

MEMORANDUM

TO: District of Columbia Board of Zoning Adjustment
FROM: Karen Thomas, Case Manager
Joel Lawson, Associate Director Development Review
DATE: March 8, 2016
SUBJECT: BZA 19187 (1212-1218 4th Street, NW)

I. OFFICE OF PLANNING RECOMMENDATION

The Office of Planning (OP) recommends **denial** of the following:

- Variance Relief:
 - § 403.2 Lot Occupancy (40% maximum permitted; 75% proposed); and
 - § 401.11 Lot Area (900 sf lot area/unit permitted; 452 sq. ft./unit requested) (11 units max. permitted; 22 requested)
- Special Exception Relief:
 - § 2003 Changing uses within structures – Office use first permitted in the C-1 District (Not existing): other retail service use first permitted in the C-1 District (Proposed).

The Zoning Administrator (ZA) has also indicated that variance relief from Section 2001.3, addition to a non-conforming structure, would be needed.

The requested variance relief, if granted would permit the considerable expansion of an apartment building well beyond the density and the lot occupancy anticipated within this zone district.

In addition, information regarding the office use's certificate of occupancy (within the required three year time frame per § 2005.1¹) or prima facie evidence of an intention to resume another permissible nonconforming use has not been convincing to support the requested change of use from the former office space to a neighborhood serving use.

¹ 2005.1 Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for any period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. *Any subsequent use shall conform to the regulations of the district in which the use is located.*

II. LOCATION AND SITE DESCRIPTION

Address	1212-1218 4 th Street, NW
Legal Description	Square 0513, Lots 0156, 0155
Ward / ANC	Ward 6; ANC 6E
Lot Characteristics	The lot is a flat rectangular lot located at the corner of Ridge Street and 4 th Street, with no alley access. The lot has an existing curb cut at 4 th Street and two smaller curb cuts on Ridge Street.
Zone	R-4 – Row dwellings and flat permitted.
Existing Development	1212-1214 4 th Street – originally developed as a two-story, 6-unit apartment building (1940's). 1216 4 th Street was originally developed around the 1940's as a two-story building with two units above an office on the ground level. The lot at 1218 4 th Street was used as a garage and storage for trucks and cabs as well as fuel oil meters with a gasoline pump.
Adjacent Properties	The recently combined lot is a corner lot, which abuts a small apartment building (#1210) to the south, the rear yards of row homes, which front on Ridge Street (# 408 Ridge Street) and the at 415 M Street, NW.
Surrounding Neighborhood Character	The neighborhood consists primarily of row dwellings and some small apartment buildings within the R-4 and R-5-B District.
Proposed Development	The applicant proposes an addition to the combined apartment and mixed use building, along with the conversion of the former office use to a neighborhood serving retail use as part of the property's overall renovation.
Historic District or Resource	Mt. Vernon Square Historic District (Contributing Structure).

III. PROJECT DESCRIPTION-IN- BRIEF

The combined lots are currently developed with a two-story, 6- unit apartment building, another two-story semi-detached, mixed-use building of two upper-level apartment units, with ground floor office space, and two small dilapidated garage structures. Both main structures were constructed around the 1940's by the same owner and are deemed contributing structures in the Mount Vernon Square Historic District.

Submitted plans show the interior of the adjoining buildings would be gutted and combined as one building, along with demolition of the dilapidated garage buildings (Demolition plans -Exhibit 8F, page PT1.7).

Historic Preservation requires any new construction/addition be set back twenty feet from the building's front façade, and the proposal indicates that this aspect has been satisfied. Sixteen

apartments would be added to the existing structure for a total of 22 units. Inclusionary zoned units would include one large one-bedroom, and one two-bedroom unit.

Based on community concerns regarding the site's proximity to the Convention Center and the effective spill-over of on-street parking during events, the applicant amended the original submission including one level of below grade parking for 22 vehicles and seven spaces above grade at the rear. Spaces not purchased by future condominium owners would be rented to neighbors within the 200 feet radius of the property at market rate.

The applicant also proposes conversion of a previous office use located in the mixed-use structure to a neighborhood retail or service establishment.

IV. ZONING REQUIREMENTS and RELIEF REQUESTED

Zone – R-4	Regulation	Existing	Proposed	Relief
Height § 400	35 ft. max.	24 ft.	35 ft.	None required
Lot Width § 401 (All other structures)*	40 ft.	99.54 ft.	99.54 ft.	None required
Lot Area § 401.11 (All other structures)*	4,000 sq. ft. (min.) 900 sf/unit (11 units maximum)	9,954 sq. ft. 8 units	9,954 sq. ft. 452 sf/unit 22 units	Variance requested
Lot Occupancy § 403.2 (All other structures)*	40 % max.	41.3% %	75 %	Variance requested
Rear Yard § 404	20 ft. min.	54.75 ft.	20 ft.	None required
Side Yard § 405	8 ft. min. if provided	0 ft.	0 ft.	None required
Parking § 2101	1 per 3 units	-	29	None required
Change of use within a structure § 2003	A non-conforming use may be changed to a use that is permitted by-right in the most restrictive zone in which the existing non-conforming use is permitted by-right, subject to conditions.	Vacant office space	Proposed use permitted in more restrictive C-1 zone	Special Exception requested

