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**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

Cross Appeal of Mr. Endalkachew Tesfaye

BZA Appeal No. 17468A
Public Hearing: June 27, 2006
ANC 6A

**CROSS APPELLANT'S OPPOSITION TO DCRA'S MOTION FOR A CONTINUANCE
AND STATEMENT IN SUPPORT OF THIS CROSS APPEAL**

Cross Appeal:

The Cross Appellant, Mr. Endalkachew Tesfaye, by and through undersigned counsel, respectfully submits this: a) Opposition to the Department of Consumer and Regulatory Affairs' Motion for a Continuance of the June 27, 2006 hearing; and b) Statement in Support of the Cross Appeal of the Department of Consumer and Regulatory Affairs and/or Zoning Administrator's decision on March 22, 2006 to deny the issuance of a Certificate of Occupancy for a "6 unit apartment (condo) building" at 1124 E Street, N.E. (Square 984, Lot 44) ("Property") in violation of the Zoning Regulations. A copy of this letter is attached as Exhibit A.

The Board has jurisdiction to hear this Cross Appeal pursuant to 11 DCMR §§ 3100 and 3101. At the May 16, 2006 hearing in BZA Appeal No. 16468, the Board accepted and docketed this Cross Appeal as BZA Appeal No. 17648A. Recognizing the harm that would continue to be suffered by the Cross-Appellant while this matter remains pending, the Board scheduled the continued hearing on the Cross Appeal on an expedited, priority basis for June 27, 2006.

ANC 6A Appeal Dismissed:

At the May 16, 2006 hearing, the Board voted 5-0 to dismiss as untimely, the underlying appeal of Advisory Neighborhood Commission 6A (ANC 6A) from the decision of the Zoning Administrator (ZA) to issue approvals for electrical, fire, mechanical and plumbing disciplines

(DCRA Tracking No. 236 D5) with the intention of issuing building permits to allow the expansion of a nonconforming apartment building from 3 units to 6 units. ANC 6A, alleged that the ZA erred by giving said approvals without consideration of the underlying R-4 zoning use and the parking requirements under 2115.

I. Opposition to Motion for Continuance:

DCRA has filed a Motion for a Continuance of the June 27, 2006 hearing based on the unavailability of Mr. Bill Crews, the Zoning Administrator, on that date. The Cross Appellant respectfully, but strenuously, opposes any continuance in this matter.¹ The requested continuance is unnecessary, contrary to the Board's desire to hear and resolve this matter promptly and extremely prejudicial to the Cross Appellant and DCRA which will continue to be subject to increasing damages for its action in this matter.

At the May 16, 2006 hearing, Mr. Crews chose not to attend based on his determination that his presence was unnecessary and that he could be fully represented by counsel. While it is clear that the Board took exception to Mr. Crews absence, no information has been provided by Mr. Crews or his counsel that suggest he believes his presence is necessary or essential to the resolution of this matter. In fact, even with Mr. Crews unwilling or unavailable to attend the hearing, DCRA and the Zoning Administrator's Office can be fully, if not better, represented by other available senior personnel. Either the Deputy Zoning Administrator, Mr. Matthew LeGrant, and/or the Chief of the Zoning Review Branch, Ms. Faye Ogunneye, are fully qualified to appear at the hearing. In the case of Ms. Ogunneye, she is the most experienced and knowledgeable member of the Zoning Administrator's senior staff and she personally reviewed

¹ In its Motion, DCRA's counsel indicated that the undersigned counsel agreed to submit questions to DCRA. In fact, Cross Appellant's counsel responded by declining a continuance and stating: "I will leave it up to your discretion, what if any, witnesses you want to present at the hearing. Exhibit B."

and approved both building permits (long before Mr. Crews was appointed Zoning Administrator and while he was a Commissioner for Advisory Neighborhood Commission 6B) and is uniquely qualified and knowledgeable to testify in this matter and defend why the permits comply with the Zoning Regulations and were properly issued.

In accepting this Cross Appeal and scheduling this hearing on an expedited basis, the Board demonstrated the strong desire to resolve this matter without further delay. DCRA has offered no reasonable basis for the continuance and certainly no justification for thwarting the Board's express desire to hear this case without further or unnecessary delay.

The Board clearly recognized that DCRA's failure to act promptly in this matter has been prejudicial to the Cross Appellant. It can not be disputed that every day that this matter remains unresolved regardless of the outcome, the Cross Appellant continues to suffer substantial damages which must be compensated by DCRA.

Finally, on the threshold issue of estoppel against DCRA, testimony by Mr. Crews or anyone else from DCRA is unnecessary and irrelevant. As more fully discussed below, the elements of estoppel are well-established and undisputed.

II. Background:

The Intervenor is the developer of the Property and owner of three (3) of the six (6) completed condominium units. Three of the units have been sold to individual homeowners. The Property is improved with a two-story residential building originally constructed in about 1901. The Property is zoned R-4 and has been used as an apartment house (3 units) since before the enactment of the current Zoning Regulations in May 1958. A copy of the most recent Certificate of Occupancy, B60942 for "Apartment House", dated April 14, 1967 and Certificate

of Occupancy B43718 for "Apartment House," dated July 15, 1964 were attached to Cross Appeal Against DCRA and Motion to Dismiss and Opposition to Appeal of ANC 6A dated May 9, 2006 ("Cross Appeal") as Exhibit 2. There is no dispute among the parties that the apartment house use is a valid pre-1958 use.

The following is a chronology of recent events involving the Property [Items in ***Bold/Italics*** supplement the earlier chronology presented by Cross Appellant]:

- February 2, 2005:** DCRA issued Building Permit B469531 authorizing "Interior Renovation and New Electrical Mechanical and Plumbing" for an Apartment House with 6 units and 2 parking spaces. Cross Appeal, Exhibit 3 [Note: Building Permit Application was approved by Zoning on January 10, 2005 by "Faye O."].
- February 25, 2005:** Intervenor begins construction at the Property.
- April 13, 2005:** DCRA approved a revision to Building Permit B469531 with Building Permit B471488 authorizing enclosure of existing covered Balcony. Cross Appeal, Exhibit 4. [Note: Approved by "Faye O." on April 6, 2005].
- May 12, 2005:** DCRA approved Electrical Permit EL 97387 authorizing installation of one service/meter 401 -800 amps, 12 smoke detectors, 12 low voltage, 32 outlets, 30 lights, 6 central a/c units, 6 electric ranges, 6 clothes dryers, 6 garbage disposals, and 6 dishwashers in an use group R2 Apartment (building). Cross Appeal, Exhibit 5.
- June 15, 2005:** DCRA approved Plumbing Permit PLBG 99415 authorizing the installation of 4 bath tubs, 6 water closets, 4 washer boxes, 4 sinks, 6 basins, 4 dishwashers and 4 water heaters in an use group R2 Apartment (building). Cross Appeal, Exhibit 6.
- July 8, 2005:** DCRA approved four (4) Air Conditioning Permits (AC 100899, AC 100900, AC 100901 and AC 100902) each of which authorized refurbishing an air conditioning condenser on the roof of the use group R2 Apartment (building). Cross Appeal, Exhibit 7.
- August 24, 2005:** Zoning Administrator's Office approves Condominium Plats and Plans for six-unit condominium. Cross Appeal, Exhibit 8.
- September 7, 2005:** Condominium Plat recorded by D.C. Surveyor.

October, 2005: *ANC 6A challenges building permits directly with Zoning Administrator, but no action is taken for at least five (5) months until March 22, 2006 letter from Mr. Crews. See Testimony of Mr. Joseph Fengler, Chair, ANC 6A at May 16, 2006 hearing.*

November 2005: Intervenor sells two (2) of the six (6) units.

November 2005: Substantial Completion for improvements.

December 13, 2005: ANC 6A filed BZA Appeal No. 17468.

December 30, 2005: **FINAL APPROVAL** (Plumbing and Mechanical Inspections) for Use and Occupancy for Units A, B, C & D. Cross Appeal, Exhibit 9.

January 17, 2006: **FINAL APPROVAL** (Electrical Inspection) for Use and Occupancy for Units A, B, C and D. Cross Appeal, Exhibit 10.

January 17, 2006: **FINAL APPROVAL** (Building Inspection) for Fire and for Use and Occupancy for Units A, B, C and D. Cross Appeal, Exhibit 11.

February 9, 2006: *Mr. Crews quoted in Voice of Hill: "Once it was brought to my attention and I reviewed it, that's where I realized the building permit was issued in error. . . It should not have been issued." Exhibit C.*

February 21, 2006: **FINAL APPROVAL** (Building Inspection) for Basement 2 units. Cross Appeal, Exhibit 12.

