

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

rec'd 11/19/13
2:49 P.M.
R. NERO

APPEAL OF WEST END CITIZENS ASSOCIATION
BZA APPEAL NO. 18031

RESPONSE TO INTERVENOR'S BRIEF ON LACHES AND ESTOPPEL

I. Background.

A. Estoppel and Laches Disfavored in Zoning Cases.

The doctrine of equitable estoppel is judicially disfavored in zoning cases because of the important public interest in the integrity and enforcement of the zoning regulations. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 925 (D.C. 1980); *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 10 (D.C. 1978); see *Nathanson v. District of Columbia Board of Zoning Adjustment*, 289 A.2d 881, 884 (D.C. 1972).

A claim of laches in the zoning context is not judicially favored and is rarely applied “except in the clearest and most compelling circumstances[.]” *Moore v. Bridgewater Township*, 69 N.J.Super. 1, 173 A.2d 430 (App.Div.1961).

B. Nonconforming Uses Not Favored.

Nonconforming uses are not favored and must be regulated strictly (*C&P Building Limited Partnership V. D.C. Bd. of Zoning Adjustment*, 442 A.2d 129,131 (D.C. 1982)). Any interpretation of the zoning regulations which expands the prerogatives of nonconforming users is generally undesirable. (*Id.* at 131.). See also, 11 DCMR §2000.3.

C. An Illegal Use Can Be Revoked at Any Time.

The illegal issuance of a certificate of occupancy is invalid and can be revoked at any time and shall not be construed as an approval of a violation of the Zoning Regulations. See *Gorgone v. D.C. Bd. of Zoning Adjustment*, D.C. App., 973 A.2d 692,694 (2009), quoting 12A

DCMR §110.1: “Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of the applicable Construction Codes, Zoning Regulations or other laws or regulations of the District.” In the current appeal before the D.C. Court of Appeals, the Court found that all previously issued certificates of occupancy for 2140 F Street which might have been interpreted to include commercial use beyond the first floor were invalidly issued.

D. All Three Above Elements Present in This Case.

The Board should consider the Intervenor’s estoppel and laches claims in light of the three principles stated above, all of which call for the immediate non-continuation of FoBoGro’s illegal uses on the basement and second floors of the subject building.

II. The Elements of Estoppel and Laches Claims.

Only by showing each of the following elements can the Intervenor successfully invoke an estoppel claim: (1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon, (4) affirmative acts of the District government, (5) without notice that the improvements might violate the zoning regulations, and (6) equities that strongly favor the Intervenor. *Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000 (D.C. 1981); *See Goto, supra* at 925 n. 15; *Wieck, supra* at 11; *Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356, 359 (D.C. 1975); *District of Columbia v. Cahill*, 60 App.D.C. 342, 344, 54 F.2d 453, 454-55 (1931).

In order to make out a claim for laches, a party must establish “‘omission to assert a right for an *unreasonable and unsatisfactorily explained length of time* under circumstances prejudicial to the party asserting laches.’” *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C.1978) (quoting 3 RATHKOPF, LAW OF ZONING AND

PLANNING 67-1 (3d ed. 1972)) (emphasis added); *see also Goto v. District of Columbia Board of Zoning Adjustment, supra*, 423 A.2d at 925.

“Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches.” 3 Rathkopf, *Law of Zoning and Planning*, at 67-1 (3d ed. 1972). It is often claimed “where the inactivity of the officials charged with the enforcement of the ordinance has misled the owner into acts in violation of the ordinance . . . or has misled persons into purchasing the property in ignorance of the illegality of the use or structure.” *Id.* at 67-2.

III. FoBoGro Has Not Satisfied the Elements Necessary for an Equitable Estoppel or Laches Claim.

It is fundamental that a party asserting an affirmative defense, such as laches or estoppel, has the burden of proceeding to prove it. *Weaver v. Du Pont*, 119 A.2d 716, 717 (D.C. 1956). FoBoGro has not proven these elements and its claim for laches and estoppel must be denied.

A. There Can Be No Justifiable Reliance Following Notice of a Zoning Challenge.

FoBoGro had knowledge of WECA’s challenge to FoBoGro’s illegal expansion of the commercial use at 2140 F Street well before the November 4, 2009 C of O (the “2009 C of O”) was issued (including by WECA’s August 31, 2009 extensive written Protest of FoBoGro’s “Substantial Change” Application with the DC Alcoholic Beverage Regulation Administration (ABRA), which was provided to the BZA on pages 13-16 of Exhibit 1 in the #18031 case file), and, in any event, WECA filed its appeal to the Board of Zoning Adjustment on November 10, 2009, only six (6) days after issuance of the certificate of occupancy challenged in Appeal No. 18031. Prior to issuance of the 2009 C of O, WECA had nothing to appeal. The 2008 C of O was

for a mere ownership change, and went unnoticed and unimplemented. The August 2009 building permit was for exterior renovations and could not be appealed for the illegal use. The 2009 C of O was the first challengeable decision, and was challenged within six (6) days.