* - The existing apartment building and mixed-use building have been confirmed by the Zoning Administrator as non-conforming structures in the R-4 District, which are regulated as “all other structures.” A permit review by DCRA for the property 1212 4th Street NW under permit # B1303054 on 02/06/2013 indicated that “since the building is already an apartment house, then there is no new conversion taking place and the property is then not eligible for the provision allowing the “greater of 60% lot occupancy as the date of conversion.” Therefore it is subject to the “All Other Structures” 40% limit... so that any increase in lot occupancy would require BZA approval.” (See Permit Information – Attached)

Further, based on the information provided by the applicant (Page PT1.2 Exhibit 8F), the Zoning Administrator commented to OP that if the existing lot occupancy is nonconforming, addition to a nonconforming structure would also require relief from § 2001.3.

V. OFFICE OF PLANNING ANALYSIS

a. Variance Relief from § 401.11 Lot Area, § 403.2 Lot Occupancy

i. Exceptional Situation Resulting in a Practical Difficulty

The corner lot has no encumbrances, such as grade changes or other exceptional situations that would create a practical difficulty for the applicant in renovating the proposed combined structure within the requirements prescribed for the R-4 District, including both density (which in this zone is measured in number of units) and lot occupancy.

ii. No Substantial Detriment to the Public Good

The number of units anticipated for this lot size in the R-4 District (11 units) would be doubled to 22 units. This, combined with the extensive lot occupancy relief requested, could result in undue impacts on other properties in the area. In addition, the proposal has not been formally submitted or reviewed by the Historic Preservation Review Board to determine its compatibility with the Historic District (see HP Comment).

iii. No Substantial Harm to the Zoning Regulations

The renovation and expansion of the combined mixed-use and apartment building structures as proposed would present substantial and unjustified harm to the Regulations. The intent of the R-4 rowhouse area, as described in the zoning and in the Comprehensive Plan, is for it to remain a predominantly rowhouse zone, and for it to not be an apartment zone. This intent to limit both conversions of rowhouses to apartment buildings, and expansion of existing apartments was confirmed by the Zoning Commission in late 2015 as part of Case 14-11. However, it is worth noting that the proposal is inconsistent with both the current AND the previous zoning regulations limiting expansion of apartment buildings in this rowhouse zone.

As such, the explicit intent of the R-4 Regulations is to ensure that development, whether new or expansions to existing structures, maintains the row house character, which includes its density. R-4 is explicitly not intended to be an apartment zone, or to encourage non-conforming expansions of existing apartment buildings. This proposed expansion would **double** the number of units anticipated by the zone, so is well in excess of the prescribed limits and well beyond the intent or density of the zone. The proposed lot occupancy would be 87.5% more than the maximum permitted in the R-4 District and further facilitates the proposed increase in the density (number of units), so is also contrary to the wording and intent of the regulations.

b. Special Exception Relief pursuant to § 2000.3 - Changing Uses within Structures

The applicant also requests relief to allow a nonconforming use to be changed to a use that is permitted as a matter of right in the most restrictive district in which the existing nonconforming use is permitted as a matter of right. In this case, the applicant proposes conversion of a previous office use of the mixed-use structure to a neighborhood retail or service establishment, that will serve the neighborhood and will therefore be a neighborhood facility. While “Neighborhood Facility” is not defined in the Zoning Regulations, in Case No. 16412 the Board found that characteristics of a neighborhood facility include:

- It will be patronized mainly by people who live and work close-by;
- It will not be used by any one group and may be used by all community members;
 - It is not exclusive; and
 - It is accessible by walking.

In past BZA cases approved by the BZA, this has meant permitting a single otherwise non-conforming use, or a limited set of uses with similar potential impacts. In this case, the applicant is asking for permission to locate any use permitted in C-1.

With respect to changing uses within structures, Section 2005.1 provides that three continuous years of non-use is construed as prima facie evidence of no intention to resume active operation as a nonconforming use and that any subsequent use shall conform to the regulations of the district in which the use is located. This essentially requires the applicant “to prove that it was not his/her intention to abandon the use by provision of evidence to support the intention to continue the nonconforming use.” (Appeal - BZA Application 15893).

The applicant provided evidence that the location was built for a commercial use on the ground floor for the location at 1216 4th Street, and the history of certificates of occupancies issued between 1961 through 1979 indicated it has been used over time as both a retail and beverage store and office use.

