

**DISTRICT OF COLUMBIA COURT OF APPEALS
PETITION FOR REVIEW**

1231 MORSE STREET, INC.,

Petitioner

v.

DISTRICT OF COLUMBIA BOARD OF
ZONING ADJUSTMENT,

Respondent

Case No. _____

BZA Appeal No. 17657

**PETITION FOR REVIEW FROM AN ORDER OF THE
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT**

Petitioner, 1231 Morse Street, Inc., by and through undersigned counsel, hereby petitions for review of the Order of the District of Columbia Board of Zoning Adjustment, dated March 31, 2009, denying Appeal Number 17657, attached as Exhibit A.

The names, addresses and telephone numbers of all the parties and their counsel who appeared in the agency proceeding are listed below:

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17657
EXHIBIT NO. 44

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17657
EXHIBIT NO. 44

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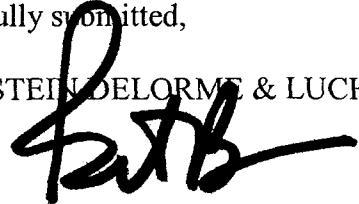
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Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.



Dated: April 24, 2009

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CERTIFICATE OF SERVICE

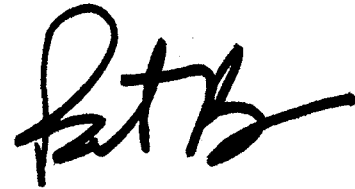
This is to certify that a copy of the foregoing Petition for Review was mailed, first-class and postage-prepaid, this 24th day of April, 2009, to:

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John Patrick Brown, Jr.

EXHIBIT A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17657 of 1231 Morse Street, pursuant to 11 DCMR 3100.2, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA) on March 6, 2007 to deny an application for the revision of Building Permit B477039, allowing for the “reconstruction of collapsed walls for an existing single-family dwelling and conversion to an 11-unit apartment building”; and the decisions on July 20, 2007 to revoke Building Permit B477039 and Emergency Demolition Permit Number B478240, all pertaining to premises 1233 Morse Street, NE (Square 4069, Lot 130), in the R-4 zone district.

HEARING DATES: October 2, 2007, October 16, 2007, and October 30, 2007
DECISION DATES: December 4, 2007, and January 8, 2008

DECISION AND ORDER

This appeal concerns a project to convert an existing one-family dwelling to an apartment house in an R-4 zone district. New apartment houses are not permitted in an R-4 zone, but structures existing before May 12, 1958 may be converted to that use. A building permit authorizing such a conversion was issued to the Appellant in September 2005 and construction commenced. In February 2006, structural deficiencies in the one-family dwelling prompted DCRA to issue an emergency demolition permit. Although the permit did not authorize the complete razing of the structure, by the conclusion of President’s Day weekend, whether by accident or design, the one-family dwelling was no more. Construction activity ceased after the first of several stop work orders was issued.

In January 2007, the Appellant filed an application to amend its building permit in order to resume construction. The Zoning Administrator denied the application on March 6th, reasoning that the destruction of the one-family dwelling rendered any further construction non-compliant with the zoning regulations. The Appellant challenges that denial. Four months later, DCRA revoked the initial building permit and the already executed emergency demolition permit. The revocation notice claimed that the Appellant misrepresented its intentions when obtaining both. The Appellant also challenges these revocations.

For the reasons stated below, the Board sustains the denial of the amended permit and dismisses the remainder of the appeal as moot.

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PRELIMINARY AND PROCEDURAL MATTERS

Notice of Appeal and Notice of Public Hearing

The appeal challenging denial of the revised permit was filed with the Board on April 20, 2007. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 5B, (the ANC within whose Commission the boundaries of the subject property is located), the property owner and DCRA. The Office of Zoning advertised the hearing notice in the D.C. Register at 54 D.C. Reg. 6662 (July 6, 2007).