The Intervenor rightly acknowledges that a previously issued 2008 C of O for an ownership change is a “nullity” because it was later revoked. This current appeal involves only the 2009 C of O. WECA filed an appeal of that permit just six (6) days after it was filed, making a claim for laches fairly absurd under applicable laches law; *i.e.*, six (6) days to file an appeal would never be considered an “unreasonable” or “inexcusable” delay entitling a party to a laches claim.

Finally, the Intervenor argues that this Board should consider, for Intervenor’s laches and estoppel claims, work which took place after WECA’s August 31, 2009 ABRA Protest (as admitted on p. 7 of FoBoGro’s filing, “FoBoGro commenced construction on or about 10/1/09” and construction was suspended on 10/21/09 after the 10/14/09 C of O revocation). This is clearly not appropriate under laches and estoppel case law. From the time FoBoGro had notice that its use might violate the Zoning Regulations, as a result of WECA’s challenge, any reliance on any affirmative actions of the District in issuing the 2009 C of O was not reasonable or justified. As of the date of the appeal, and actually well before that date, FoBoGro had notice both from DCRA and the WECA that its proposed use might violate the Zoning Regulations. From that point forward, FoBoGro moved forward at its own risk that the 2009 C of O would be overturned, which it eventually was by the Court of Appeals.

The Court of Appeals addressed a similar issue in a D.C. zoning case and ruled:

"The conduct that petitioners characterize as "reliance" occurred after the petition for review was filed, but before a final adjudication of their rights by this court. Petitioners' decision to proceed with their investment under those circumstances was solely at their risk. They were not entitled to rely upon their own assumptions that this court's decision would be favorable to them." *Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000 (DC, 1981).

IV. The 2008 C of O and the August 2009 Building Permit are Irrelevant.

FoBoGro attempts to back-date the only relevant date - November 4, 2009 - all the way back to 2008, when FoBoGro's current owner, Kris Hart, obtained (the same day as application therefor) an 8/21/08 "change of ownership" certificate of occupancy (the "2008 C of O") which:

(i) was never fully implemented (the store was vacant from October 2008 to May 2010, i.e., nearly the entire life of the 2008 C of O);

(ii) evidenced not a single aspect of the issues later addressed in the WECA appeal, most importantly the number of floors to be used;

(iii) was unknown to the public and to WECA until almost a year later (at which time WECA immediately began to challenge its issuance); and

(iv) was invalid since Mr. Hart signed it representing that he was the owner of the business, when in fact he was not (as admitted on p. 6 of FoBoGro's filing, Mr. Hart purchased the grocery business on 11/20/08 and later signed a lease with the property owner on 6/11/09).

FoBoGro also claims that the issuance of a building permit in August of 2009 should be the date from which this Board considers whether or not WECA unreasonably delayed its challenge of the use of the building. But that building permit was for outdoor renovations work only and described as:

"Renovations to existing townhouse. Replace windows, replace rear exit stairs. Replace first floor framing with new floor. Replace doors."

The Intervenor does not explain how or under what methodology WECA might challenge FoBoGro's use of the building by appealing a building permit for windows, framing, and stairs.

Intervenor claims that WECA “slept on its right to appeal a Zoning Decision for over a year.” This is a complete misrepresentation, and an outrageous claim, in every respect. First of all, an approval of a change of ownership C of O is typically a walk-through matter which never even touches the Zoning Administrator’s desk. Second, WECA was not aware of the issuance of this C of O until about a year later when FoBoGro was pursuing a “Substantial Change” alcohol license. Third, the C of O was not actually used, as the building was vacant and not in use almost the entire time that the C of O was in existence. Fourth, the 2008 C of O was itself invalid, since it was signed by Kris Hart who did not own the business that he claimed to own when he signed the C of O application. Fifth, nobody that knows WECA has known them to “sleep” on any right to appeal when it believes that there is a violation of the Zoning Regulations, as evidenced by the filing of Appeal 18031 only six (6) days after the decision being challenged.

V. Conclusion.

The Intervenor simply has not made the case that laches or estoppel should be invoked to allow what the Court of Appeals has determined to be an illegal use on the basement and second floors of the building at 2140 F Street, NW.

Respectfully Submitted

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

Martin P. Sullivan
Sullivan & Barros, LLP

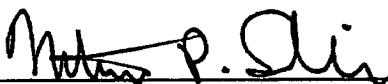
CERTIFICATE OF SERVICE

I, Martin P. Sullivan, HEREBY CERTIFY that on November 19, 2013, a copy of the foregoing document was delivered via e-mail to the following:

Constance J. Miller, Esq.
2010 Corporate Ridge Drive, Suite 700
McLean, VA 22102
CJMiller1951@ME.com; miller@manning-sossamon.com

John Postulka
Assistant Attorney General
Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, NW, Suite 5266
Washington, DC 20024
John.Postulka@dc.gov

Florence Harmon
2A02@anc.dc.gov; Florencedc@comcast.net



Martin P. Sullivan