At this time, evidence has not been provided to the record indicating intent to continue the nonconforming general cleaning office use² (1979) or any other compatible nonconforming use. Photos to the record indicate a dilapidated property, which shows no signs of improvement to support a viable commercial use. A search of public records to date for site inspections or building permits issued for the location, and certificate of occupancies subsequent to 1979 indicated no findings to support the intent to continue commercial activity at this location in spite of the three year lapse in time, per Section 2005.1.

To the contrary, records for 1216 4th Street NW where the office use was located indicate that a permit was issued to a previous owner of record on 3/13/2008 for a conversion from office space to a two-family flat (B115244). Other permits indicate that permits were issued to install partition walls on the first floor and basement from a one family to two family flat (See Attachment – 1216 4th Street Permit Information).

² See C/O attached

Therefore, given the above, and without additional evidence to the contrary, OP cannot proceed with an analysis of the requested special exception relief, as the use seems to have been converted to a residential use in conformance with the R-4 District. Regardless, if the applicant were to provide satisfactory evidence, OP has not typically and would not in this case support permitting an undefined C-1 use.

VI. HISTORIC PRESERVATION

The project is located in the Mt. Vernon Square Historic District. Comments were requested from OP's Historic Preservation staff regarding the proposal and were provided as follows:

"HPO is skeptical of the parking garage entrance proposed at 1212-1216 4th Street NW in the Mount Vernon Square Historic District. Although not rendered sufficiently to come to a conclusive opinion, HPO cannot conceive of a parking garage entrance that it could recommend to the Historic Preservation Review Board (HPRB) as compatible with the mid-19th century architectural character and scale of Ridge Street. Neither of the two previous concept designs submitted to HPRB for this site by this applicant (HPA 10-428, Oct. 2010 and HPA 12-511, July 2012) included a parking garage component, and both were approved without major concerns or conditions. HPO would encourage the applicant to abandon the idea of a parking garage and reconsider one of the previous concept designs approved by HPRB."

The applicant's current proposal was not formally submitted to the Historic Preservation Review Board (HPRB) for comment.

VII. COMMENTS OF OTHER DISTRICT AGENCIES

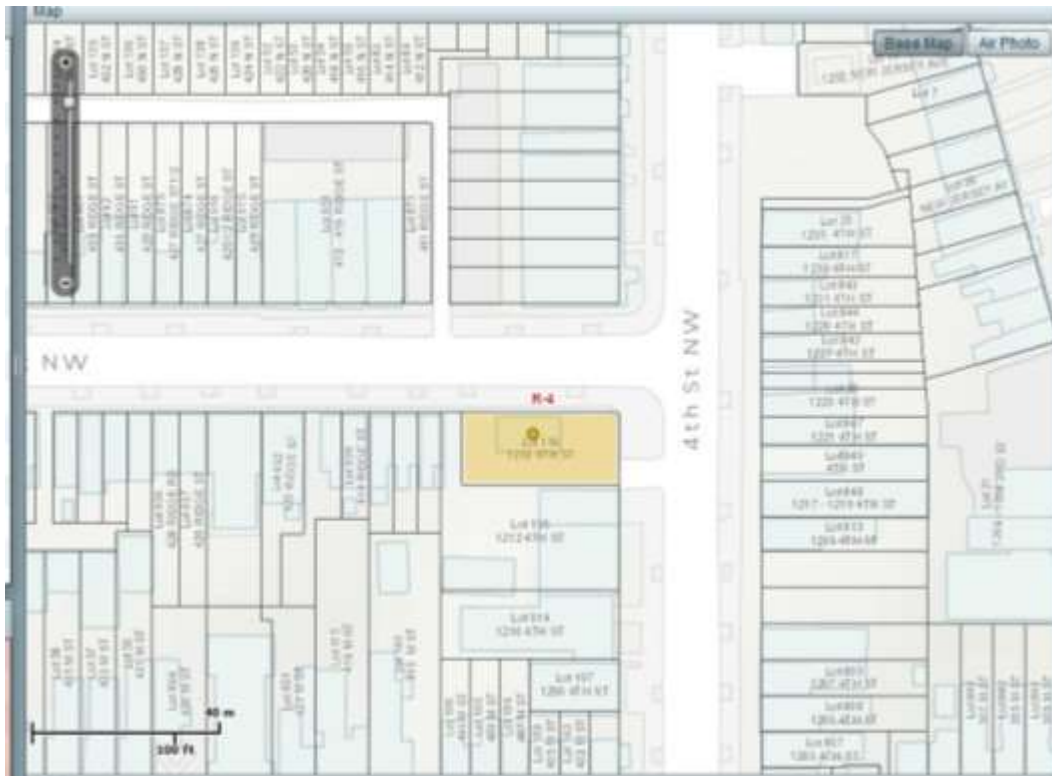
The applicant informed OP that the District Department of Transportation (DDOT) had no concerns regarding the curb cut proposed for the garage entrance. DDOT's report to the record would be submitted under separate cover.