Parties

Appellant

The Appellant, 1231 Morse Street, Inc. (Morse Street) is a corporation organized under the laws of the District of Columbia, and is the owner and developer of the premises at 1231 Morse Street, N.E. (the property). Taiwo Demurren, the President of Morse Street, appeared on the corporation's behalf. Morse Street was represented by Greenstein DeLorme & Luchs, PC, Patrick Brown, Esq.

DCRA

The Appellee, DCRA, is the agency of the government of the District that is authorized, among other things, to issue building permits. DCRA was represented by Assistant Attorney Generals Matthew Green, Jr., Esq., Melinda Bolling, Esq., and Doris Parker-Woolridge, Esq. The Office of the Zoning Administrator of DCRA is headed by a Zoning Administrator (ZA). That office is separate from the entity within DCRA that issues building permits, which, at the time of the events relevant to this appeal, was called the Building and Land Regulation Administration (BLRA). The ZA is charged with administering and enforcing the Zoning Regulations. At the time of the public hearing, Matthew LeGrant was the Acting ZA. Mr. William Crews was the ZA when most of the events which are relevant to this appeal took place. Mr. Olutoye Bello was the ZA when the subject property was subdivided. He is no longer an employee of the District of Columbia and testified as an expert in zoning on behalf of Morse Street.

The Affected ANC

ANC 5B, as the affected ANC, was automatically a party to the appeal by virtue of 11 DCMR § 3199.1(a). However, the ANC did not file a report or participate in the proceedings and therefore no great weight could be given to it.

Notice to Amend Appeal

On August 9, 2007, Morse Street filed a "Notice of Related Appeal" and "Motion to Amend Pending Appeal to Incorporate Directly Related Revocation of Permits by DCRA". The Motion was argued on October 2, 2007. After argument, the Board granted the motion allowing the amendment, determining that DCRA's later decisions to revoke the initial permit and the

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emergency demolition permit were directly related to the pending appeal.

Motion for Summary Judgment

Morse Street also filed a Motion for Summary Judgment prior to the public hearing on October 2, 2007. (Exhibit 17) That motion was opposed by DCRA and extensively argued by the parties. The Board held the motion in abeyance pending a full hearing of the appeal. However, as the Board found there were material facts in dispute, the motion was ultimately denied.

Motion to Dismiss

On October 1, 2007, the first day of public hearing, DCRA filed a Motion to Dismiss Morse Street's Appeal, claiming that the Appeal, as amended, fails to state a claim. (Exhibit 19). Morse Street was given time to respond and filed a statement in opposition on October 12, 2007 (Exhibit 28). This motion was argued with the Motion for Summary Judgment, and also held in abeyance. It too was ultimately denied, as the Board found that Morse Street had indeed stated a claim, albeit a non-meritorious one.

Motion to Disqualify Expert Witness and Strike Testimony

On or about October 26, 2007, before the public hearing had concluded, DCRA moved to disqualify Mr. Bello as an expert, and strike his October 2, 2007 testimony from the record. (Exhibit 31). DCRA argued that because Mr. Bello approved the subdivision for Morse Street's project as the former ZA, he could not later advocate a position that was contrary to the District. (Exhibit 31)¹ Morse Street opposed the motion to disqualify and strike. (Exhibit 32) The Board held this motion in abeyance pending completion of the hearing. However, ultimately the Board agreed with Morse Street and denied the motion, finding that Mr. Bello's testimony was not colored by his participation in the subdivision for several reasons: (a) the 2005 subdivision approval was not substantially related to the matters now on appeal, (b) Mr. Bello received no confidential information regarding the property when the subdivision was approved, and (c) Mr. Bello had no connection with any of the permit applications, all of which were processed after Mr. Bello left his position with the District.

FINDINGS OF FACT

The Property

1. The subject property is located at 1233 Morse Street, NW, Square 4069, Lot 130, (formerly Lots 810, 812, and 816).

¹ DCRA argued that Mr. Bello's actions violated the Ethics in Government Act of 1978 (18 U.S.C. § 207) placing restrictions on former government employees, and the D.C. Employee Code of Conduct (6 DCMR § 1814), relating to post 2/27/09-employment conflicts of interest.