February 23, 2006: **FINAL APPROVAL** (Building Inspection/Fire Protection) for Units E and F. Cross Appeal, Exhibit 13.

February 23, 2006: **FINAL APPROVAL** (Plumbing Inspection) for Units E and F. Cross Appeal, Exhibit 14.

February 23, 2006: **FINAL APPROVAL** (Electrical Inspection) for Units E and F. Cross Appeal, Exhibit 15.

February 23, 2006: **FINAL APPROVAL** (Mechanical Inspection) for Units E and F. Cross Appeal, Exhibit 16.

February 24, 2006: Intervenor submitted application for Certificate of Occupancy.

March 2006: Mr. Crews is quoted in Voice of the Hill newspaper, stating that "Building Permit was issued in error." Cross Appeal, Exhibit 17.

March 22, 2006: Letter from Mr. Crews disapproving Certificate of Occupancy Application. Exhibit A.

April 7, 2006: ***Cross Appellant's counsel writes directly to Dr. Patrick J. Canavan, Director of DCRA, requesting his personal review of this matter. Exhibit D. Dr. Canavan refuses to meet with Cross Appellant and no response was received for 55 days.***

June 1, 2006: ***Letter received from Dr. Canavan stating that a BZA Appeal is the only remedy to this matter. Exhibit E.***

DCRA issued two separate building permits (the first, 16 months ago; and the second, 14 months ago) authorizing the interior work for a six-unit apartment building at the Property. The authorized work has been completed in accordance with the permits and all of the Final Inspections have been completed and approved. Under the two Building Permits issued by DCRA which remain valid,² Mr. Tesfaye has satisfied all the applicable requirements and no legal basis exists for denying the Certificate of Occupancy. Further, DCRA, as a matter of law, is estopped from denying the Certificate of Occupancy.

III. Argument

A. The Appeal is Barred Under the Equitable Doctrine of Estoppel.

The applicability of the equitable doctrine of estoppel is well established in District of Columbia zoning law. See *Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (DCCA 1975); *Lyke c. DC BZA*, 383 A.2d 7 (1978); *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917 (DCCA 1980).

The elements of estoppel are that the claimant is required to prove: (i) that he acted in good faith; (ii) on affirmative acts of the District; (iii) made expensive and permanent improvements in reliance thereon; and (iv) the equities are strongly in the claimant's favor. See also *District of Columbia v. Cahill*, 60 App. DC 342 (1931). Based on the clear and undisputed

² No action has been taken to revoke the Building Permits. The Zoning Administrator is not authorized to revoke a building permit. 12 DCMR § 105.6 (January 2004). At all times relevant to this case, the "Code official" has been Mr. Lennox Douglas, Acting Administrator of BLRA.

facts of this case, including the repeated affirmative actions of DCRA, the inaction by ANC 6A for more than nine (9) months, the inaction of DCRA for at least five (5) months after being informed of this issue by ANC 6A, and failure by Mr. Crews to take any action or inform the Cross Appellant for more than forty-one (41) days after announcing his decision in the Voice of Hill that the permit was issued in error, the Board and the District are estopped from denying the Cross Appellant's certificate of occupancy.

Specifically, the Cross Appellant acted in good faith and without knowledge of the ANC 6A Appeal or Mr. Crews' decision. These actions were based on the affirmative approval by DCRA of at least seven (7) building and other permits issued over a six (6) month period. As authorized by these permits, the Cross Appellant spent almost One Million Dollars (\$1,000,000.00) in completing the authorized work at the Property, in addition to \$850,000.00 for acquisition of the Property. Exhibit F. Substantial completion at the Property and the sale of two units occurred prior to the filing of the ANC 6A Appeal or any notice from Mr. Crews. All the construction has been completed, inspected, finally approved and three (3) units sold. No one can disagree that it would be fundamentally unfair and punitive to the Cross Appellant and the new individual unit owners to deny the certificate of occupancy at this late date. Similarly, the Zoning Administrator's attempt to retroactively disapprove the existing building permits is incorrect, without proper authority, unjust and undermines the finality and reliability of the building permit process. In the future, no one would be justified in relying on permit or approval issued by DCRA.

B. No Zoning Violation.

Beyond the Zoning Administrator's failure to act in a timely manner and in accordance with established procedures and issue the Certificate of Occupancy, he has not offered a valid,

experienced and/or well-informed basis in the Zoning Regulations for his actions. In fact, a careful, well-informed and professional zoning analysis prepared by Mr. Olutoye Bello clearly demonstrates that the underlying building permits comply fully with the Zoning Regulations, were issued properly and remain valid and binding on the Zoning Administrator. Exhibit G. Mr. Bello has more than fifteen (15) years of daily, hands-on expertise in D.C. zoning matters while serving in a series of increasingly senior D.C. government zoning positions, including most recently as the Zoning Administrator for the District of Columbia.

C. Zoning Commission Interpretation of Its Regulations is Binding on Zoning Administrator.

The Zoning Commission has exclusive jurisdiction to adopt and amend the Zoning Regulations and Zoning Map. 11 DCMR § 102. The Zoning Administrator is responsible for applying and enforcing the Zoning Regulations, but must only do so in a manner that is consistent with the Regulations and the interpretations promulgated by the Zoning Commission.

1. Zoning Commission Order No. 211.

The Zoning Administrator is clearly unaware of Z.C. Order No. 211 (March 9, 1978), but must act in accordance with the clear interpretation of 11 DCMR § 401.3 (formerly § 3301.3) set forth by the Zoning Commission. Exhibit H. Specifically, the Zoning Commission unequivocally approved and endorsed the long-standing interpretation that the reconfiguration of a pre-1958 apartment house (e.g. multiple dwelling) to increase the number of units is **not** a "conversion" subject to the 900 square foot per unit lot area requirement. The Zoning Commission took this action to endorse the Board of Zoning Adjustment's decision in two Appeals, involving the same property, 12434 and 12440 (October 11, 1977). Exhibit I. In a joint decision, the Board held that the change of a pre-1958 nine-unit rooming house to a seven-unit

apartment in an R-4 zone was not a "conversion" subject to the 900 square foot lot area requirements of § 3303.1 (now § 401.3).

D. Zoning Analysis.

1. Valid, Existing Conforming Use.

The Property, prior to issuance of the Building Permits, was a valid and conforming use for several reasons. First, the use of the Property as an Apartment House for three units was valid and authorized most recently by Certificate of Occupancy No. B60942. Second, the use of the Property was and continues to be a conforming use. The Zoning Regulations define "nonconforming use" as follows:

"[A]ny use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective, that does not conform to the use provisions for the district in which the use is located. A use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use. That nonconforming use shall be considered a conforming use, subject to the further provisions of §§ 3104.2 and 3104.3 (30 DCR 3922)."

11 DCMR § 199.1 (Emphasis added).

Based on the long established application of this definition and the undisputed facts, the following must be concluded. The apartment house use existed prior to the enactment of the current Zoning Regulations. However, the apartment house does conform to the use provisions in the R-4 zone. Specifically, 11 DCMR § 330.5 permits as a matter-of-right, the use (conversion) of a structure existing before May 12, 1958 as an apartment house. Accordingly, the apartment house use fails to meet the definition of "nonconforming" and must be treated as a conforming use.

2. § 401.3 Not Applicable.

As a valid, existing, and conforming use, the apartment house use is not subject to the restrictions in 11 DCMR § 401.3 (900 square feet of lot area per unit). Section 401.3 would only apply in the case of a conversion of another existing use (e.g. single-family dwelling) to an apartment house. Here, no conversion has occurred with the continuation of the longstanding apartment house use.

3. No Expansion of Apartment House.

Finally, there has been no expansion of the apartment house use. As authorized by the two (2) DCRA issued building permits, the interior renovation occurred entirely within the existing building envelope without any expansion of the space devoted to apartment house use. The reconfiguration of the existing apartment house interior space from 3 to 6 units is not relevant or controlling to the issue of expansion of the permitted use.³ Further, the two (2) existing off-street spaces satisfy the parking requirement and those spaces are in compliance with the Zoning Regulations.

