearing, the Board is left to decide, based on the record, whether the Appellant has shown that the Zoning Administrator erred. In this case, the Board, in reviewing the record, could not point to *any* evidence presented by Appellant that would suggest the Zoning Administrator erred. *See* Order at p. 6.

2. The Appellant failed to meet its burden of proof

In addition to asserting that the grocery use was not established in the basement and the 2nd floor prior to 1958, the Appellant also argues that even if the grocery use was established on those floors it is an illegal use because it was not noted on a certificate of occupancy issued prior to May 12, 1958. *See* App. Mot. at p. 2.

As to the question of whether the grocery use was established on all three floors prior to 1958, the Board stated, "the Appellant, who has the burden of proof on the 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." *See* Order at p. 6 [emphasis added]. Appellant, in its Motion for Reconsideration, points to no evidence or testimony that would cause the Board to disturb

this holding. In fact, both of Appellant's witnesses at the hearing testified that in their memory, the basement and the 2nd floor had been used for storage and as an office for the grocery store and that they were not aware of the presence of any other use on those floors. *See* Transcript at p. 218, 239-40; Order at p.8-9. This evidence does not contradict, but rather supports the Board's findings. It is strange that Appellant would now so vehemently insist that the basement and 2nd floor were not used in conjunction with the grocery operation, but when given the opportunity to present such evidence at the hearing Appellant completely failed to do so.

Further, Appellant's objection to the Board's reliance on reasonable inferences in making its findings lacks any legal support. Contrary to Appellant's assertion, D.C. Code § 6-641.06a does not prohibit the Zoning Administrator or the Board from making reasonable inferences as to the historical use of a property so long as they are supported by the facts. Here, they certainly were. For example, given that there is no bathroom on the first floor, it would be unreasonable and arbitrary to conclude that the grocery owner did not use the bathroom on the 2nd floor. *See* Order at p. 4. Additionally, given that there was no storage of inventory on the first floor, it would be unreasonable to conclude that the basement was not used for storage or that the grocery had no storage space. *See* Order at p. 8. More importantly, to the extent such inferences were made by the Zoning Administrator in issuing the certificate of occupancy, it was Appellant's burden to show that they were erroneous.

The Appellant also fails to show that the Board erred by not concluding the use of the basement and second floor is illegal because Intervenor does not have a certificate of occupancy, issued prior to May 12, 1958, which contains a notation indicating that all three floors were used as a grocery. In its Order, the Board addressed this point, stating "the expansion limitation of 2002.3 is based upon the areas actually devoted to a use that later became non-conforming, not

the areas listed on a C of O as encompassing that use. The Board has already resolved that all three floors were devoted to the grocery store use when that use became non-conforming.” See Order at p. 9.

Appellant disagrees with the Board’s interpretation of § 2002.3, but provides no convincing legal support to show that the Board erred on that point. To support this assertion, Appellant relies on Bernstein, a case where the Court of Appeals upheld the Board’s denial of a use variance where the applicant could not confirm that the use had been lawfully established. *Bernstein v. District of Columbia Bd. of Zoning Adjustment*, 376 A.2d 816, 819 (1977). The property in that case was an apartment building that had some nonconforming commercial uses on the first floor. *Id.* at 818. The applicant was seeking a variance for an office that was partitioned off from the main lobby, and not used in conjunction with the apartment building or any of the lawfully, nonconforming commercial adjuncts. *Id.* at 821; Application No. 11793 of Norman Bernstein, et al. (August 6, 1975) at p. 1, 3. In that case, the Board did not find that the use had been lawfully established because a certificate of occupancy for the office use had never been obtained. See Application No. 11793 at p. 2.

Appellant misapplies this case by overextending the extent of its holding. Here, unlike the office in Bernstein, the grocery store use was lawfully established and had a valid certificate of occupancy. The fact that the other two levels of the building, used for purposes ancillary to the grocery store, were not included on the certificate of occupancy does not make the use of that space illegal. The Zoning Administrator, based on his experience dealing with numerous certificate of occupancy applications, stated that certain ancillary uses, like storage space, were historically not included on certificate of occupancy applications. See Order at p. 8. The Board credited his testimony on this point and found his application of the rule to be a reasonable one

under the circumstances. *Id.* The Board has broad discretion in how it applies and interprets the Zoning Regulations. *See Sheridan-Kalorama Neighborhood Council v. District of Columbia Bd. of Zoning Adjustment*, 411 A.2d 959, 961 (1979) (“It is an established maxim of review that an agency’s interpretation of its administrative regulations is to be given great deference and to be upheld unless clearly erroneous or inconsistent with the regulations.”). The Board’s application of § 2002.3 in this case is an entirely reasonable one and is not in conflict with Bernstein.

3. The grocery use has never been abandoned

Appellant’s argument that the grocery use has been abandoned is not supported by the facts. In its Order, the Board found that the grocery had been continuously operating since 1946. *See* Order at p. 2. No facts presented by Appellant contradict that. Appellant’s contention that the failure of the prior owners to have the basement and 2nd floor included on prior certificates of occupancy is evidence of an intent to abandon does not make sense considering: 1) that Appellant cannot show that the use was ever actually discontinued, and 2) that the Board found that in the past, ancillary uses were often not included on certificate of occupancy applications. *See* Order at p. 8. It is antithetical to the concept of abandonment that the Board could find an intent to abandon where the nonconforming use of the property never ceased. *See e.g. Wood v. District of Columbia*, 39 A.2d 67 (1944).

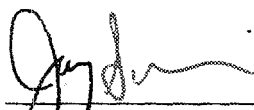
Accordingly, the Appellant has failed to show that the Board erred in its August 24th Order and the Motion for Reconsideration must be denied.

Respectfully Submitted,

PETER J. NICKLES
Attorney General
for the District of Columbia

MELINDA M. BOLLING
General Counsel

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JAY A. SURABIAN (DC Bar # 977657)
Assistant Attorney General
Department Of Consumer And
Regulatory Affairs
Office of the General Counsel
1100 4th Street, SW, 5th Floor
Washington, DC 20024
(202) 442-8403 (office)
(202) 442-9447 (fax)
jay.surabian@dc.gov

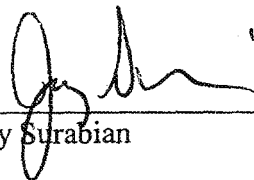
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition was served by first class mail,
postage prepaid, this 10th day of September, to the following:

Martin P. Sullivan, Esq.
Sullivan, Styles & Barros, LLP
1990 M Street, NW, Suite 200
Washington, DC 20036

Rebecca Coder
Chair, ANC 2A
2501 M St., NW, #721
Washington, DC 20037

Constance Miller, Esq.
Manning & Sossamon, PLLC
1120 20th Street, NW, Suite 700
Washington, DC 20036



Jay Surabian