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2. Morse Street acquired Lots 810, 812, and 816 in April and November of 2004.
3. At the time of purchase, the property was improved with a vacant one-family dwelling (OFD) that had been constructed in 1940.
4. The property is zoned R-4 and has a lot area of 10,443 square feet. In the R-4 zone, the Zoning Regulations allow the "conversion of a building . . . existing before May 12, 1958, to an apartment house as limited by § 350.4 (c) and the area requirements of § 401.3. 11 DCMR § 330.5(c)).
5. Section 350.4 (c) disallows residencies of less than a month and is of no relevance to this appeal.
6. The proposed project would have complied with § 401.3, which requires converted buildings to provide 900 square feet of lot area for each apartment or, in this case, a minimum lot area of 9,900 square feet for eleven units.

The initial permit

7. On April 12, 2005, Morse Street applied for a building permit under § 330.5(c) to build an addition to the OFD, and convert the structure to an eleven unit apartment building. A copy of the application is attached to the Statement on Appeal, Exhibit 4, Tab B. The plans submitted with the application depict the existing OFD that was to be converted.
8. The proposed use stated on the application is for "Apartment 11 Units".
9. On September 2, 2005, DCRA issued Building Permit Number B477039 (the initial permit), authorizing Morse Street to "BUILD ADDITION TO SFD/CONVERT SFD² TO 11-UNIT APT. AS PER PLAT/PLANS." (emphasis supplied). A copy of the initial permit is attached to the Statement on Appeal, Exhibit 4, Tab C.
10. On or about September 7, 2005, Morse Street began construction of the addition to the OFD.

The demolition permit

11. On or about February 7, 2006, during the construction of the addition, Morse Street became concerned about the structural integrity of the OFD, notified DCRA and requested an inspection of the property.
12. DCRA inspectors agreed that the structure was unsafe, and instructed Morse Street to obtain an emergency demolition permit. Under the direction of Mr. Lennox Douglass (Deputy Director for Licensing and Permitting at DCRA), an emergency demolition permit (the demolition permit) was issued on February 14, 2006. A copy of the demolition permit is

² The acronym refers to a "single family dwelling". That term does not exist in the zoning regulations, which instead uses the term "one-family dwelling" (OFD) when referring to structures/uses of this kind.

attached to the Statement on Appeal, Exhibit 4, Tab D.

13. Morse Street began the demolition work on or about February 15, 2006. It ceased demolition activities on Saturday, February 18, 2006 (during President's Day weekend).
14. At some point during President's Day weekend, any remaining wall[s] of the OFD collapsed into a hole, resulting in the complete destruction of the OFD.
15. Morse Street contends that the ultimate destruction of the structure was a result of adverse weather conditions; DCRA contends that the actions of Morse Street constituted an intentional razing of the structure.
16. At the time of the collapse, the rear addition was about 75% framed, construction was about 30% completed, and Morse had spent approximately \$300,000 in direct construction costs, plus financing costs. (T. October 2, 2007, p. 159).

The stop work orders and expended costs

17. Shortly after the collapse of the OFD, on or about February 22, 2006, DCRA issued a written notice of a Stop Work Order (SWO), alleging that the OFD had been razed without a raze permit and that Morse Street was unlawfully constructing a new apartment house.³ DCRA post-dated the SWO to allow Morse Street to back fill and brace the ground in order to stabilize the property and prevent damage to the adjacent property.
18. Construction was halted when the SWO became effective on or about February 28, 2006.
19. The project has been substantially shut down since then. (T. October 2, 2007, p. 159).
20. The only costs Morse Street claims to have expended from February 2006 until it filed its post-hearing submissions (on or about December, 2007), was approximately \$225,000.00 in high interest carrying charges. (Exhibit 40, Demuren Affidavit, p. 2)
21. Morse Street appealed the SWO to the Code Reviewing Official, the DCRA Director, and finally, on October 17, 2007, to the Office of Administrative Hearings (OAH).
22. In an order dated March 27, 2007, Administrative Law Judge Claudia Barber granted the appeal, finding that DCRA's failure to cite the applicable Building Code sections was a fatal defect.
23. Morse Street resumed construction for a brief period after that decision, until a second SWO was issued on or about April 9, 2007.
24. During the succeeding months, DCRA issued a third SWO to cure technical problems with