4. Parking in Compliance.

The Zoning Administrator's letter of March 22, 2006 does not identify a violation of the parking requirements, and therefore is not part of this Cross Appeal. However, parking was at issue in the ANC 6A Appeal which was dismissed. In order to reach a complete and final resolution of all issues related to this Property and avoid separate action by the Zoning Administrator in the future, the Board should find that there is no violation of the parking requirements. Specifically, as set forth by Mr. Bello in his detailed Zoning Analysis, Exhibit G,

³ Alterations, repairs, modernizations to a non-conforming use are permitted (11 DCMR § 2002.4), provided the non-conforming use is not enlarged. 11 DCMR § 2002.5.

the two existing pre-1958 parking spaces are grandfathered and in compliance with the Zoning Regulations.

E. Zoning Administrator Acted Improperly, Without Justification, and Beyond the Scope of His Authority in Denying the Certificate of Occupancy).

The Intervenor was issued several permits by DCRA (long before the current Zoning Administrator was hired) which were repeatedly determined to be (and are in fact) in compliance with the Zoning Regulations. All the authorized work has been completed and all final inspections approved. There exists no valid or authorized basis for the Zoning Administrator to deny the Certificate of Occupancy. The Intervenor was entitled to complete the work authorized by the building permits. 11 DCMR § 3202.4. Further, the Intervenor, upon completion of the work and inspection was entitled to issuance of a Certificate of Occupancy in accordance with approved use ("Apartment House, 6 units, 2 parking spaces," Cross Appeal, Exhibit 3) under the building permits. 12 DCMR § 110.3 (January 2004).

IV. Witnesses

At the hearing, at least following will be witnesses for the Intervenor:

1. Mr. Endalkachew Tesfaye
2. Mr. Olutoye Bello, Zoning Expert

V. Conclusion

For the foregoing reasons, the Zoning Administrator's action is barred by the doctrine of estoppel and the Cross Appeal must be GRANTED and DCRA directed to issue the requested Certificate of Occupancy without further delay or interference.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

A handwritten signature in black ink, appearing to read 'JPB', is written over a horizontal line.

John Patrick Brown, Jr., Esquire
1620 L Street, N.W., Suite 900
Washington, D.C. 20036-5605

June 6, 2006

CERTIFICATE OF SERVICE

I hereby certify that foregoing Cross Appellant's Opposition to DCRA's Motion For A Continuance and Statement in Support of this Cross Appeal was mailed first-class, postage prepaid, this 6th day of June, 2006, to:

Jill Stern, Esquire
General Counsel
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
Room 9400
Washington, D.C. 20002

Dennis M. Taylor, Esq.
Assistant General Counsel
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
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Washington, D.C. 20002

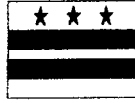
Mr. Joseph Fengler, Chair
Advisory Neighborhood Commission 6A
815 F Street, N.E.
Washington, D.C. 20002



John Patrick Brown, Jr.

A

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



March 22, 2006

Endalkachew Tesfaye
7050 Solomon Seal Court
Springfield, VA 22152

Re: 1124 E Street, NE
Washington, DC

Dear Mr. Tesfaye:

Your certificate of occupancy application filed on February 24, 2006, to use 1124 E Street NE as a 6 unit apartment (condo) building is disapproved. This property is located within an R-4 District, which does not allow your proposed use for the size of your lot.

Occupancy records indicate that a previous certificate of occupancy was issued authorizing a non-conforming use as a 3 unit apartment building. This use predated the current zoning regulations, which allows this existing use, but designates it as non-conforming.

11 DCMR Sec. 2000.3 requires that all uses and structures incompatible with permitted uses or structures shall be regulated strictly and permitted only under rigid controls. 11 DCMR Sec. 401.3 requires that in an R-4 district, existing buildings can be used as apartment buildings only if the lot size allows 900 square feet per unit. In order for you to expand the number of units to 6, you would need a minimum lot size of 5,400 square feet.

Under 11 DCMR 3100.2 you may appeal this decision to the Board of Zoning Adjustment (BZA) located at 441 4th Street, NW, Suite 200S, Washington, DC.

In the alternative, you may apply to the BZA under 11 DCMR 3103 for a variance to waive the minimum lot size requirement.

Best regards,

Bill Crews
Zoning Administrator for the District of Columbia

B

John Patrick Brown Jr.

From: John Patrick Brown Jr.
Sent: Thursday, May 18, 2006 11:29 AM
To: 'Taylor, Dennis (DCRA)'; 'fengler6a02@yahoo.com'
Subject: RE: Bill Crews Availability - 2

Dennis, My client is not interested in a continuance. I will leave it up to your discretion, what if any, witnesses you may want to present at the hearing.

Best regards, Pat

John Patrick Brown, Jr., Esq.
Greenstein DeLorme & Luchs, P.C.
1620 L Street, N.W.
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202.452.1400 Phone
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-----Original Message-----

From: Taylor, Dennis (DCRA) [mailto:Dennis.Taylor@dc.gov]
Sent: Wednesday, May 17, 2006 5:06 PM
To: fengler6a02@yahoo.com; John Patrick Brown Jr.
Subject: Bill Crews Availability - 2

Gentlemen, please substitute this document for the one I sent a few moments ago.

Thanks,

Dennis

Dennis M. Taylor
Assistant Attorney General
Department of Consumer and Regulatory Affairs
941 North Capitol Street, NE, Room 9401
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Confidentiality Notice

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6/5/2006

C

citydesk

New Dragon to close doors in July

BY DAVID FRANCIS

Eight Hill East residents and the owner of New Dragon Restaurant have come to an agreement in which the controversial establishment will close this summer.

New Dragon owner Zhen Jian Lan agreed to close the troubled spot in exchange for the residents dropping a lawsuit filed against him. The complaint against Lan claims that the New Dragon should be zoned

as a fast-food establishment, not a restaurant, as it is currently zoned. Zoning code prohibits fast-food restaurants in residential areas.

The New Dragon, located at the corner of 15th and C streets, SE, has long been a beacon for trouble. Residents have complained of drug dealing and other crimes taking place in front of, in and around the store, and have fought for increased police patrols and cooperation from Lan for years.



New Dragon owner to close up shop in July.

Under the terms of the settlement agreement, the New Dragon will close on July 31. Chad Anthony and Topher Cushman purchased the building in October. Cushman said in an October interview with *The VOICE* that he does not know what

will take the New Dragon's place.

The agreement was signed by Hill East residents Corey Buffo, Jack Calhoun, Tamara Copeland, Jim Myers, Jeremy Duff, Becky Duff, Rachel Conway and David Wright.

Calhoun said he was pleased that the agreement

could be reached, but was confident that the residents would have won had the lawsuit gone forward. "I think we had the law on our side," he said. "Our efforts with regard to the New Dragon have been quite righteous."

Calhoun said closing the restaurant took years of work by residents, who recognized it as a focal point for drug dealing and gun violence. "It has been a magnet for crime," he said.

Jim Myers, who has worked for years to curb crime in the area, said that establishments like the New Dragon are out of place in residential neighborhoods. "[The New Dragon] doesn't belong at this particular type of corner where the building is contiguous with residential properties," he said.

Myers added that he was sorry Lan had to give up his business. "I'm sorry that the owner of the restaurant itself has to leave. But I don't think there was a significant business potential for that address," he said.

VOICE

DCRA to revoke E Street condo permits

BY GARY EMERLING

The Department of Consumer and Regulatory Affairs said it plans to revoke the certificates of occupancy for an E Street townhouse converted into six condominiums in an effort to amend what residents say was an agency error that allowed the illegal conversion in the first place.

"You may see with the work that we're doing as we get into the neighborhoods and staff up, especially in zoning, you may see more of this where we're taking action in areas where these things are being brought to our attention," department spokeswoman Linda Argo said. "And hopefully they're brought to our attention and we catch some of this stuff earlier."

The problem began when regulatory department issued construction permits to expand the townhouse — located at 1124 E St., NE — from three to six units, according to Joe Fengler, head of the Northeast Capitol Hill advisory neighborhood commission.

The building — which normally would only be able to house two units — was issued a certificate of occupancy for three units prior to 1958, when city zoning laws were changed. It was then grandfathered into compliance with city code. An occupancy certificate has not been issued for the remaining three condos.

However, city regulations state that each unit must be allotted at least 900 square feet. The entire lot is

only 1,710 feet, and legally could only accommodate three units because of its grandfathered status.

"Once it was brought to my attention and I reviewed it, that's where I realized the building permit was issued in error," city zoning administrator Bill Crews said. "It should not have been issued."

The lot also must have at least one parking space that measures 9 feet wide by 19 feet long for every three units. Crews said the spaces at the condominiums do not comply with the regulations.

"They're not long enough," he said. "There's a limit on how steep the driveway can be and this driveway is steeper than allowed. In effect they don't comply with the parking requirements."