VIII. COMMUNITY COMMENTS

The applicant met several times with the community and ANC 6E to discuss the proposal. The ANC voted to support the application at its regularly scheduled meeting on March 1, 2016.

Attachment:

1. Location Map
2. Certificate of Occupancy 1979
3. Permit Information 1216 4th Street and 1214 4th Street NW
4. Appeal – BZA 15893 (July 1994)



LOCATION MAP

Form L11-P-601
(Rev. 9-79)

CERTIFICATE OF OCCUPANCY

No. **B117701**

Washington, D.C., Nov. 13, 19 79

Permission is hereby granted to McKinley Battle

to use the 1st floor floor(s) of the building located on lot 835 Square 513

known as premises 1216 4th St. NW for the following

purpose(s): General Cleaning Office

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

DEPARTMENT OF LICENSES, INVESTIGATIONS AND INSPECTIONS GOVT. OF DIST. OF COL.

OFFICE COPY.

ZONE **R-4**

FEB \$ 20.00

By Charles Branch Chief, Permit Branch
Permit Clerk

Certificate of Occupancy - 1979

1216 4th Street NW Permit Information

Issued Permits 1216 4th Street NW

Issued Permits : No. of
 Records = 7

1216 4TH ST NW 0513 0929	B0904077	Construction/ Alteration and Repair	2009/03/13	Permit Issued	2009/03/13	1 ST RENEWAL OF BUILDING PERMIT # B115244, VALID FROM 3/12/2009 - 9/12/2009.
1216 4TH ST NW	B114890	Construction/ Alteration and Repair	2008/01/16	Permit Issued	2008/01/16	REPLACE WINDOWS IN HISTORIC DISTRICT FIST FLOOR REPLACEMENT WINDOWS ONLY INSTALL PARTITION WALLS ON FIRWT FLOOR BSMT UPGRADE ELEC.
1216 4TH ST NW	B115161	Construction/ Alteration and Repair	2008/01/28	CONVERTED RECORD		INSTALL TUB IN MASTER BEDROOM , INSTALL FLOORING. CONSTRUCT A RETAINING WALL FOR WINDOW AND DUCT WORK. SEPARATE ELE,MECH,AND PLUMBING
1216 4TH ST NW	B115180	Construction/ Alteration and Repair	2008/01/28	CONVERTED RECORD		INSTALL P ARTITION WALL ON FIRST FLOOR AND BASEMENT, UPGRADE ELECTRICAL, INSTALL FLOORING. CONSTRUCT A RETASINING WALL FOR BASEMENT WINDOW A ND DUCT WORK
1216 4TH ST NW	B115244	Construction/ Alteration and Repair	2008/03/13	Permit Issued	2008/03/13	INSTALL PARTITION ON THE FIRST FLOOR AND BASEMENT UPGRADE ELECTRICAL INSTALLATION TUB IN MASTER BEDROOM INSTALL FLOORING - CONVERSION FROM ONE FAMILY TO A TWO FAMILYN FLAT
1216 4TH ST NW	MS68081	Construction/ Miscellaneous	2004/09/17	CONVERTED RECORD		
1216 4TH ST NW	MS81806	Construction/ Miscellaneous	2005/07/26	CONVERTED RECORD		REVISION BP 466211

B1303055: Status = Application Canceled

The proposal is for a new 2 family flat building to be built in conjunction with the house at the neighboring lot 153. The Building will be a three story plus basement structure with two units each with three bedrooms and three 1/2 baths. The existing cinder block structure shall be removed. The proposed shall include new utilities.

Zoning Review:

Task	Due Date	Assigned Date
Zoning Review	11/11/2013	04/10/2013
Assigned to Department	Assigned to	Status
ZONING REVIEW		Zoning Review - HFC
Action by Department	Action By	Status Date
ZONING REVIEW	Mamadou Ndaw	11/13/2013
Start Time	End Time	Hours Spent
Billable	Comments	Time Tracking Start Date
No		

1. Please update the DC Surveyor's plat. When submitted it shall be not more than 6 months. 2. Please submit a plat (not altered as issued by the Office of the DC Surveyor) depicting the proposed lots. Note that a new apartment house shall not be built in R-4 Zoning District without BZA approval. 3. Please check for compliance with DCMR 11 §400.1 (maximum number of stories) § 403.2 (maximum lot occupancy), §406.1 (minimum open court width). 4. Please check the validity of the address as it is currently assigned to lot 155. 5. Please submit a recorded easement granting access to the proposed lot 154. Please also depict the proposed parking spaces on the plat. 6. Additional comments may follow.

