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

Appeal of the West End Citizens Association

Appeal No. 18031

**DCRA'S BRIEF AS ORDERED
BY THE BOARD ON OCTOBER 8, 2013**

The Board has ordered the parties to brief whether West End Citizens Association's (WECA) appeal is barred by the equitable doctrines of laches and/or estoppel. Because WECA sat on its claim too long, the doctrine of laches requires dismissal of the case.

FACTS

In 2008 Foggy Bottom Grocery (FoBoGro) applied for a Certificate of Occupancy (C of O) for 2140 F Street NW. In August 2008, the Zoning Administrator approved the C of O which allowed FoBoGro to use the entire premises at 2140 F Street NW to operate a grocery store. After the C of O was issued, FoBoGro has indicated that it took a variety of actions to improve the building including entering into a long term lease for the building, entering into agreements for renovations of the building, engaging an architectural firm to redesign the premises, and obtaining a Building Permit.

About a year after the August 2008 C of O was issued, WECA contacted the Zoning Administrator (ZA) and requested that the C of O be revoked. Shortly

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thereafter, the August 2008 C of O was revoked. However, after FoBoGro met with the ZA, a substantially similar C of O was issued in November 2009.

On November 10, 2009, WECA filed this appeal challenging the November 2009 C of O. WECA argued that the C of O was improper because it allowed FoBoGro to expand a prior non-conforming use.

The Board heard the appeal in February 2010. At the February 23, 2010 hearing, WECA, FoBoGro and DCRA each presented witnesses. The witnesses testified similarly about the use of the building before the issuance of the 2008 C of O. Barbara Kahlow, a member of WECA, testified that she was aware that even before the 2008 C of O was issued, the building contained the store on one floor, storage on another, and an office upstairs. February 23, 2010 Hearing Transcript, pp 217-218. Along the same lines, the business owner, Kris Hart, testified that prior to 2008 one floor of the building contained the store and the other two floors were for office space and storage related to the operation of the store. *Id.* at 311-12. This was consistent with the testimony of Zoning Administrator LeGrant who stated that in his opinion, FoBoGro's proposed use of the entire building as a grocery store was not an increase in the intensity of the building's prior use. *Id.* at 275-76.

After the hearing, the Board unanimously voted to deny the appeal. In its written opinion, the Board made the following relevant finding of facts and conclusions of law:

2. The building on the subject property has three stories, consisting of a basement, a first, or main, floor, and a second floor with a mezzanine or loft area over part of the second floor. The building also has a second floor rear deck with exterior stairs to the ground....

4. The subject property has housed a retail grocery store since 1946....
6. The 1958 map shows the property as being within the R-5-D District. All R-5-D properties were rezoned into new R-5-E zones by the Zoning Commission on November 13, 1992 as a result of the publication of Zoning Commission Order No. 721....
7. Because a grocery store is not a matter-of-right use in any residence zone established on or after May 12, 1958 the grocery store on the subject property became a nonconforming use at least as of May 12, 1958....
9. In 2009, the Intervenor [FoBoGro] purchased the existing grocery store business and subsequently entered into a lease with GWU, in order to continue the grocery store use.
10. On August 28, 2008, the Zoning Administrator... issued a C of O to FoBoGro which had permitted all 1,835 square feet of the building on the subject property to be used as "retail, cigarettes and medicine, grocery store, sandwich shop...
11. The 2008 C of O was revoked by the ZA effective 10 days from the revocation letter of October 14, 2009 – more than a year after it was issued – as having been issued in error....
12. After receiving the letter which would revoke the 2008 C of O, representatives of FoBoGro met with the ZA and explained the nature of the grocery store use intended....
16. Based upon these representations, the ZA issued C of O No. 10000323 to the Intervenor, FoBoGro, on November 4, 2009....
18. The 2009 C of O permitted all three floors and all 1,835 square feet of the premises to be used for the grocery store and accessory prepared food shop uses....
23. The owner of the grocery store business immediately preceding the Intervenor's purchase of the business used the main floor for display and sales, the basement for storage and food preparation, and the second floor for more inventory storage, as well as for the business office of the grocery store operation....