Despite these violations, Fengler and area residents said construction continued at the site until the units were completed, rendering the regulatory department responsible for issuing the permits in the first place.

and then doing nothing to rectify the error.

"One of my main sources of aggravation with this whole thing is the city did nothing, nothing, nothing," said a resident near the townhouse who did not want to be identified. "I'm a little concerned that a developer comes in and isn't worried about the neighborhood and the city says that's fine."

"It sends the absolute wrong message."

Residents also said workers ignored two stop-work orders issued by the regulatory department — one to discontinue work on Sundays and one to stop working until an electrical permit was obtained.

The owner of the lot, listed as Endalkachew Tesfaye, could not be reached for comment.

However, Phil DiRuggiero, a Realtor for Urban Land Co., which is selling the units at the site, said three of the condos are already under contract and that he was not aware of the zoning violations.

"I hadn't heard of that," he said. "I'm hired to sell the units as the seller describes them to us ... anything that we have documents approved by

the city, and if the city has approved it, that's what they've done."

Crews said penalties for violating the stop work orders are under review by regulatory department staff, but that enforcing Sunday stop-work orders can be "hit-and-miss," meaning it can be hard to catch construction crews in the act.

The developer also may not face penalties for the electrical permit stop-work order, because one was obtained after the order was issued, putting the developer back in legal compliance.

However, Crews and Argo both said they are requesting the department's general counsel to prepare a notice of intent to revoke the certificate of occupancy at the townhouse and hope to have the issue resolved in the near future.

"It's gone on long enough," Crews said.

Meanwhile, Fengler and the advisory commission have filed an appeal with the Board of Zoning Adjustment, stating that the regulatory department erred in issuing construction permits at the site and requesting a formal review by zoning board to either uphold or repeal the department's actions.

"Our commission understands why DCRA would want to avoid a lawsuit for negligence, [but] we believe the developer has responsibility to build in compliance with the zoning code," Fengler said. "The zoning regulations on the Web and in this case are very clear."

Fengler said the appeal is on the zoning board agenda and is scheduled to be heard in May.

VOICE

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replace him. He just doesn't want to step down."

In order to remove an official, 10 percent of registered voters in that official's single-member district must sign a recall petition. If a commissioner misses three consecutive meetings, only 5 percent of registered voters have to sign the petition, according to Gottlieb Simon, executive director of the city's 37 advisory neighborhood commissions.

Simon said that other commissioners cannot remove a fellow member from the panel.

Other commissioners, however, have stepped down on their own once other obligations impeded their ability to serve their constituents.

Northeast Capitol Hill commission member Robyn Holden resigned in November citing "increased family obligations." An election to replace Holden is planned for the commission's February meeting.

This is not the first time commissioners have had extended absences. Wanda Stevens-Harris was consistently absent from the Northeast commission and did not seek reelection when her term was up in 2004.

VOICE



The city plans to revoke permits for this E Street condominium project.

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D

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JPB@GDLLAW.COM

April 7, 2006

BY HAND DELIVERY

Patrick J. Canavan, Phd.
Director
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Room 9500
Washington, D.C. 20002

Re: 1124 E Street, N.E., Square 984, Lot 44 ("Property")

Dear Dr. Canavan:

This firm is counsel for Mr. Endalkachew Tesfaye, the owner of the Property. Mr. Tesfaye has received the attached letter from Mr. Bill Crews, the Zoning Administrator, denying his application for a Certificate of Occupancy. Exhibit 1.

As a courtesy, I am alerting you that, once again, Mr. Crews has exceeded his authority, acted illegally, and demonstrated a fundamental misunderstanding of and/or disregard for the Zoning Regulations. In doing so, Mr. Crews has exposed DCRA and himself, personally, to substantial liability. We look forward to your prompt and complete resolution of this matter and issuance of the pending Certificate of Occupancy.

The facts are clear and undisputed. The Property is zoned R-4 and has been used as an apartment house (3 units) since before the enactment of the current Zoning Regulations in May 1958. A copy of the most recent Certificate of Occupancy, B60942, dated April 14, 1967 is attached as Exhibit 2. The following is a chronology of recent events involving the Property:

Patrick J. Canavan, Phd.
April 7, 2006
Page 2

- February 2, 2005: DCRA issued Building Permit B469531 authorizing "Interior Renovation and New Electrical Mechanical and Plumbing" for an Apartment House with 6 units and 2 parking spaces. Exhibit 3 [Note: Building Permit Application was approved by Zoning on January 10, 2005 by "Faye O."].
- April 13, 2005: DCRA approved a revision to Building Permit B469531 with Building Permit B471488 authorizing enclosure of existing covered Balcony. Exhibit 4. [Approved by "Faye O." on April 6, 2005].
- December 30, 2005: FINAL APPROVAL (Plumbing and Mechanical Inspections) for Use and Occupancy for Units A, B, C & D. Exhibit 5.
- January 17, 2006: FINAL APPROVAL (Electrical Inspection) for Use and Occupancy for Units A, B, C and D. Exhibit 6.
- January 17, 2006: FINAL APPROVAL (Building Inspection) for Fire and for Use and Occupancy for Units A, B, C and D. Exhibit 7.
- February 21, 2006: FINAL APPROVAL (Building Inspection) for Basement 2 units. Exhibit 8.
- February 23, 2006: FINAL APPROVAL (Building Inspection/Fire Protection) for Units E and F. Exhibit 9.
- February 23, 2006: FINAL APPROVAL (Plumbing Inspection) for Units E and F. Exhibit 10.
- February 23, 2006: FINAL APPROVAL (Electrical Inspection) for Units E and F. Exhibit 11.
- February 23, 2006: FINAL APPROVAL (Mechanical Inspection) for Units E and F. Exhibit 12.
- February 24, 2006: Mr. Tesfaye submitted application for Certificate of Occupancy.
- March 2006: Mr. Crews is quoted in Voice of the Hill newspaper, stating that "Building Permit was issued in error." Exhibit 13.
- March 22, 2006: Letter from Mr. Crews disapproving Certificate of Occupancy. Exhibit 1.

DCRA issued two separate building permits (the first, 14 months ago; and the second, 12 months ago) authorizing the interior work for a six-unit apartment building at the Property. The authorized work has been completed in accordance with the permits and all of the Final Inspections have been completed and approved. Under the two Building Permits issued by

Patrick J. Canavan, Phd.
April 7, 2006
Page 3

DCRA which remain valid,¹ Mr. Tesfaye has satisfied all the applicable requirements and no legal basis exists for denying the Certificate of Occupancy. Further, DCRA, as a matter of law, is estopped from denying the Certificate of Occupancy.

Beyond Mr. Crews failure to act in accordance with established procedures and issue the Certificate of Occupancy, he has not offered a valid and/or well-informed basis in the Zoning Regulations for his actions.

The Property, prior to issuance of the Building Permits, was a valid and conforming use for several reasons. First, the use of the Property as an Apartment House for three units was valid and authorized by Certificate of Occupancy No. B60942. Second, the use of the Property was and continues to be a conforming use. The Zoning Regulations define "nonconforming use" as follows:

[A]ny use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective, that does not conform to the use provisions for the district in which the use is located. A use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use. That nonconforming use shall be considered a conforming use, subject to the further provisions of §§ 3104.2 and 3104.3 (30 DCR 3922).

11 DCMR § 199.1 (Emphasis added).

Based on the long established application of this definition and the undisputed facts, the following must be concluded. The apartment house use existed prior to the enactment of the Zoning Regulations. However, the apartment house does conform to the use provisions in the R-4 zone. Specifically, 11 DCMR § 330.5 permits as a matter-of-right, the use (conversion) of a structure existing before May 12, 1958 as an apartment house. Accordingly, the apartment house use fails to meet the definition of "nonconforming" and must be treated as a conforming use.

As a valid, existing, and conforming use, the apartment house use is not subject to the restrictions in 11 DCMR § 401.3 (900 square feet of lot area per unit). Section 401.3 would only apply in the case of a conversion of another existing use (e.g. other than apartment house) to an apartment house. Here, no conversion has occurred with the continuation of the longstanding apartment house use.

¹ No action has been taken to revoke the Building Permits.

Patrick J. Canavan, Phd.

April 7, 2006

Page 4

Finally, there has been no expansion of the apartment house use. As authorized by the two (2) DCRA issued building permits, the interior renovation occurred entirely within the existing building envelope without any expansion of the space devoted to apartment house use. The reconfiguration of the existing apartment house space from 3 to 6 units is not relevant or controlling to the issue of expansion of the permitted use, except with respect to parking which requirement was satisfied under the issued Building Permits and not referenced in Mr. Crews' letter.