Est. Completion Date **In Possession Time (hrs)**

B115244: Permit issued 3/13/2008

INSTALL PARTITION ON THE FIRST FLOOR AND BASEMENT UPGRADE ELECTRICAL INSTALLATION TUB IN MASTER BEDROOM INSTALL FLOORING - CONVERSION TO A TWO FAMILY FLAT

Task	Due Date	Assigned Date
Zoning Review		
Assigned to Department	Assigned to	Status
ZONING REVIEW		Zoning Review Approved
Action by Department	Action By	Status Date
DC/////	AA CONV	02/07/2008
Start Time	End Time	Hours Spent
Billable	Comments	Time Tracking Start Date
No	CONVERSION FROM OFFICE SPACE TO A TWO FAMILY FLAT.	
Est. Completion Date	In Possession Time (hrs)	Display Email Address in ACA
		No

Owner of Record: FIKERO ZEWDIE

1214 4th Street NW Permit Information

#B1303054

Task Zoning Review	Due Date 02/25/2013	Assigned Date 01/10/2013
Assigned to Department ZONING REVIEW	Assigned to	Status Zoning Review - HFC
Action by Department ZONING REVIEW	Action By Jeannette Anderson	Status Date 02/06/2013
Start Time	End Time	Hours Spent
Billable No	Comments	

[1] Under Section 403.2, for the subject R-4 Zone, since the building is already an apartment house, then there is no new 'conversion' taking place and the property is then not eligible for the provision allowing for the "Greater of 60% or lot occupancy as of the date of conversion". Therefore it is subject to the "All other structures" 40% limit, and since it is at the 43% amount already it is grandfathered at that level only. So to increase the lot occupancy any further would require BZA approval; [2] Provide a copy of the (e) Certificate of Occupancy for the four units; [3] Clarify for the reason I count 7 Kitchens, if proposing 6 Units, only one kitchen per every unit is allowed; and [4] Provide four (4) in-house, (DCRA) Surveyor's Plat showing existing structure and addition(s), fully dimensioned and labeled to clearly identify the work proposed to include minimum setbacks. Do not forget to show and label addition, roof decks, rear parking spaces as depicted on Site Plan.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 15893 of Woodrow D. Malone, pursuant to 11 DCMR 3105.1 and 3200.2, from the decision of Hampton Cross, Administrator, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs made on or about May 31, 1993, to the effect that Certificate of Occupancy No. B-164998 was issued in error and is revoked for a carryout/delicatessen on the first floor and basement in an R-4 District at premises 1000 O Street, N.W. (Square 339, Lot 803).

HEARING DATES: February 16, April 13 and June 8, 1994
DECISION DATE: July 6, 1994

ORDER

SUMMARY OF THE EVIDENCE:

The property which is the subject of this appeal is located at 1000 "O" Street, N.W., and is zoned R-4. The appellant is the owner of the property, a three-story and basement brick structure built about 100 years ago. The first floor and basement have been used for commercial purposes. There are apartments on the second and third floors.

The Zoning Administrator, Joseph Bottner, testified that there were Certificates of Occupancy for the first floor and basement since 1950, initially as a grocery store. In February 1976, the Board approved a change of nonconforming use from retail grocery to retail grocery and delicatessen (no seating) in BZA Application No. 12077. Several Certificates of Occupancy for that use and subsequently, a carryout/delicatessen (no seats) had been issued.

The appellant purchased the property in 1985. The last Certificate of Occupancy issued prior to the permit that is the subject of this appeal was issued to Eunice Talley in 1988. Ms. Talley leased the property from the appellant and operated the carryout/deli at the site.

In February 1990, an inspector from the Food Protection Branch of the Department of Consumer and Regulatory Affairs inspected the premises and noted it appeared to be out of business. On May 4, 1990, Ms. Talley was evicted pursuant to a case in the Landlord and Tenant Branch of the Superior Court. The owner's rental agent, Lawrence Willoughby, testified that, from the food that was set out at the time of the eviction, the tenant appeared to have been operating her business as of that date. Neighborhood resident and ANC representative, Merle Sykes, stated she saw no evidence of business operation on that date but understood that

various household furnishings were removed from the premises during the eviction, and that the food may have been the tenant's personal property.

The appellant submitted documentary and testimonial evidence of his numerous continuing efforts to lease the property as a carryout/delicatessen between May 1990 and April 1992. These efforts included newspaper advertising and posting a "For Rent" sign at the premises. Ultimately, the appellant leased the property to Haywood Liles who made efforts to use the property. In early April 1992, Mr. Liles (the tenant) filed an application for a florist shop. He later learned that a variance would be needed to establish a flower shop. Consequently, on April 24, 1992, the tenant applied for a Certificate of Occupancy to operate a carryout/delicatessen. The appellant and his agent encouraged and monitored the tenant's progress in this matter once the property was leased.

On April 24, 1992, the prior nonconforming use was noted on the application. Inspections by construction, fire, plumbing and electrical branch inspectors were scheduled for October 9, 1992. The appellant was under the impression that the process was moving forward without problems.

The tenant testified that he worked as quickly as he could, considering his shortage of capital, to make the repairs required by the inspectors and otherwise prepare the premises for the carryout. He said that when conditions were not properly remedied prior to reinspection, inspectors did not warn him of time restrictions. Instead, they casually told him to contact them when the work was completed.