³ DCRA relied on provisions of the Building Code that require a "raze" permit to remove a building or structure down to the ground. See, 12A DCMR §§ 105.1.7 and 105.1.7.1

the second SWO, and then a fourth SWO to cure similar problems with the third SWO.

25. All three stop work orders made the same substantive allegations as were stated in the first SWO.
26. The second, third, and fourth SWOs were each separately appealed to the OAH by Morse Street, consolidated by OAH into a single appeal, and stayed pending the outcome of this proceeding.

The denial of the application to amend the building permit.

27. In mid-December of 2006, approximately two months after the OAH appeal was filed, Morse Street and DCRA entered into settlement discussions.
28. Morse Street contends that a settlement was reached by which DCRA agreed to let Morse Street resume construction if it filed an amended building permit application. DCRA denied reaching such an agreement and no document memorializing the alleged understanding was produced by the Appellant.
29. On January 16, 2007, Morse Street filed an application to revise the original permit to "reconstruct collapsed walls of an existing structure. Per Plans." (Exhibit 4, Tab A)
30. On March 5, 2007, Mr. William Crews (the ZA at the time) issued a denial letter for the application. (Exhibit 4, Tab A)
31. According to the March 5th letter, a District inspection determined that the one-family dwelling had been 'razed.' The ZA then opined that "once an existing structure has been razed, it may no longer be considered a reconstructed building. ... Furthermore, without an existing structure there can be no conversion to an apartment building in the R-4 ... district." In addition, the ZA found that the submitted plans "misrepresent the existing structure" because the plans did "not reflect the original structure and collapsed walls".
32. This appeal was filed on April 20, 2007, challenging only the denial of the revised permit.

The revocations of the building and demolition permits

33. On or about July 20, 2007, DCRA issued a notice revoking the initial permit and the demolition permit. (Exhibit 16, Tab B, Notice of Revocation).
34. The notice cited 12A DCMR § 105.6 (1) for DCRA's authority to revoke a permit "[w]here there is a false statement or misrepresentation of fact or other significant inaccuracy, in the application or on the plans on which a permit or approval was based' and 12A DCMR § 105.6 (6) which authorizes the Director to revoke a permit that was 'issued in error'".
35. Specifically, DCRA concluded that Morse Street had always intended to raze the existing

OFD and misrepresented that fact in stating on its building permit application that it intended to convert the structure instead. According to the notice, if Morse Street had indicated that it “planned to raze the existing structure and construct a new one, the District would have denied [the] Application.”

36. DCRA also asserted in the notice that Morse Street’s statement in its application for a demolition permit that it intended to demolish only one wall of the OFD did not accurately represent its plans.
37. DCRA did not allege therein any violation of the Zoning Regulations.
38. Shortly thereafter, on August 9, 2007, Morse Street filed an amended appeal challenging the revocations.

CONCLUSIONS OF LAW

For the reasons explained below, the Board concludes that (1) DCRA did not err when it denied the revised permit; and (2) the legal issues arising from the revocations of the initial building permit and emergency demolition permit have become moot.

Denial of the revised permit application

The building permit that is the subject of this appeal authorized Morse Street to “BUILD ADDITION TO SFD/CONVERT SFD TO 11-UNIT APT. AS PER PLAT/PLANS.” The insertion of the phrase “CONVERT SFD” was not surplusage. New apartment houses are not permitted as a matter of right in the R-4 zone. However, 11 DCMR § 330.5 (c) does permit “the conversion of a building or other structure existing before May 12, 1958, to an apartment house”, subject to other requirements not relevant here. Because the plans showed a pre-1958 one-family dwelling being converted to an apartment house, the building permit was properly issued.