Time is of the essence. Mr. Tesfaye received all of his FINAL APPROVALS and submitted his Certificate of Occupancy application six (6) weeks ago. At least three of the condominium units have been sold and are ready to be occupied by the new owners.

Based on this information, we expect that the Certificate of Occupancy will be issued no later than Thursday, April 13, 2006. If that does not occur, this firm will have no alternative but to seek judicial sanctions, including injunctive relief and monetary damages from DCRA and Mr. Crews in his personal capacity. I am sure you will agree that it is in DCRA's best interest to avoid unnecessary litigation and liability.

Sincerely,

GREENSTEIN DELORME & LUCHS, P.C.



By: _____
John Patrick Brown Jr.

JPB:sp

Enclosures

cc: Mr. Endalkachew Tesfaye
Mr. Stanley Jackson, Deputy Mayor
Ms. Theresa D. Lewis, DCRA
Mr. Bill Crews, DCRA
Richard W. Luchs, Esq. (w/o encls.)
Joshua M. Greenberg, Esq. (w/o encls.)

E

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs



Office of the Director

May 25, 2006

Mr. John Patrick Brown, Jr.
Greenstein, DeLorme & Luchs, P.C.
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036-5605



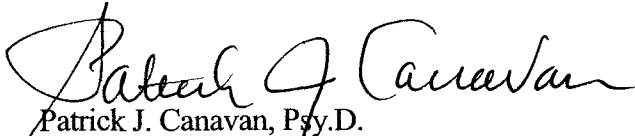
RE: 1124 E Street, N.E.

Dear Mr. Brown:

I received your April 7, 2006 letter in which you outline your disagreement with the Zoning Administrator's March 22, 2006 decision to deny a Certificate of Occupancy for the above-referenced property. While I appreciate the courtesy of you alerting me of your disagreement with that decision, the proper remedy, as I am sure you are aware, is an appeal of that decision to the Board of Zoning Adjustment.

If you have any further questions or concerns, feel free to contact David Rubenstein, Acting General Counsel for the Department of Consumer and Regulatory Affairs at (202) 442-8404.

Sincerely,


Patrick J. Canavan, Psy.D.
Director

F

John Patrick Brown Jr.

From: endalkachew tesfaye [endalki@yahoo.com]
Sent: Tuesday, May 09, 2006 12:50 PM
To: John Patrick Brown Jr.
Subject: 1124 property- codt estimate and New from Voice of hill

	\$850,000.00
House bought	
Closing cost and agent	\$35,000.00
Project management	\$95,000.00
Direct construction fee	\$625,000.00
Architect	21,000.00
Appliances	\$15,000.00
Mortgage	\$95,000.00
Insurance	\$6,000.00
Condo conversion (attorney , surveyor, architect engineer)	\$12,000.00
Project manager	\$85,000.00
Total	\$1,839,000.00

G



Bello, Bello & Associates, LLC

Zoning, Land Use & Development Consultants

June 5, 2006

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

BZA Appeal No. 17468A

Public Hearing: June 27, 2006

Cross Appeal of Mr. Endalkachew Tesfaye

ANC 6A

STATEMENT OF ZONING ISSUES UNDERLYING CROSS APPEAL

The substantive issues central to the cross appeal and in the matter before the Board of Zoning Adjustment in the instant case are:

1. That an apartment house in existence prior to May 12, 1958 in an underlying R-4 zone is a non-conforming use, as the term is defined in § 199.1, DCMR Title 11
2. That an apartment house in existence prior to May 12, 1958, which seeks to increase intensity of use by an increase in the number of apartment units is subject to the minimum lot area requirement set forth in § 330.5 (c).

In denying the subject property of appeal a certificate of occupancy for a six-unit apartment house in a letter dated March 22, 2006, the Zoning Administrator stated as basis that the underlying R-4 zone district does not allow the use for the size of lot, that the existing use of the building as a three-unit apartment house is nonconforming, and that § 401.3 required a minimum lot area of five thousand, four hundred square feet (5,400 sf), notwithstanding that a building permit had allowed reconfiguration for that very purpose earlier.

NON-CONFORMING USE STATUS OF PRE-1958 APARTMENT HOUSE IN R-4 ZONE DISTRICT

The District of Columbia Zoning Regulations defines a non-conforming use in § 199.1 as follows:

Non-conforming use: "Any use of land or of a structure, or of a structure at the time this title or any amendment to this title became effective that does not conform to the use provisions for the district in which the use is located. A use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a non-conforming use. That non-conforming use shall

900 Second Street N.E., Suite 6 –Washington, D.C. 20002

be considered a conforming use, subject to the further provisions of §§3104.2 and 3104.3 (30 DCR 3922)”

The Use Provisions of the R-4 zone district, under which all uses permitted as a matter of right, are set forth in § 330.5. In whole, §330.5 (c) states as follows:

§ 330.5 (c) “The conversion of a building or other structure existing before May 12, 1958, to an apartment house as limited by §§ 350.4 (c) and 401.3”

Setting aside momentarily, the minimum lot area requirement set forth in § 330.5 (c), which is specifically applicable to a building or structure seeking to **convert** to an apartment house for the first time after May 12, 1958, beyond reproach is the argument and the fact that under the current scheme, an apartment house use may be established as a matter of right in the R-4 zone district. The use (apartment house) as defined, devoid of the latter day (post May 12, 1958) minimum lot area requirement, is a conforming use because the use may currently still be established in the R-4 zone district, albeit through the conversion of an existing building. Hence an existing apartment house cannot be deemed a non-conforming use, in the context of the definition of the term. To argue otherwise is to ascribe more than one definition to the term “apartment house”, one for pre-1958 apartment houses, and the other for post-1958 ones; but only one definition is set forth in § 199.1:

Apartment House: “any building or part of a building in which there are three (3) or more apartments, or three or more apartments and one (1) or more bachelor apartments providing accommodation on a monthly or longer basis”

In light of the foregoing definition, an apartment house is an apartment house whether it contains three (3) units or six (6) units, or any number of units for that matter. Further, in the context of a zoning use, an existing three (3) unit apartment house cannot be deemed to be converting into a six (6) unit apartment house without self-contradiction, because by definition, no conversion occurs. Pertinent to this argument is the dictionary definition of the word “**convert**”.

In pertinent part, the word convert is defined as..... *“To change (something) from one use, function, or purpose: convert a forest into farm land....”*

As will be expatiated on later, the central pre-occupation of the Zoning Regulation, in accordance with the General Provisions of the R-4 zone set forth in §§ 330.1 through 330.4, is the control of the proliferation of new apartment houses through the conversion of existing stock of buildings or structures, and not the foreclosure of the rights of pre-existing apartment houses to additions, and or increases in intensity of use, subject to other provisions of the regulations, as applicable. Hence the use status of an apartment house in existence prior to May 12, 1958 in the R-4 district must necessarily be viewed independently from the area requirement set forth in § 401.3, to reach the conclusion that such use constitutes a conforming use. The minimum lot area requirement set forth in § 401.3 for buildings or structures converting to an apartment house use after May 12, 1958, is an area requirement and to argue that an apartment house use in existence prior to May 12, 1958 which does not meet that minimum lot requirement is a *nonconforming use*, is analogous to bestowing similar status upon a pre-existing one-family dwelling in the R-1

zone district, which may be constructed on a lot not meeting the minimum lot requirement for its underlying zone district.

There is internal conflict in the Zoning Administrator's notion that as a nonconforming use, the Zoning Regulations seek the demise of apartment houses located within the R-4 zone district, because that same very use may still be established as a matter of right under stated provisions. An apartment house in existence prior to the effective date of the Zoning Regulation is subject to the same conforming status as an apartment house which is established in accordance with the requirements set forth in § 330.5 (c), because the minimum lot area requirement set forth in § 401.3 is not germane to its existence. What is left to debate is whether the regulations intended that the minimum lot area requirement set forth in § 330.5 (c) be applicable to pre-1958 apartment houses seeking to *increase intensity of use* either through an addition or, as in the instant case before the Board, through reconfiguration of the existing building.