In early February 1993, a notice was sent to the tenant by the Occupancy Branch, advising him of the impending expiration of the period to complete the repair and inspection process, the failure of which would result in the closing of his application for a Certificate of Occupancy. He had changed his residence since filing the application and had not notified the Branch of his new address. As the notice was sent only to his former residence, and not to either the subject premises or the owner's agent, the former tenant, Mr. Liles, did not receive it. After he failed to call the inspectors or request an extension of time, the application was closed. Related inspection records were discarded with that action.

The Advisory Neighborhood Commission requested an inspection of the premises by the Food Protection Branch in early February 1993. An inspection was made and a report issued on February 18, 1993 to the ANC that "Eunice Delicatessen" was found "out-of-business" on February 6, 1990 and February 9, 1993. A copy was

delivered to the Zoning Administrator who issued a notice to the Occupancy Branch not to issue a certificate for commercial use for this property as a nonconforming use because the period of discontinuance exceeded three years.

On March 12, 1993, Mr. Liles returned to the Occupancy Branch to report the completion of repairs required by the inspectors and to receive his certificate. He was advised that the file had been closed and he would have to reapply. He did this and in the normal process took the application to the attending zoning technician for review. The technician approved it and the Certificate was issued the same day.

In May 1993, the Zoning Administrator received complaints from residential neighbors opposed to the resumption of the commercial use that the store was operating. After investigating the issuance of the certificate of March 12, 1993, he recommended to his superior, Mr. Hampton Cross, Administrator, Building and Land Regulation Administration, that the certificate be revoked, pursuant to 14 DCMR 1406, as issued in error.

An undated notice of revocation was prepared, addressed to Mr. Liles at his former address, and signed by Mr. Cross' deputy. While the rules provide for service by certified mail at least 10 days before a proposed revocation, no evidence of mailing was presented. Mr. Bottner testified that on or about May 28, 1993, representatives of DCRA attempted to deliver the notice and that a report was made that Mr. Liles refused to sign for receipt of it. Mr. Liles denied that he refused to sign for any such delivery. Finally, on or about July 5, 1993, representatives of the department delivered the notice and retrieved the certificate from the premises, and the business was closed. The owner knew of no undue delay or difficulty with the permit until after the Certificate was revoked. Mr. Liles applied for a variance approximately one month later. Then the owner filed this appeal.

The appellant maintains that the certificate of occupancy was revoked in error and that the Board does not have the authority to eliminate nonconforming uses.

The appellant noted that 11 DCMR 2000 - Nonconforming Uses and Structures - General, provides for the strict regulation of nonconforming uses and structures "to the extent permitted by the Zoning Act of June 20, 1938, as amended" (2000.3) and that such uses may be "continued, operated, occupied, or maintained, subject to the provisions of this chapter." (2000.4)

The appellant's main argument is based on 11 DCMR Section 2005 (Nonconforming Uses and Structures - Discontinuance) which provides:

Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impeded access to the premises, for a period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located. (2005.1)

The regulations noted above were effective upon publication on August 5, 1983 after staff proposals, public hearings, revisions and comment periods beginning two years earlier. The section pertaining to discontinuance had no precedent in the prior regulations, and the section adopted was significantly different from the originally proposed language, especially regarding the issue of "intent." The rejected proposal was as follows: (Section 7107.1):

If a nonconforming use of a structure or of land or of structure and land in combination is discontinued for any reason (except where governmental action for a period of more than one hundred eighty (180) consecutive days or for a total of three hundred sixty five (365) days during any three-year period, any subsequent use shall conform to the regulations for the district in which the use is located. Intent to resume active operation as a nonconforming use shall not alter the provisions of this subsection. (emphasis added)

The appellant noted that prior to the adoption of the regulation, the controlling legal authority on the subject of resuming nonconforming uses after a period of discontinuance of use was governed by rulings in cases by the District's Court of Appeals and its predecessor, the Municipal Court of Appeals. The first case, Wood v. District of Columbia, 39 A.2d 67 (Mun. Ct. App. D.C. 1944) involved the resumption of the use of stables for horses after a period of six years of nonuse, but during which period, starting in 1937, it was advertised for rental as a stable. The Court adopted the prevailing rule of other jurisdictions that irreversible discontinuance of nonconforming use followed only from "(1) the intent to abandon and (2) some overt act or failure to act which carries the implication of abandonment." Id. p.68. The ruling in the Wood case was followed in the last published Court case to consider the issue of "abandonment", George Washington University v. D.C. Board of Zoning Adjustment, 429 A.2d 1342 (D.C. App. 1981). In both cases, the courts noted that the mere lapse of a period of nonuse was not enough to lead to the forfeiture of the right to a use.