In February of 2006, the one-family dwelling was destroyed. In January 2007, while its appeal of a stop work order remained pending, Morse Street filed an application to revise the original permit. By letter dated March 5, 2007, the then Zoning Administrator denied the application, on the grounds that an inspection by the District on February 27, 2006 revealed that the OFD had been razed. Because an OFD no longer existed, there could be no **conversion** of an OFD pursuant to 11 DCMR § 330.5 (c). The letter stated that “without an existing structure there can be no conversion to an apartment building in the R-4 ... district”. (Exhibit 4, Tab A).⁴

⁴ The letter also stated that the revised plans misrepresent the existing structure and violate Title 11, Chapter 3 of the Zoning Regulations. The Board need not and does not reach this question because it upholds the decision of the Zoning Administrator on other grounds.

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Morse Street argues that in fact conversion of the one-family dwelling had occurred long before the events of President's Day weekend 2006, going so far as to claim that the OFD "ceased to exist independently and was replaced by the 11 unit apartment dwelling" once the building permit was issued. (Exhibit 28, page 3). In the alternative, it argues that § 3202.4 vested its construction rights for all purposes and that § 3203.11 similarly vested its occupancy rights, so that the destruction of the one-family dwelling had no more effect on its ability to proceed than would have a change in the Zoning Regulations.

The Board does not agree that the one-family dwelling was converted to an apartment house at the split second that the building permit was issued. To the contrary, the Board is of the view that conversion is a process that is not accomplished until the construction is complete and the certificate of occupancy for an apartment house is issued. Accordingly, the Board determined that because not one speck of the one family dwelling remained as of February 27, 2006, conversion could not be continued under a revised permit pursuant to 11 DCMR § 330.5 (c).

The Appellant's rationale to the contrary would undermine the intent and purpose of the zoning regulations governing the R-4 zone. The R-4 zone was not intended to "be an apartment house district," 11 DCMR § 330.3, but was established to ensure "the stabilization of remaining one-family dwellings", 11 DCMR 330.2. Adopting the Appellant's view would have the exact opposite effect, since it would permit the immediate razing of structures, such as this one-family dwelling, upon building permit issuance. This would amount to the matter of right replacement (rather than conversion) of existing structures with new apartment houses, which is not permitted until the R-5-A zone, and then only by special exception.

As to the question of vesting, § 3202.4, § 3203.11 and similar provisions found in other jurisdictions, do no more than vest "the right to initiate or continue the establishment of a use or construction of a structure which, when completed, *will be contrary to the restrictions or regulations of a recently enacted zoning ordinance.*" 4 *Rathkopf's The Law of Zoning and Planning* § 70:2 (4th ed.) (emphasis added).

Section 3202.4 of the Regulations states in its entirety:

Any construction authorized by a building permit may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued, subject to the following conditions:

- (a) The permit holder shall begin construction work within two (2) years of the date on which the permit is issued; and
- (b) **Any amendment of the permit shall comply with the provisions of this title in effect on the date the permit is amended⁵**

⁵ § 3203.11 provides in pertinent part that "[a] building permit shall be issued in compliance with § 3202"

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There is no issue in this case involving a change in a zoning ordinance or regulation.

Instead, this case involves a change in facts - facts that are key to the Applicant's authority to proceed under the same regulation. Applicant's original permit allowed the applicant to build an addition to a one family dwelling /convert a one family dwelling in existence prior to May 12, 1958, to an 11-unit apartment building.

On February 27, 2006, Applicant could have proceeded under a revised permit to continue the addition to the one family dwelling/conversion of the one family dwelling to an 11-unit apartment as a matter of right pursuant to 11 DCMR 330.5(c) had there been even a part of the pre-May 12, 1958 one family dwelling still in existence. It was undisputed that there was none. Without the existence of the one family dwelling built in 1958, there could be no conversion to an apartment building pursuant to 11 DCMR 330.5(c), the regulation in effect at the time of the original permit and at the time of the application for the revised permit.