This statement submits, as will be expanded upon below, that BZA Appeal No 12434 and ZC Order No 211 are unequivocal in their conclusions that:

1. The Zoning Administrator has, since May 12, 1958, consistently interpreted § 330.5 (c) and its predecessor section, not to be applicable to multiple dwellings in existence as of May 12, 1958.
2. Such history of interpretation is not improper, in that a conversion does not occur when a multiple dwelling is changed to an apartment house.
3. The intent of the Zoning Regulations, notwithstanding its plain language and its proper interpretation prior to its amendment in ZC Order 211, extended to the applicability of the 900 square feet per unit conversion of multiple dwellings (i.e. Rooming houses), other than apartment houses, to apartment houses.
4. An apartment house in existence as of May 12, 1958 seeking to increase in intensity of use by increasing in number of units is not subject to retroactive application of the minimum lot area requirement set forth in § 401.3 through § 330.5 (c)

ZONING COMMISSION ORDER No. 211 AND BOARD OF ZONING ADJUSTMENT APPEAL Nos. 12434 AND 12440.

In the context of the plain language set forth in § 330.5 (c), the definition provided for an apartment house in § 199.1, and the dictionary definition provided for the word "convert", the incongruity of stating that a three (3) unit apartment house undergoes a conversion to an apartment when it seeks to increase its number of units to six (6) has already been established.

The determination of the Zoning Administrator, that an apartment house in existence prior to May 12, 1958 is subject to the minimum lot area requirement set forth in § 401.3, which forms the basis upon which the certificate of occupancy is denied was the central question of appeal

before the BZA in Appeal Nos. 12434 and 12440; thus the issue is not new or foreign. In the conjoined appeal, appellants alleged that the Zoning Administrator erred in granting approval to a building with a pre-1958 history of use as a tenement and rooming house (a multiple dwelling by definition) to convert to a seven unit apartment house post 1958 in 1977, without subjecting said property to the minimum lot requirement applicable to buildings or structures undertaking conversion for the first time.

In upholding the decision of the Zoning Administrator, the Board stated in the first paragraph of its Conclusion of Law as follows:

“The Board concludes that the subject matter of the present appeal does not constitute a “conversion” to a multiple dwelling but a change of use of a multiple dwelling, to a different type of multiple dwelling. Thus, the Board concludes that Sub-section 3303.1 does not apply to the subject appeal, that the present ruling of the zoning Administrator’s office as to the interpretation of Sub-section 3303.1 in these appeals is correct and is consistent since the time of the enactment of the current Zoning Regulations”

It is noteworthy, in the context of the definitions set forth in § 199.1 for the terms “Dwelling, multiple” and “Apartment house”, that until its amendment by Zoning Commission Order No.211 in 1978, the predecessor Section to § 330.5 (c), § 3301.1 permitted the conversion of a building or structure in existence prior to May 12, 1958, to a “**multiple dwelling**” subject to the minimum lot area requirement set forth in § 3104.33. Specifically, ZC Order No. 211 amended the text, substituting the term “apartment house”.

The Zoning Regulations provide the following definitions for the terms “Apartment House” and “Dwelling, multiple” respectively:

Apartment house – “any building or part of a building in which there are three (3) or more apartments, or three (3) or more apartments and one (1) or more bachelor apartments, providing accommodation on a monthly or longer basis”

Dwelling, multiple – “a building containing three (3) or more dwelling units or rooming units or any combination of these units totaling three (3) or more”

The distinction is that whereas an apartment house must contain at least three (3) **apartments**, not so a multiple dwelling, which may contain three (3) or more **dwelling units or rooming units**, or a combination of these two types of units totaling three (3) or more. The terms in bold are defined in the zoning Regulations respectively as follows:

Apartment – “one (1) or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the exclusive control of the occupants of those rooms”

Dwelling unit – “one (1) or more habitable rooms forming a single unit that is used for living and sleeping purposes, which may or may not contain cooking facilities. The term dwelling unit shall include a dwelling, apartment, bachelor apartment, or tenement, but shall not include a rooming unit”

Rooming unit – “one (1) or more habitable rooms forming a single, habitable unit used or intended to be used for living or sleeping purposes; but not for the preparation or eating of meals. The term rooming unit shall not include a tenement or a bachelor apartment”

A dwelling unit may parade itself as an apartment only when it contains a kitchen and bathroom facilities for the exclusive use of its occupants and at least three of this type of dwelling units must exist within a building to be deemed an apartment house.

In response to the BZA’s suggestion that the ambiguity contained in the plain language of §3301 may require clarification, the significance of the distinction between the terms multiple dwelling and apartment was not lost on the Zoning Commission when the Commission commenced a hearing to clarify and modify the relevant Section. While it sought to clarify that permitting other types of multiple dwellings, such as a rooming or tenement house, to be reconfigured into apartment houses in the R-4 zone district without being subject to the minimum 900 square feet per unit rule was not the intent of the Zoning Regulations, it left in tact the longstanding history of interpretation by the Zoning Administrator, that a conversion does not occur when an apartment house in existence prior to May 12, 1958 increases in number of units, and therefore not subject to the minimum lot area requirement imposed on buildings or structures converting for the first time after the effective date of the current regulations. Hence, in the third paragraph of Order No. 211, the Zoning Commission found in pertinence as follows:

“The Commission finds that the intent of the Zoning Regulations was not only to apply the 900 square foot criteria to conversions of buildings which are single family dwellings or flats, but also to apply such criteria to conversions of buildings which are multiple dwellings (for example, rooming houses) to apartments. The Commission further finds that the present Regulations, as written, are being properly interpreted and that the Regulations should be amended to specifically apply the 900 square feet criteria to such conversions”

In addition to affirming the consistent history of interpretation of the Zoning Administrator, that multiple dwellings and apartment houses in existence prior to May 12, 1958 were not subject to the conversion rule of what is now § 330.5 (c), the Zoning Commission, in amending the text under Order No. 211, moved to distinguish an apartment house from other types of multiple dwellings

The intent and purpose of the Zoning Regulations derive from its statement of General Provisions for each underlying Zone District. In mapping the R-4 zone district, the Zoning Commission specifically designed to include those areas it recognized were already developed primarily with row dwellings, but which had experienced substantial conversions of the building stock into dwellings for two, or more families (see § 330.1). In whole § 330.1 states as follows:

§ 330.1

“The R-4 district is designed to include those areas now developed primarily with row dwellings but within which there have been a substantial number of conversions of the dwellings into dwellings for two (2) or more families”

§330.3

“The R-4 district shall not be an apartment house district as contemplated under the General Residence (R-5) districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement”

As aforementioned, the plain language of these two sections underscore the fact that the preoccupation of the Zoning Regulations was not that substantial conversions into apartment houses and flats had occurred within the R-4 zone district prior to its mapping; it recognized their existence; but how to control the proliferation of the conversion of the remainder stock. Hence, it is confident that controlling the conversion of the remainder stock of buildings, or structures through imposition of a ***minimum lot area per family requirement*** would serve to actualize its stated objective or purpose, that the R-4 zone district not be an apartment house district in the vein contemplated for the R-5 residence district.

Notwithstanding that the R-4 district is not contemplated to be an apartment house district as is the R-5 residence district, nothing specifically in the General Provisions, or the Use Provisions of the R-4 zone district may be construed to foreclose the right of a pre-1958 apartment house to an addition or increase in intensity of use, provided it complies with all other provisions such as lot occupancy, side yard setback, where applicable, rear yard, height and parking.

Clearly if the Regulations intended to control the ability of pre-1958 apartment houses to increase in intensity of use by however means, it was aware of the prevailing conditions of the area it mapped the R-4 zone, and would have specifically stated that such increase in intensity would be subject the same requirement that new conversions are subject to. The Zoning Commission had another opportunity to vacate the longstanding history of interpretation by the Zoning Administrator's office, rather it affirmed that interpretation as it pertained to apartment houses, but modified it for other types of multiple dwellings.

Based on the foregoing, the Board must conclude that the minimum lot area requirement set forth in § 330.5 (c) is not applicable to an apartment house which existence predates the effective date of the adoption of the Zoning Regulations, May 12, 1958.

PARKING ASSESSMENT OR SCHEDULE

The subject property of appeal complies with the parking requirement for the increase in intensity of use, as set forth in §§ 2100.6 and 2100.7, which stipulate that when the intensity of use of a building is increased by more than twenty-five percent (25%), parking shall be provided

for the addition, based on unit of measurement specified in § 2101.1, provided the additional parking may not exceed the number of parking spaces, were the use or building be constructed anew (see § 2100.8). The unit of measurement is the number of units and the requirement set forth for an apartment house in § 2101.1 is one (1) parking space for every three (3) units

The subject property complies with the parking requirement of two (2) parking spaces, as set forth in § 2101.1 by providing two indoor parking spaces. It should be noted that the ramp and the use of the indoor spaces as two parking spaces also pre-dated the effective date of the Zoning Regulations. To the extent that the spaces do not meet the minimum size requirements set forth in § 2115.1, the private garage is grandfathered by virtue of its existence prior to May 12, 1958.