The appellant stated that Section 2005.1 now provides that the mere passage of time - three continuous years - of nonuse constitutes "prima facie" evidence of intent to discontinue,

essentially requiring the owner to come forward to prove that it was not his intention to abandon the use. The appellant argued that if the owner comes forward, then the result will depend on whether there was evidence to support the intention to continue the nonconforming use. At that point, the standard is the same as that set forth in the Wood case. The Board must weigh the "prima facie" evidence of discontinuance against the owner's evidence, by overt acts or otherwise, of his intention to continue the use.

The appellant argued that this result differs from the result of the rule first proposed in 1981 which clearly set a time limit and then provided: "Intent to resume active operation of a nonconforming use shall not alter the provisions of this Subsection" (emphasis added by appellant). Rather, the rule as adopted only provides that nonuse for three years will be "construed as prima facie evidence," not conclusive evidence, of intent to abandon. The owner has the right to present contrary evidence. The misleading phrasing of the last sentence of the regulation, which appears to speak in absolute terms of "subsequent use" conformity, must be attributed to the imprecise process of substantially revising draft regulatory language. In the end, it must be read consistently with the other revisions to the very thrust of the section, and be viewed as being subject to them, meaning if the "prima facie" evidence is un rebutted and the nonconforming use is deemed lapsed, then any subsequent use must "conform to . . . the regulations." Any other interpretation would be to read the phrase "prima facie" evidence as the equivalent of "conclusive evidence." The appellant maintains that this is simply impermissible.

Relying on this interpretation of the Zoning Regulations, the appellant maintains that a number of factors evidence his intention to continue the deli/carryout use at the site. Among the actions taken are the following:

- The owner evicted the former tenant in May of 1990 for nonpayment of rent.
- The appellant hired a real estate agent to find a tenant to use the property as a deli/carryout.
- Mr. Liles rented the property with plans to use it as a deli/carryout.
- Mr. Liles renovated the site by installing counters, a hooded stove, a cabinet freezer and display equipment; up grading plumbing and electrical systems; and erecting partitions to alter the size of the carryout space.
- Mr. Liles spent approximately \$12,000 between August 1992 and early March 1993 to repair, upgrade and equip the property for use as a carryout.

- Mr. Liles arranged to have inspections conducted so that he could open the business.

Mr. Stover, a representative of the Willoughby Real Estate Company, testified that he saw the property in February 1993, and the changes noted above had been made to the property. He stated that in February 1993 it appeared that Mr. Liles was ready to open. It was just a matter of getting inspections approved.

Mr. Stover testified that he manages commercial and residential property in the vicinity of the site, therefore he monitors the area. While in the area he would look in on the subject site, and he stated that there was often activity, sometimes not much activity, but he was comfortable that Mr. Liles was making progress in bringing the property up to code.

Based on the testimony of Mr. Liles and Mr. Stover, the appellant contends that there is substantial evidence of intent to continue the deli/carryout use. The lack of finances kept Mr. Liles from finishing the upgrades sooner, and the inspections, being made 5-1/2 months after the certificate of occupancy application was filed, caused further delays in the process. These problems ultimately cost the appellant his certificate of occupancy. However, he argued that he was not made aware of the time-sensitive nature of his project or the impending revocation.

The Zoning Administrator testified about the chronology of events that lead to revocation of the appellant's certificate of occupancy. He noted that when the application was filed, the employee at the zoning desk should have realized that the permit application was for a nonconforming use and there should have been a request that the applicant submit proof of continuation of the nonconforming use. This was not done. The application was approved based on a prior permit. Consequently, the Zoning Administrator inquired into the matter to determine if building permits had been issued on the property that would serve as evidence of the applicant's intent to continue the use. He found no other permits issued to prepare the property for the proposed use. Therefore, given that the three year period had elapsed, no other permits had been issued and no inspections had been approved, he decided that the nonconforming use had ceased. The Zoning Administrator testified that if building permits were taken out and there was a problem getting the work done, the appellant could have requested a time extension to allow the work to be done. However, he found no evidence of that. Therefore, he proposed revocation of the certificate of occupancy.

Advisory Neighborhood Commission (ANC) 2F submitted a report, dated April 6, 1994, in opposition to the appeal. The ANC representative testified that the neighbors had been monitoring the

property for three years and documenting its use because they wanted the deli/carryout use to cease.

The ANC stated that the owner and his agents, through lack of vigilance and supervision, allowed the special exception for the nonconforming use to expire. The appellant has submitted leases as evidence of intent to continue the use, but it is the ANC's contention that a lease is insufficient to determine actual use of the property. The previous tenant, Eunice Talley, discontinued use of the property as a deli prior to her eviction of May 1990 as evidenced by a DCRA inspection determining it was out-of-business on February 6, 1990. Neighbors have indicated that the business ceased operating at some date in the fall of 1989, prior to the DCRA inspection. Further, neighbors concluded that the premises were used by Ms. Talley as a residence after the deli was closed and prior to her eviction.

