

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18031-A of West End Citizens Association, pursuant to 11 DCMR §§ 3100 and 3101, from a November 4, 2009 decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. CO1000323, for a grocery store in the R-5-E District at premises 2140 F Street, N.W. (Square 81, Lot 811).

HEARING DATE: February 23, 2010

DECISION DATE: February 23, 2010

**DATES OF
RECONSIDERATION:** September 28, 2010 and October 5, 2010

ORDER ON RECONSIDERATION

On September 3, 2010, the West End Citizens Association ("WECA") filed a motion for reconsideration of the decision of the Board of Zoning Adjustment ("Board" or "BZA") in Appeal No. 18031, as set forth in its Order No. 18031, issued on August 24, 2010. (57 DCR 7920.) (Exhibit 22.) The motion was received slightly after the deadline of the 10-day period within which motions for reconsideration are permitted to be filed, due to e-mail transmission interruptions, but WECA requested that the Board waive the 10-day requirement of 11 DCMR § 3126.2, and the Board did so. (Exhibits 24 and 25.)

On October 5, 2010, the Board deliberated on the motion for reconsideration and decided, by a vote of 3-0-2, to deny it.

Summary of Arguments

WECA makes three arguments in its motion for reconsideration. WECA's first argument is that the Board wrongly saddled it with the burden to prove that the decision of the Zoning Administrator ("ZA") to allow the use of all three floors by the nonconforming grocery store was erroneous. WECA's second argument is that the Board erred by agreeing with the ZA's decision to allow the grocery use on all three floors in the absence of a valid certificate of occupancy expressly permitting the use on all floors as of May 12, 1958. WECA's last argument is that, even if such a valid certificate of occupancy existed, the nonconforming use of all but the "first" floor had been abandoned. (See, Exhibit 23.)

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov

BOARD OF ZONING ADJUSTMENT
District of Columbia

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EXHIBIT NO. 28

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Discussion

Subsection 3126.4 of the Board's Rules of Practice and Procedure requires that a motion for reconsideration must "state specifically all respects in which the final decision is claimed to be erroneous." As will be explained below, WECA's first two arguments claim error in legal conclusions made by the Board that were either accepted or espoused by WECA during the proceedings. Its third claim of error is based upon an argument it never made during the hearing. WECA's motion thus faults the Board for agreeing with it and for not making a ruling WECA never requested. None of these assertions furnish grounds for reconsideration.

As to WECA's first argument, the Board did not err in assigning to WECA the burden of proof, but was following the dictates of the Zoning Regulations, as accepted by WECA itself. Subsection 3119.2 of the Zoning Regulations clearly states, "In all appeals and applications, the burden of proof shall rest with the appellant or applicant. If no evidence is presented in opposition to the case, the appellant or applicant shall not be relieved of this responsibility." And, in fact, WECA accepted that burden, its representative stating, "I believe the WECA has met its burden of proof by establishing from sworn testimony before the BZA by the former owner of the Foggy Bottom Grocery that her sales, grocery sales were on one floor only."¹ (Hearing Transcript of February 23, 2010, p. 336, lines 13-17.) Having conceded during the hearing that it had the burden of proof, WECA cannot now claim the Board erred in agreeing with it.

WECA next argues that the ZA erred by allowing grocery use on all three floors in the absence of a valid pre-May 12, 1958 certificate of occupancy demonstrating that all three floors were devoted to grocery use. As shown by the above quote from the Appellant's representative, the Appellant never claimed such proof was required. Instead, the statement reflects WECA's view, accepted by the other parties and the Board, that the burden of proof could be met based upon evidence of the store's operation in the recent past, rather than on evidence of its actual operation on the date that grocery store uses became disallowed in the zone district where the property is located.

In any event, the Zoning Regulations do not prohibit the expansion of a nonconforming use to portions of a structure not indicated on a pre-1958 certificate of occupancy, but prohibit the expansion of such uses "to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of this title" (11 DCMR § 2002.3.) While in this case a pre-1958 certificate of occupancy might have aided the Board in determining which portions of the building were or were not devoted to the grocery store use at the time it became disallowed, the understandable inability of any party to produce such a document proves nothing. Nor does the Court of Appeals decision cited by WECA suggest otherwise. *Bernstein v. District of Columbia Bd. of Zoning Adjustment*, 376 A.2d 816 (D.C. 1977), concerned an applicant for a special exception who wished to be treated as if he owned a nonconforming use, but could not

¹ WECA's characterization of the evidence was based upon its erroneous conclusion that the use of the other floors for storage and other accessory purposes by the prior owner did not also constitute part of the grocery store use.

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produce *any* certificate of occupancy authorizing the establishment or continuation of the use. Here, WECA does not dispute that the grocery use is nonconforming and the record contained numerous certificates of occupancy authorizing its continuation. Therefore, the issue involved in the *Bernstein* decision is not germane here.

WECA last argues that, even if all three floors had been devoted to grocery use when the use became nonconforming, such use of the basement and second floor had been abandoned at some point in the past. WECA, however, did not make this argument during the proceedings on the appeal, either in its pleadings, or in its oral presentation. As noted, a motion for reconsideration must show in what respects the final decision is claimed to be erroneous, and if the abandonment issue was never addressed, and not discussed in the final decision, there can be no claim that that decision is erroneous with respect to that issue. The Board, therefore, will not entertain the question of abandonment in this order on reconsideration.

For all of the above reasons, it is hereby **ORDERED** that WECA's motion for reconsideration is **DENIED**.

VOTE: **3-0-2** (Meridith H. Moldenhauer, Michael G. Turnbull, and Nicole C. Sorg
 to Deny; No other Board members (vacant) participating)

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

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

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 04 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.