A private garage is defined in § 199.1 as “a building or other structure, or part of a building or structure not exceeding nine hundred square feet (900 ft ²) in area, used for the parking of one (1) or more motor vehicles and having no repair or service facilities”

In reopening the private garage, applicant merely restored the pre-existing spaces that had been illegally eliminated contrary to the dictate of § 2117.1

DENIAL OF CERTIFICATE OF OCCUPANCY

The certificate of occupancy filed by applicant in the instant case is attendant to the building permit issued for the work performed under the controlling building permit; permit No B469531, dated 2/2/05, which permitted the reconfiguration of the existing three (3) -unit building into a six (6) unit apartment house. The permit remains valid and was valid at the time of the certificate of occupancy application.

In whole § 3203.11 states as follows:

“This subsection shall govern the issuance of a certificate of occupancy for the use of a structure, or part thereof, if the establishment of the use is dependent upon the erection, construction, conversion, or alteration of the structure, or part thereof: provided:

- (a) The use authorized shall be designated as a proposed use at the time of the application for the building permit on which the use depends;*
- (b) The building permit shall be issued in compliance with § 3202;*
- (c) At the time of issuance of the building permit that is required by this subsection, the proposed use shall be designated in a provisional certificate of occupancy; and*
- (d) The use designated in the provisional certificate of occupancy shall comply with all provisions of this title in effect on the date on which the building permit required by this subsection is issued”*

In the instant case, the use authorized was designated as a proposed use at the time of the application for the building permit. The building permit was issued in compliance with § 3202. As set forth in § 3203.11 (c), a provisional certificate of occupancy has in fact been issued at the time of the issuance of the building permit. Having approved the building permit for the work to reconfigure the existing three (3) unit building to a six (6) unit apartment house, the designated use on the provisional certificate of occupancy complies with the provisions of this title in effect at the date on which the building permit was issued.

In light of the foregoing, property owner's application for a permanent certificate of occupancy constitutes a last and irreversible formality in a process that began at the time at of the issuance of the building permit. Therefore, the Zoning Administrator is foreclosed from denying the certificate of occupancy, since the building permit remains valid and inspection reports for all disciplines have approved the permitted work as completed according to approved plans and in compliance with relevant codes

Respectfully submitted by:



Toye Bello

H

Government of the District of Columbia

ZONING COMMISSION



Zoning Commission Order No. 211

Case No. 77-42

March 9, 1978

Pursuant to notice, a public hearing of the District of Columbia Zoning Commission was held on February 23, 1978 to consider an amendment to the text of the D. C. Regulations. The proposed amendment would limit the number of apartments, based on the area of the lot, which could be located in a building in an R-4 District.

The present Zoning Regulations currently permit an existing building to be converted to a multiple dwelling provided that there is 900 square feet of lot area for each dwelling unit proposed to be created. This provision has consistently been interpreted such that it is not applied to multiple dwellings already in existence in 1958, since changing such buildings to apartments would not be a "conversion to" a multiple dwelling. The Board of Zoning Adjustment, in a case appealing the decision of the Zoning Administrator, has recently confirmed that ruling.

The Commission finds that the intent of the Zoning Regulations was not only to apply the 900 square foot criteria to conversions of buildings which are single family dwellings or flats, but also to apply such a criteria to conversions of buildings which are multiple dwellings (for example, rooming houses) to apartments. The Commission further finds that the present Regulations, as written, are being properly interpreted and that the Regulations should be amended to specifically apply the 900 square feet criteria to such conversions. The Commission finds that such a regulation would prevent excessive density in the R-4 District, and would tend to help stabilize those areas of the District where the R-4 zone is concentrated.

The Commission finds that the proposed amendment was referred to the National Capital Planning Commission under the terms of the District of Columbia Self Government and Governmental Reorganization Act and that the NCPC reported that the proposed amendment would not have a negative impact on the interests or functions of the Federal Establishment within the National Capital.

The Commission finds that the proposed amendment is in the best interests of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act. The Commission therefore hereby orders adoption of the following amendments to the Zoning Regulations:

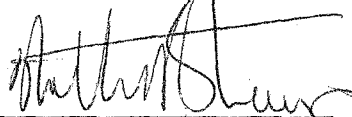
1. Change Paragraph 3104.33 to read as follows:

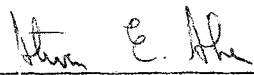
"The conversion of a building or other structure existing before May 12, 1958 to an apartment house as limited by paragraph 3301.1".

2. Change the table applicable to the R-4 District in Sub-section 3301.1 to read as follows:

<u>Row dwelling and flat</u>	1,800	18
<u>One family semi-detached dwelling</u>	3,000	30
<u>Conversions to apartment house</u>	900 per <u>apartment or bachelor apartment</u>	none prescribed
<u>All other structures</u>	4,000	40

Vote of the Commission taken at the public hearing held on February 23, 1978: 4-0 (George M. White, Ruby B. McZier, Walter B. Lewis and John G. Parsons to adopt, Theodore F. Mariani not present, not voting).


WALTER B. LEWIS
Chairman


STEVEN E. SHER
Executive Director

This order was adopted by the Zoning Commission at its public meeting held on March 9, 1978 by a vote of 4-0 (Ruby B. McZier, George M. White, Walter B. Lewis and John G. Parsons to adopt, Theodore F. Mariani not present, not voting).

In accordance with Section 3.62 of the Rules of Practice and Procedure before the Zoning Commission of the District of Columbia, this order is effective on 24 MAR 1978.

I

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 12434 of Martin Lobel from the decision of the Acting Chief, Zoning Regulations Division, Department of Housing and Community Development in authorizing the premises at 318 East Capitol Street, N. E., Lot 804, Square 786 to be converted from a rooming house to a seven unit apartment. Appellant alleges that lot area limitations of the R-4 District, Sub-sections 3301.1 and 3104.33 of the Zoning Regulations, were not applied.

Appeal No. 12440 of the Capitol Hill Restoration Society, Inc. from the decision of the Acting Chief, Zoning Regulations Division, Department of Housing and Community Development in authorizing the premises at 318 East Capitol Street, N. E., Lot 804, Square 786, to be converted from a rooming house to a seven unit apartment. The appellants allege that the lot area limitations of the R-4 District, Sub-sections 3301.1 and 3104.33 of the Zoning Regulations, were not applied.

HEARING DATE: June 28, July 20 and September 29, 1977
DECISION DATE: October 11, 1977

FINDINGS OF FACT:

1. For the purposes of a hearing and decision of the Board, these two appeals have been consolidated since the same issues are raised in both appeals.

2. The subject property is located at 318 East Capitol Street, N. E. and is in an R-4 District.

3. The lot, 20 by 110 feet, contains 2,200 square feet and is improved with a three story building with basement.

4. The most recent Certificate of Occupancy, number B67138 and issued August 15, 1969 permitted use of the building as a nine unit and nine bedroom rooming house. On May 12, 1958 the premises had a Certificate of Occupancy for a tenement house on all floors, Certificate of Occupancy number B7008, issued September 4, 1957.

5. Title to the subject property is held by Victor S. Kamber; Stanley Bissey and his wife, Jean B. Bissey; and Robert L. Herrema and his wife, Joan F. Herrema (hereinafter referred to as the "property owners").

6. On and before January 17, 1977, the present owners of 318 East Capitol Street determined to investigate the purchase of the subject property. Mr. Herrema, who was responsible for determining the use to which the property could be put, met with Mr. Joseph Bottner of the Zoning Regulations Division, Department of Housing and Community Development, on or about January 17, 1977, to discuss the development and to discuss the use of the existing multiple dwelling for seven apartments. Mr. Herrema was orally advised by Mr. Bottner that the use of the subject property for a seven-unit apartment house was in compliance with the Zoning Regulations. Mr. Bottner further indicated that the use of the subject property for seven apartment units complied with the Zoning Regulations with regard to parking. Prior to rendering that advice, Mr. Bottner and Mr. Eugene C. Chorosinski, also of the Zoning Regulations Division staff, made a detailed review of the use history of the property, including a review of the certificate of occupancy file indicating that the previous use was as a multiple dwelling.

