

441 4th Street, N.W.
Washington D.C. 20001

Appeal No. 17468A

-1-

The status quo changed in 2005. Developer Endalkachew Tesfaye, new owner of the building, applied for building permits in order to transform the structure from a three-unit apartment building to a six-unit apartment building. These permits were issued in error.

Advisory Neighborhood Commission 6A (“ANC”) discovered the nonconforming construction and appealed the erroneously issued building permits to this body on December 13, 2005. In its March 22, 2006 hearing, this Board, ruling from the bench, dismissed the ANC appeal as untimely. However, Mr. Tesfay’s cross appeal of the ANC appeal remained and is currently at issue.

ARGUMENT

A. The Construction is an Expansion of a Non-conforming Structure

The precedent of this Board mandates a finding that the construction at 1124 E Street, NE (the “Property”) is an expansion of an already non-conforming structure which must comply with current zoning regulations. This Board analyzed an analogous matter in *Application No. 15657 of Marsel Elliott, Inc.* (October 22, 1993). The facts of *Elliott* mirror those of the instant matter.

The property in question in *Elliott*, 1260 C Street, SE, lay within an R-4 District and was constructed in 1948. *See id.*, at 1. The instant Property was constructed in 1901. Both properties had been constructed prior to the adoption of the zoning code in 1958.

Neither property contains the requisite lot area of 900 square feet per apartment unit. Prior to renovation, the *Elliott* property averaged 488 square feet per apartment unit.¹ Prior to renovation, the instant Property averaged 300 square feet per apartment unit.²

¹ 6341 square feet divided by 13 apartments equals 487.77 square feet per apartment.

² 900 square feet divided by 3 apartments equals 300 square feet per apartment.

Although neither property's structure or use complied with the zoning regulations adopted in 1958, they were both grandfathered pursuant to 11 DCMR § 199.1. *See id.*

Both property developers were intending to expand the density of the housing within the units. The *Elliott* developer sought to expand density from thirteen units to fifteen units. *See id.* The instant developer seeks to expand density from three to six units.

The only factual distinction is that the *Elliott* developer did not expand the exterior of the property, while the instant developer has added a deck on the second story of the building in contravention of the approved building plans.³ Therefore, *Elliott* is directly on-point with the instant matter.

In adjudicating *Elliott*, the Board noted that while the structure, and its attendant use, had been grandfathered, the structure was still nonconforming because it did not conform to the lot area requirements for an apartment building in a R-4 District. The Board wrote:

6. Notwithstanding its grandfathered designation, the subject property and its attendant use constitute a nonconforming use within the R-4 District. The property is nonconforming because the apartment building does not conform to the minimum lot area of 900 square feet per apartment unit.

Id. Moreover, the Board found that the expansion of the number of units from thirteen to fifteen constitute the enlargement of a nonconforming structure, writing:

2. The applicant seeks to construct two, two-bedroom apartment units in the basement of an apartment building that is located in an R-4 District.
3. The applicant proposes to enlarge a nonconforming structure.

Id., at 3. As a result, “[t]o allow the proposed construction would enlarge, rather than eliminate, a nonconformity.” *Id.*, at 4.

³ The *ultra vires* deck is not the subject of the instant cross appeal. If the Board orders the issuance of a Certificate of Occupancy, the District is expected to pursue civil remedies against the developer for the deck construction.

In addition to establishing that construction proposing to increase the number of units in an already nonconforming apartment building constitutes an enlargement of a nonconforming structure, the *Elliott* Board also established the guiding principal for evaluating such proposals.

The Board wrote:

Since any proposed construction should comply with existing regulations, it is the intent of the Zoning Regulations to have nonconforming aspects of property diminish over time.

Id. That is this case.

The precedent cited by Mr. Tesfaye is inapposite, and, if analogous, would be overturned by *Elliott*. Mr. Tesfaye relies upon *Appeal No. 12434 of Martin Lobel* (December 5, 1977).