Since there is uncontroverted evidence that the basement and the second floor were devoted to grocery store uses, and having accepted the parties' invitation to consider the prior tenant's operations as reflecting the store's operations at the time the use

became nonconforming, the Board concludes that all three floors of the building were devoted to the grocery store use as of that date....

[T]he Board agrees with the ZA that... ancillary storage and office uses are "indeed... allowable aspects of the primary grocery store use."... [Therefore,] the ZA properly concluded that the C of O should reflect the entire area that had been, and which may continue to be, lawfully developed to grocery store uses. No error was made in doing so....

It is hereby ORDERED that this appeal be DENIED.

[BZA August 10, 2010 Opinion and Order, p 2-4.]

WECA appealed the Board's decision to the DC Court of Appeals. The Court of Appeals concluded that the Board had erred in rejecting WECA's argument that there was an expansion of a prior non-conforming use. But it remanded for consideration of whether the appeal was timely and whether it was barred by the equitable defenses of laches and estoppel.

Only the laches issue will be addressed in this brief

ARGUMENT

1. WECA's appeal is barred by laches.

At the outset it should be pointed out that laches is "distinct from that of the timeliness of ... appeal [and] ... may bar consideration of an appeal which, for jurisdictional purposes, would be timely." *Goto v. District of Columbia BZA*, 423 A.2d 917, 925 n. 16 (D.C. 1980). What that means in this case is that even if WECA's appeal was technically timely, its claim will still be barred if laches applies.

Laches is an equitable defense. *American Univ. Park Citizens Ass'n v. Burka*, 400 A.2d 737, 740 (D.C. 1979). There are two factors to consider in deciding if laches applies. Laches will bar a party's claim if (1) they "delayed

unreasonably in bringing their appeal to the Board....[2] to [the other party's] prejudice.'" *Goto*, 423 A.2d at 925. The doctrine will be applied against a party who "has inexcusably slept on his rights so as to make a decree against the defendant unfair." *Beins v. District of Columbia BZA*, 572 A.2d 122, 126 (D.C. 1990). The party asserting the defense has the burden of proof. *American Univ. Park Citizens Ass'n*, 400 A.2d at 740.

The Court of Appeals decision in *Goto v District of Columbia BZA* illustrates how the doctrine is applied in practice. In that case, Goto consulted with the City in early 1974 about building a kiln in her yard. *Id.* at 918-19. She was told that she could build the kiln without a permit. *Id.* at 919. However, after neighbors Gottesman and Hinton complained, Goto was told to stop construction and obtain a permit. *Id.* So Goto applied for a permit. *Id.* In April 1975, Goto was again told she could build the kiln without a permit. *Id.* Gottesman and Hinton became aware of this decision in June 1975. In August 1975, Goto completed construction of the kiln. *Id.* In November 1975, Gottesman and Hinton wrote the City a letter again complaining about the kiln. *Id.* By January 1976 letter, the City rejected Gottesman and Hinton's complaints. *Id.* In March 1976, Hinton filed a claim with the BZA. *Id.* The BZA sided with Hinton and decided that a permit was required for construction of the kiln. *Id.* at 920.

One of the issues on appeal was whether laches barred Hinton from bringing the BZA appeal. The Court decided that the "critical period [to consider] was from June 1975 to March 1976." *Id.* at 925. It reasoned that this was the important period because Hinton had knowledge of the kiln as of June 1975 yet failed to file an appeal with the BZA until March 1976. *Id.* The court ultimately

concluded that laches barred the claim because the unreasonable delay by Hinton substantially prejudiced Goto who had spent about \$2,000 dollars finishing the kiln while Hinton sat on his claim. *Id.* at 926.

The decision in *Goto*, which involved facts that are strikingly similar to the facts of this case, indicates that the two factors necessary for laches to apply, unreasonable delay and prejudice, are satisfied in this case.