The revocations of the initial permit and the emergency demolition permit.

Morse Street also challenges DCRA's July 2007 revocation of the initial permit and the demolition permit. At the time of the revocation, the one family dwelling had already been demolished and the Zoning Administrator had already denied on March 5, 2007, applicant's application for the revised permit; in addition, a stop work order was in place preventing further work on the project.⁶ The revocation was essentially based on grounds that the building and demolition permit applications each contained a "false statement or other misrepresentation, or other significant inaccuracy ... that substantively affected the approval of the application(s)" 12A DCMR § 105.6 (1) and that based on the applicant's violation of the zoning regulations, the initial permit was issued in error. 12A DCMR § 105.6 (6).⁷

With the stop work order in place and the revised permit denied, this project cannot go forward. That being the case, the question as to whether Morse Street submitted a building permit application to convert a structure it really intended to raze has become purely academic, and therefore moot. The same is true with respect to the revocation of the demolition permit as it was issued after the structure had already been destroyed. *See N. St. Follies, Ltd. Pushup v. D.C. Bd.*

⁶ Morse Street has appealed that and two other stop work orders to the Office of Administrative Hearing, which has stayed that proceeding pending the Board's decision in this case. The Board notes that DCRA's decisions to deny the amended permit and to issue the stop work orders were both based in part upon the same interpretation of the Zoning Regulations; namely that further work on the project would be tantamount to the construction of a new apartment house.

⁷ The Board notes that the grounds for the revocations are based on the Building Code, not the Zoning Regulations. The question of what constitutes misrepresentation in the context of a building permit requires an interpretation of § 105 of the Building Code and not any provision of the Zoning Regulations.

of *Zoning Adjustment*, 949 A.2d 584, 589 (D.C. 2008) (“If a tribunal is asked to decide only abstract or academic issues, a case is also moot because there is no justifiable controversy.”) (internal quotation marks omitted).

Estoppel and laches

Morse Street claims that the District is estopped from preventing it from building a new apartment house. Estoppel is generally invoked in the zoning context to permit the continuation of construction initially approved by the government, but which the government later seeks to halt as unlawful. *See generally Saah v. District of Columbia Bd. of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981) (Board estopped from denying variance when DCRA had miscalculated FAR).

In this case Morse’s initial construction was initially approved by DCRA when it was lawful under 11 DCMR 330.5(c). DCRA denied the resumption of construction when it was no longer lawful under that same regulation as a result of a change in facts, not as a result of the District’s change in its application of the law.

In order to establish the affirmative defense of estoppel, Morse Street must show the existence of “(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 petitioner.” *Bannum, Inc. v. District of Columbia BZA*, 894 A.2d 423 (D.C. 2006).

The Appellant claims it relied upon (1) DCRA’s action in issuing of the building permit and (2) DCRA’s purported statements made around the time that the emergency demolition permit was issued and during subsequent settlement discussion suggesting that Morse Street could continue construction of the multi-family dwelling without the one-family dwelling in place.

As to the building permit, there is no doubt that the Appellant made expensive improvements between September 2005, when the permit was issued, and February 2006, when the first stop order was posted. The Applicant represents that when DCRA halted work the Applicant had expended over \$300,000 in construction costs and the addition was 75% framed. *Compare Saah, supra*, 433 A.2d at 1116 (expensive improvements found based upon \$225,000 of construction work). However, except for the amount spent to secure the work site after notice of an impending stop work order was received, all this money was spent while the one family dwelling still existed.

The building permit on its face authorizes the conversion of the one-family dwelling. There is no evidence in the record that DCRA represented that the Applicant could construct an 11-unit apartment building without the existence of the one family dwelling.

As to the alleged subsequent conduct or statements by DCRA suggesting or promising that construction could proceed in the absence of the one-family dwelling, the Board concludes that the Appellant failed to establish that anything of the kind occurred. It produced no writing memorializing the claimed representations, and DCRA has denied making any. Since the

Appellant bears the burden on the issue, its unproven and contradicted assertions do not suffice.