Rather than enlarging the nonconformity of the structure, the developer in *Lobel* was diminishing the nonconformity. The grandfathered structure contained nine units. The developer proposed renovating the building to contain seven units. With the construction, the lot area per unit increased from 244 to 314 square feet. In addition, it is black letter law that to the extent two adjudicatory opinions overlap on the same point of law, the later opinion serves as the valid precedent. The *Elliott* matter was considered sixteen years after the cross appellant's *Lobel* matter.

In conclusion, *Elliott* is directly on point with the instant matter and serves as the appropriate precedent in guiding the Zoning Administrator's, and this Board's, consideration of the instant matter. Because the instant construction enlarges the nonconforming structure sited at 1124 E Street, NE, no Certificate of Occupancy should be issued and the cross appeal should be denied.

B. Equitable Estoppel is not Applicable

Mr. Tesfaye's claim that the District is barred under the doctrine of equitable estoppel from enforcing the zoning regulations in this matter is flawed because he has not acted in good faith with justifiable and reasonable reliance in spite of the knowledge that his construction might violate the zoning regulations. He had constructive knowledge of the District's zoning regulations, and he was aware that the issuance of his building permits was under appeal. That flaw is fatal.⁴

The Court of Appeals has consistently stated that, "[t]he 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." *Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000, 1003 (D.C. 1981); *see also Rafferty v. District of Columbia Zoning Commission*, 662 A.2d 191 (D.C. 1995); *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7 (D.C. 1978).

Mr. Tesfaye is assigned constructive knowledge of the zoning statutes and regulations as an operation of law. To the extent that he relied upon the act of a District official that contravened those statutes and regulations, he did so at his peril. This matter requires the same conclusion as that in *Rafferty v. District of Columbia Zoning Commission*, 662 A.2d 191 (D.C. 1995):

We sustain the Commission's rejection of the estoppel claim because its conclusion that petitioners had constructive notice of the PUD restrictions, hence could not justifiably rely on the issuance of the building permit, is supported by and flows rationally from substantial evidence in the record.

⁴ *Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000, 1003 (D.C. 1981). . . . only by showing each of the following elements could petitioners 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 petitioners.

Id., at 193. A reasonable and diligent inquiry by Mr. Tesfaye would have led to the applicable zoning violations. *See id.* Furthermore, his constructive knowledge is not defeated by an assumption that the approving District official had the same constructive knowledge. *See id.*, at 194. Finally, when ANC 6A filed its appeal, Mr. Tesfaye had actual notice that the validity of his building permits was in question. He continued construction at his peril. Because Mr. Tesfaye's reliance on the District's issuance of the building permits was unreasonable, his claim of estoppel must fail.

Conclusion

For the foregoing reasons, the District of Columbia respectfully requests that this Board deny the Cross Appeal.

Respectfully Submitted,

ROBERT J. SPAGNOLETTI
Attorney General for the District of Columbia

DAVID RUBENSTEIN
Deputy Attorney General,
Public Safety Division



JILL STERN
General Counsel
Department of Consumer and Regulatory
Affairs



DENNIS M. TAYLOR
Assistant Attorney General
Bar Number 479856
Suite 9400
941 N. Capitol Street, NE
Washington, DC 20002
(202) 442-8199
(202) 442-9447 (fax)
E-mail: dennis.taylor@dc.gov

June 21, 2006

CERTIFICATE OF SERVICE

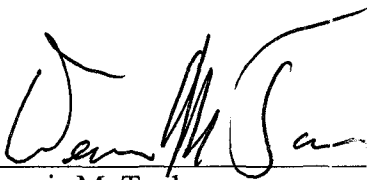
I hereby certify that a copy of the foregoing District of Columbia's Statement in Opposition to the Cross Appeal was served by e- mail this 21st day of June 2006, to the following:

John Patrick Brown, Esquire
Greenstein DeLorme & Luchs, P.C.
JPB@gdllaw.com

Joseph Fengler
Advisory Neighborhood Commission 6A
fengler6a02@yahoo.com

Bill Crews
Zoning Administrator
Department of Consumer and Regulatory Affairs
bill.crews@dc.gov

Jill Stern, Esquire
General Counsel
Department of Consumer and Regulatory Affairs
jill.stern@dc.gov


Dennis M. Taylor