7. On the basis of their investigation of the use of the property, including the advice of the Zoning Regulations Division, the property owners on or about January 21, 1977, made an offer of \$95,000 for the subject property to the trustees of the estate. A real estate contract was ratified by the sellers on March 10, 1977. The parties went to settlement on March 18, 1977, at which time the property owners purchased the subject premises for \$95,000 and expended \$1,500 in costs for a total of approximately \$96,500. By deed dated March 21, 1977, and recorded March 23, 1977, the property was conveyed to the present owners.

8. According to an appraiser retained by the property owners, the fair market value of the property as a seven-unit apartment house in compliance with the existing zoning is \$257,000. On the basis of that appraiser's report the property owners obtained a permanent loan commitment for 75% of the appraised value; namely, \$192,650 from the American Income Life Insurance Company.

9. The building was vacated on April 10, 1977, and interior work, such as the removal of appliances, relocation and removal of partitions, none of which requires a building permit, commenced on April 11, 1977.

10. On April 1, 1977, application was made for a building permit together with the necessary plans showing the change to seven units of apartments in place of the nine-unit rooming house. The Acting Chief of the Zoning Regulations Division approved the application and building Permit No. B250386, was issued on April 22, 1977 and dated April 25, 1977. Mr. Herrema received the permit on April 22, 1977, and posted the property on that date.

11. Construction work under the permit commenced April 25, 1977. Mr. Herrema testified that he was present at the work site between the hours of 8:00 a.m. and 5:30 p.m. most of the time while work was in progress.

12. On May 6, 1977 Martin Lobel, a neighboring property owner filed with the Board of Zoning Adjustment an appeal, No. 12434. On May 13, 1977 the Capitol Hill Restoration Society also filed an appeal, No. 12440. The basis for the appeals was that the Acting Chief, Zoning Regulation Division, had erred in not applying the lot area limitations of the R-4 District, Sub-sections 3301.1 and 3104.33 of the Zoning Regulations.

13. On May 9, 1977 Mr. Lobel left a copy of notice of appeal, addressed to Mr. Robert L. Herrema, 318 East Capitol Street, N. E., Washington, D. C., underneath a rock on a step in front of the subject premises. The letter was returned marked "Addressee Unknown". On May 10, 1977 the Capitol Hill Restoration Society, by certified mail, advised Mr. Herrema of the appeal and that a request for an expedited hearing was scheduled before the Board of Zoning Adjustment on May 17, 1977. The return receipt was marked May 18, 1977.

14. At the June 28, 1977 public hearing of the Board the intervenor property owners submitted a Motion to Dismiss the appeals for lack of the Board's Jurisdiction. This motion had five grounds listed as follows:

(1) in filing their appeals the appellants have not provided sufficient information so as to reasonably inform parties as to the specific errors alleged; (2) appellants have failed to state or show in any specific way that they are "persons aggrieved" as required by Section 8102.1 of

the Zoning Regulations as a result of the ruling challenged; (3) these appeals seek an amendment to the Zoning Regulations which requested relief is beyond the purview of the Board; (4) the appeal is barred by the doctrine of equitable estoppel; and (5) the decision of the Acting Chief of the Zoning Regulations Division must be sustained under principles of stare decisis in that it is in conformance with the long established application of the Zoning Regulations.

15. At said hearing the Motion to Dismiss was argued on grounds (1), (2), (3) and (5). The Board denied the motion on grounds (1) and (2), reserved decision on grounds (3) and (5) and scheduled ground (4) for a specific hearing on July 20, 1977.

16. In denying the motion on the grounds of insufficient information, the Board found that the forms filed by the appellants clearly indicated the reason for the appeals and the basis for the appeals. As to lack of persons aggrieved, the Board found that the subject property falls within the boundary of the Capitol Hill Restoration Society, that this Society regularly and frequently appeared before the Board on zoning matters and the Society has testified and the Board has always accepted them as being interested parties in matters relating to zoning within the Capitol Hill area. As to Mr. Lobel the Board found that appellant was a resident who lived clearly within 200 feet of the subject property actually residing across the alley to the rear of the site and would be accepted normally and generally as a party in any case affecting this property.

17. The property owners state that they have proceeded in good faith and in reliance upon the advice and approval of the District officials and have substantially changed their position as a result of that reliance.

18. At the July 20, 1977 public hearing the Motion to Dismiss was argued on the grounds of estoppel. At its Executive Session of August 3, 1977 the Board denied the Motion to Dismiss on the grounds of estoppel, and set September 29, 1977 as the hearing date to hear the appeals on the merits and decided to defer ruling on the Motion to Dismiss on the remaining grounds until the merits of the appeals were heard.

19. In denying the Motion to Dismiss based on estoppel the Board found that there was no equitable estoppel against the Government of the District of Columbia nor the Zoning Regulations Division, Department of Housing and Community Development since neither has attempted to rescind the building permit. There was no equitable estoppel against the F

of Zoning Adjustment since the BZA as a quasi-judicial body is granted the power to take jurisdiction over appeals from the Zoning Administrator. As to Mr. Lobel and the Capitol Hill Restoration Society, the Board found that appellants were not estopped from bringing this appeal since appellants' actions were taken as expeditiously as possible with a great deal of reasonableness and with no lack of diligence on their part. The Board noted that on May 9, 1977 a notice was put on the front step under a rock at the construction site which Mr. Herrema frequented daily and that on May 10, 1977 a notice was sent by certified mail by the Capitol Hill Restoration Society to Mr. Herrema at his place of residence. Having received notice of pending action the property owners continued work on the subject premises at their own peril.

20. Appellants stated that Paragraph 3104.33 of the Zoning Regulations permits the conversion of an existing building or other structure into a multiple dwelling as limited by Sub-section 3301.1 which requires 900 square feet of lot area for each unit in the building in an R-4 District.

21. Intervenors contend that the Regulations are clear on their face in indicating that the 900 square foot requirement applies only when there is a "conversion to multiple dwelling" and this was not the subject situation

22. The Acting Chief of the Zoning Regulations Division stated that his office has consistently taken the position with regard to a change of use of a multiple dwelling to a different type multiple dwelling in the R-4 District that it is permitted as a matter-of-right if established prior to May 12, 1958, and if on the effective date of the Zoning Regulations, it had a certificate of occupancy as a multiple dwelling unit as defined in the Zoning Regulations or it meets the 900 square foot requirement.

23. Sub-section 3301.1 states "except as described in other paragraphs of this Section, the minimum dimensions of a lot in a residential area in the R-4 District has to be 900 square feet per dwelling unit".

24. Paragraph 3104.33 of the Zoning Regulations states that the conversion of an existing building or other structure into a multiple dwelling is permitted as a matter-of-right as limited by Sub-section 3301.1.

25. The Board ruled that since it is constituted as a quasi-judicial body of independent citizens it has by the authority granted to it jurisdiction over appeals from rulings of the office of the Zoning Administrator and is not precluded under the principles of stare decisis from overruling the ruling of the Zoning Administrator.

26. The Board ruled that the appellants are not seeking in the subject appeal an amendment to the Zoning Regulations but rather a decision from the Board of Zoning Adjustment on the merits of their appeal under Sub-sections 3301.1 and 3104.33.

CONCLUSIONS OF LAW:

Based on the record the Board is of the opinion that the subject property was in existence as a multiple dwelling as of May 12, 1958 and had a history of use as a multiple dwelling prior to May 12, 1958. On May 12, 1958, the effective date of the current Zoning Regulations the premises had a certificate of occupancy as a multiple dwelling. The Board concludes that the subject matter of the present appeal does not constitute a "conversion" to a multiple dwelling but a change of use of a multiple dwelling, to a different type of multiple dwelling. Thus, the Board concludes that Sub-section 3303.1 does not apply to the subject appeal, that the present ruling of the Zoning Administrator's office as to the interpretation of Sub-section 3303.1 in these appeals is correct and is consistent since the time of the enactment of the current Zoning Regulations.

The Board is aware that the language of Section 3301 of the Zoning Regulations is ambiguous and lacks specificity in this regard. There are legitimate concerns on the appellants' side. This, however, is a matter to which the Zoning Commission can and should address itself, either to clarify and continue the present interpretation or to amend the Zoning Regulations to mandate a different interpretation.

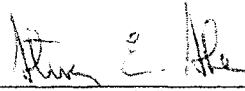
The Board concludes that the decision of the Zoning Administrator was a proper interpretation of Section 3301 as that section exists at present. Accordingly, the Board is constrained to UPHOLD the decision of the Zoning Administrator and DENY the appeals.

VOTE:

5-0 (Chloethiel Woodard Smith, Walter B. Lewis,
Charles R. Norris, William F. McIntosh and
Leonard L. McCants).

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

ATTESTED By:


STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 5 DEC 1977