Even if the Appellant had shown that such actions occurred, it made no expensive and permanent improvements in reliance thereon. As just noted, all of the permanent improvements were made prior to the time that the statements allegedly were made. The Appellant was notified on February 22, 2006 that a stop work order was to be posted a few days later, and the only action it took prior to the cessation of construction a week later was to safeguard the project site. Since then, the Appellant has undertaken little or no construction work because of the stop work orders that barred it from doing so. Although it claims to have expended large sums in debt carrying costs, it presented no authority that these could be considered akin to permanent improvements.

Finally, the equities do not favor the Appellant. 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", 11 DCMR § 330.1. Its "primary purpose [is] the stabilization of remaining one-family dwellings", 11 DCMR § 330.2, and for that reason the "R-4 District shall not be an apartment house district," 11 DCMR § 330.3. To permit the construction of a new multi-family dwelling, instead of a matter of right use, would contravene these purposes. Therefore, the Board cannot conclude that the equities strongly favor the Appellant.

Morse Street also fails to show the applicability of the doctrine of laches. "Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches". *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 13 (D.C. 1978), quoting, RATHKOPF, LAW OF ZONING AND PLANNING, at 67-1 (3d ed. 1972). Laches is rarely applied in zoning matters "except in the clearest and most compelling circumstances." *Id.* at 11. To establish a claim of laches, Morse Street must show it has been prejudiced by delay, and the delay was unreasonable.

The delay claimed by Morse is between February 2006, when DCRA concluded that the project no longer complied with the Zoning Regulations, until either March, 2007, when DCRA denied the application to amend the permit or until July, 2007, when it revoked the initial permit. The prejudice claimed is the debt carrying costs mentioned in its estoppel argument.

The claim of laches fails in this case because there was no delay on DCRA's part in asserting any right that resulted in prejudice to the Applicant. On February 20, 2006, what was left of the pre-1958 building collapsed. On February 28, 2006, DCRA issued the first stop work order. Since that date, DCRA continued to take the position that the Applicant could no longer build pursuant to the original permit as a matter of right. It was not until mid-January, 2007, that the Applicant submitted a revised application to DCRA, 11 months after the issuance of the first stop work order. The Zoning Administrator's denial of the revised permit on March 5, 2007, less than two months later, did not unreasonably delay or prejudice the Applicant. The notice of revocation of the original permit in July, 2007, was basically redundant of the March 5, 2007 denial of the application for the revised permit.

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Accordingly, the Applicant was on notice within one week of the collapse of the remaining wall of the pre-1958 building that it could not build in accordance with the original permit. The prompt issuance of a stop work order and others to follow suspended the project during the time leading up to the denial of the revised permit and the subsequent revocation of the original permit. Although the Applicant claims prejudice in the form of its payment of debt carrying costs, such debt was retained with full knowledge of DCRA's view that further construction was illegal. As such, any prejudice was a result of applicant's own actions.

For all of these reasons, the doctrine of Laches is not available to the Appellant.

For the reasons explained above, the Board concludes that DCRA did not err when it denied the revised permit and that DCRA's revocation of the initial permit and the demolition permit are both moot.

For the reasons discussed above, it is hereby **ORDERED** that the appeal is **DENIED**.

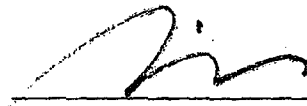
VOTE: **3-1-1** (Ruthanne G. Miller, Shane L. Dettman, and Michael G. Turnbull to deny; Marc D. Loud opposed to the motion to deny; No fifth Board member participating or voting)

Vote taken on January 8, 2008

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

Three Board members have approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY:



RICHARD S. NERO, JR.
Acting Director, Office of Zoning

FINAL DATE OF ORDER: **MAR 31 2009**

PURSUANT TO 11 DCMR SECTION 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR SECTION 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

SG

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on **MARCH 31, 2009**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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