

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

Appeal of AMM Holdings, Inc.

Appeal No. 18181

2011 MAR 25 AM 8:46

DCRA'S POST-HEARING BRIEF

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("Appellee" or "DCRA"), by and through undersigned counsel, respectfully submits its Post-Hearing Brief as permitted by the Board at the March 8, 2011 hearing.

Appellant acknowledges that the November 18, 2010 Stop Work Order was not issued in error, as a new 3-unit apartment building is not permitted as a matter of right in an R-4 zone. *See* 11 DCMR § 330.5. Instead, Appellant argues that the Board should grant its appeal based on the equitable doctrine of estoppel. This argument fails however, as the Appellant has failed to establish the elements necessary to support an estoppel defense.

I. Equitable Estoppel

Equitable estoppel has four necessary elements:

- 1) A party acting in good faith, 2) on affirmative acts of a municipal corporation, 3) makes expensive and permanent improvements in reliance thereon, and 4) the equities strongly favor the party invoking the doctrine.

See Wieck v. D.C. Bd. of Zoning Adjustment, 383 A.2d 7, 11 (1978).

The court in Wieck advised that estoppel is not judiciously favored "due to the important general public interest in the integrity and enforcement of zoning regulations." *See Wieck v.*

D.C. Bd. of Zoning Adjustment, 383 A.2d at 10. Similarly, the Board should apply a high level

of scrutiny to any claim of estoppel. Here, Appellant's attempt to assert this defense fails as it has not met the necessary elements.

Appellant states that the equities are strongly in its favor, but does not provide any support for such a conclusory statement. When the facts of this case are examined, it is clear that the equities are not in its favor. The Board cannot find that the equities strongly favor the Appellant where there is an obvious lack of due diligence on the part of the Appellant. Appellant's belief that it could build a 3-unit building comes from its own mistaken understanding that because the lot exceeded 2700 sq. ft. it could accommodate 3 units. Appellant never consulted the regulations to determine what was actually permitted. Nor did Appellant consult anyone who was well versed in the Zoning Regulations. While Mr. Agipong has a background in structural engineering, he does not indicate in his affidavit if he has any familiarity with the Zoning Regulations.¹ Mr. Agipong states that he and Appellant believed in good faith that the project was in compliance with the Zoning Regulations, but without having a background in zoning or consulting the regulations, how could one reasonably come to that belief? Appellant is in the real estate development business and has undertaken other development projects in the District. Nevertheless, it took no steps to determine whether its plans complied with the Zoning Regulations before submitting them to DCRA. Such reckless business practices should not be viewed favorably by the Board.

Secondly, any financial loss suffered by Appellant can be mitigated. If the Board denies this appeal, it is not depriving Appellant use of its land. Appellant can reconfigure the interior of its building to convert the property to a 2-unit flat. Such a conversion is possible at this stage of construction, as the pictures attached to Appellant's appeal show that finished walls have not yet

¹ Mr. Agipong is correct that he does not have a license to practice as a structural engineer. This is in part due to his 2007 felony conviction for bribery after he offered a bribe to a DCRA official. See *United States of America v. Yaw Oteng-Agipong*, Case No. 07-0034-01 (D.D.C.).

been put in place. The cost of reconfiguring the interior of the building can be offset by the savings Appellant saw in acquiring the land. Appellant paid a mere \$72,000 at auction for a buildable lot with an assessed value of \$193,000. *See DCRA Exhibits of March 7, 2011* at Exhibits A and B. Additionally, the Board should not ignore the fact that Appellant spent a significant amount of money before DCRA issued the building permit. All of the funds spent by Appellant in acquiring the land and in the design phase were not spent in reliance on the building permit.

For these reasons, the Board cannot find that Appellant has established a valid claim of equitable estoppel.

II. Laches

DCRA's enforcement of the Zoning Regulations is not barred by the defense of laches. Under this doctrine, the government can be precluded from enforcing a law where it has failed to do so for an "unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." *See Wieck v. D.C. Bd. of Zoning Adjustment*, 383 A.2d at 11. Like equitable estoppel, laches is "disfavored in the zoning context because of the public interest in the enforcement of the zoning laws." *See Appeal No. 17109 of Kalorama Citizens Association* (November 8, 2005) at p. 7. The Board has stated that "laches is rarely applied in the zoning context except in the clearest and most convincing circumstances." *Id.* at p. 8. In determining the validity of a laches defense, the Board looks at the entire course of events. *Id.*

This case does not present the Board with a clear and convincing record to find a valid laches defense. Unlike the Wieck case, where the District waited six and a half years to enforce its prior order instructing the homeowner to remove the unlawful backyard structure; here, DCRA acted quickly to acknowledge its error in approving the permit and promptly informed the

Appellant. The timing of DCRA's discovery of this error was not unreasonable considering 1) that Appellant was informed of the error before construction was completed and before final inspections had been conducted, 2) that DCRA discovered the error upon reviewing Appellant's application for a permit to construct a roof deck, which is dated October 27, 2010, and 3) that at no point did Appellant bring the error to DCRA's attention. Within a few days of receiving the Stop Work Order, Appellant met with the Zoning Administrator to discuss its options to bring the property into compliance. Specifically, the Zoning Administrator advised Appellant that it could seek a variance from the Board or it could convert the property into a flat. Instead, Appellant chose to incur more expense and delay by filing this appeal.

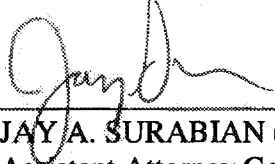
Accordingly, Appellant has failed to establish the defenses of laches or equitable estoppel and the appeal must be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served by email and first class mail, this 24 day of March 2011, to the following:

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A handwritten signature in dark ink, appearing to read "Jay Surabian", is written over a horizontal line.

Jay Surabian