The *Goto* court found the "critical period" to consider in deciding whether the neighbors had unreasonably delayed in filing their appeal was the period between June 1975 and March 1976. It focused on this period because the neighbors had knowledge of the proposed use during this time but failed to file an appeal challenging the action. In this case, at the latest,¹ the "critical period" is from August 2008 to September 2009. This is because a Certificate of Occupancy was issued in August 2008 which would allow FoBoGro to use the entire premises as a grocery store. Yet, WECA did not take any action to challenge the issuance of the C of O until it asked the Zoning Administrator to revoke the C of O in September 2009. Based on the one year "critical period" in this case, which is longer than the 9 month period at issue in *Goto*, it is apparent that the first factor to consider in deciding whether laches applies, unreasonable delay, is satisfied.

In opposition, WECA may argue that it did not have notice of the August 2008 C of O. But this is a tough argument to sell when taking into account the fact that WECA is very vigilant in monitoring the property uses surrounding

¹ It could be argued that the critical period actually started before August 2008 at the time that FoBoGro started using the entire premises for grocery store purposes. This point will be discussed more below.

George Washington University. As FoBoGro points out in its brief, WECA has been involved in 157 BZA cases involving GWU.

Furthermore, even if WECA was not immediately aware of the issuance of the C of O in August 2008, the Board has already concluded that the entire building at issue was being used for grocery store purposes before August 2008. BZA August 10, 2010 Opinion and Order p 6, ("the Board accepts the testimony of Intervenor's representative... that all three floors of the building were devoted to the grocery store use.") And WECA's representative testified that even before the 2008 C of O was issued, she was aware that the building contained the store on one floor, storage on another, and an office upstairs. Exhibit 1, February 23, 2010 Hearing Transcript, p 217-218. The fact that the entire building has been used for grocery store purposes for years but WECA did not challenge the use until September 2009 indicates that it sat on its claim too long.

Moving on to the second factor, the *Goto* court concluded that there was prejudice. It relied on the fact that while the neighbors were doing nothing, Goto spent approximately \$2,000 building the kiln. Here, FoBoGro alleges that it spent much more than \$2,000 after the C of O was issued in August 2008. Among the many affirmative steps FoBoGro said it has taken are entering into a long term lease for the building, entering into agreements for renovations of the building, engaging an architectural firm to redesign the premises, and obtaining a Building Permit. FoBoGro has asserted that its total costs exceeded \$500,000. It seems obvious that if spending \$2,000 in 1975 constitutes prejudice, which would amount to less than \$10,000 today when taking inflation into account, then spending over \$500,000 qualifies as well.

Accordingly, both factors to consider in deciding if laches is applicable support finding that WECA should be barred from proceeding with this case.² Therefore, the case should be dismissed.

CONCLUSION

FoBoGro was issued a C of O in August 2008. Rather than immediately challenging this action, WECA responded by waiting nearly a year before arguing to the Zoning Administrator that the C of O should be revoked. Its failure to timely assert its challenge is fatal to its claim. The doctrine of laches requires dismissal of the case.³

² Because laches bars the appeal, there is no need to consider whether estoppel bars the claim. In addition, "[i]t is not clear that estoppel will bar a case brought by a neighboring landowner; arguably, that defense may be asserted only against the municipality which rendered the decision on which a party relied." *Gato*, 423 A.2d at 925, n. 15.

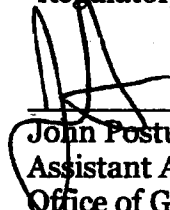
³ While DRCA contends that the record is sufficient for the Board to dismiss the case now, if the Board is not fully convinced, it should hold an evidentiary hearing on the issue.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November 2013, a copy of the foregoing Brief was served via e-mail to:

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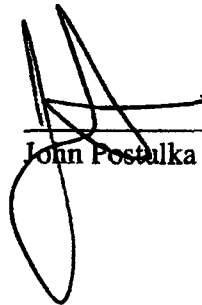
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