The ANC stated that the subsequent tenant, Mr. Liles, applied for a certificate of occupancy in April of 1992 but failed to obtain the required approvals by the various inspectors in a timely manner. He was forced to reapply for the certificate in March of 1993, by which time the community had documented the lapse of three years in the operation as a deli/carryout. In fact, the community requested that a letter be placed in the DCRA files which would indicate discontinuance of the deli/carryout use and compel applicants for deli/carryout certificates of occupancy at the subject address to seek a variance. The letter was not placed in the file and the certificate was issued in error.

The ANC stated that the lapse of the three year time period occurred due to lack of action on the part of the owner and/or his agents: 1) the property was allowed to go unrented for a period just short of two years; 2) the lease did not stipulate a time period by which a deli operation must begin; and 3) the tenant was not supervised sufficiently to ensure that preparations for operations were proceeding in a timely manner.

The community attested to the detrimental effects of the deli/carryout operations at the hearing for the related variance case. The ANC stated that this community should not be made to suffer from this inappropriate use after taking all the actions it is afforded under the law in order to rid itself of this commercial intrusion. Therefore, the ANC requests that the Board deny the appeal.

Factual Issues:

The subject appeal raises the following factual issues:

1. Whether the deli/carryout use was operating either when the premises were

inspected in February 1990 or on May 4, 1990 at the time of eviction?

2. Whether there is evidence of the appellant's intention to continue the use at the site?

FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. The deli/carryout use was not in operation in February 1990 when the property was inspected.
2. The appellant evidenced his intent to use the property as a deli/carryout by hiring a real estate agent to lease the property for this use and leasing the property to Mr. Liles for a deli/carryout use. Mr. Liles evidenced his intent by installing equipment, upgrading the electrical and plumbing systems, arranging for inspections, and applying for a certificate of occupancy.

CONCLUSIONS OF LAW AND OPINION:

In the instant appeal, the Board must decide if the Zoning Administrator's decision to revoke a certificate of occupancy was proper.

The Board concludes that the appellant has the burden of demonstrating his intent to continue the deli/carryout use in spite of the three year lapse in time. The Board is not convinced of this intent by the evidence submitted in this appeal. Instead, the Board concludes that the appellant failed to manifest his intention to resume the carryout use. The Board bases this conclusion on the appellant's application for a flower shop certificate of occupancy; the lack of due diligence in preparing the property to open and the passage of three years during which time the property was vacant. The Board draws no conclusion about whether the examination of the permit records conducted by the Zoning Administrator was an adequate basis to determine that the certificate of occupancy should be revoked. However, the Board does conclude that the revocation was not in error.

Therefore, the Board hereby **DENIES** the appeal and **UPHOLDS** the **DECISION** of the Zoning Administrator.

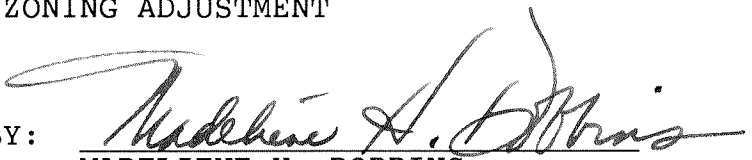
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VOTE: 3-2 (Craig Ellis, Maybelle Taylor Bennett and George M. Evans to deny and uphold; Laura M. Richards and Angel F. Clarens opposed to the motion).

THIS ORDER WAS ISSUED AS A PROPOSED ORDER PURSUANT TO THE PROVISIONS OF D.C. CODE SECTION 1-1509(d). THE PROPOSED ORDER WAS SENT TO ALL PARTIES ON APRIL 22, 1997. THE FILING DEADLINE FOR EXCEPTIONS AND ARGUMENTS WAS MAY 27, 1997. NO PARTY TO THIS APPLICATION FILED EXCEPTIONS OR ARGUMENTS RELATING TO THE PROPOSED ORDER, THEREFORE, THE BOARD OF ZONING ADJUSTMENT ADOPTS AND ISSUES THIS ORDER AS ITS FINAL ORDER IN THIS CASE.

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

ATTESTED BY:


MADELIENE H. DOBBINS
Director

FINAL DATE OF ORDER: JUN 9 1997

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

15893ord/TWR/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15893

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on JUN 9 1997 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each person who appeared and participated in the public hearing concerning this matter, and who is listed below:

Michael E. Brand, Esquire
Paul Crumrine
471 H Street, N.W.
Washington, D.C. 20001

Woodrow D. Malone
P.O. Box 1231
Seattle, Washington 98111

Mr. Haywood Liles
958 Mount Olivet Road, N.E.
Washington, D.C. 20002

Mr. Jack Stover
809 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Helen M. Kramer, Chairperson
Advisory Neighborhood Commission - 2F
1325 13th Street, N.W., #25
Washington, D.C. 20005

A large, stylized handwritten signature in dark ink, which appears to read "Madeliene H. Dobbins".

MADELIENE H. DOBBINS
Director

DATE: JUN 9 1997