GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 18181 of AMM Holdings, Inc.,[1] pursuant to 11 DCMR §§ 3100 and 3101, from a November 18, 2010 decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue a stop work order halting the construction of a new three (3) unit apartment building, in the R-4 District at premises 527 Irving Street, N.W. (Square 3048, Lot 63).

HEARING DATE: March 8, 2011
DECISION DATE: March 29, 2011

DECISION AND ORDER

PRELIMINARY MATTERS

On December 15, 2010, AMM Holdings, Inc. ("Appellant") filed this appeal challenging the November 18, 2010 issuance of a Stop Work Order ("SWO") by the Zoning Administrator ("ZA") of the Department of Consumer and Regulatory Affairs ("DCRA"). The SWO was issued because the Appellant was constructing a *new* three-unit multiple dwelling in an R-4 District, which is not permitted as of right by the Zoning Regulations. (11 DCMR § 330.5(c).) Notwithstanding the fact that the Zoning Regulations prohibit the construction of a new multiple dwelling in an R-4 Zone, DCRA had issued to the Appellant all the necessary building and other permits to construct the multiple dwelling that is the subject of this appeal ("subject property" or "subject dwelling"), and by the time the SWO was issued, the subject dwelling was under roof and almost complete.

The Appellant then appealed the issuance of the SWO to the Board of Zoning Adjustment ("BZA" or "Board"). At the commencement of the hearing, the Appellant confirmed that it was proceeding under an estoppel theory.[2] (Hearing Transcript of March 8, 2011, ("T"), p. 113, lines 19-20.)

[1]The Appellant was represented at the hearing by one of its principals. Throughout this order, the words "Appellant," "Appellant's representative," and/or "Appellant's principal" are meant to signify the Appellant.

[2]The word "estoppel" was rendered as "a stopple" by the reporter.

The Board heard the appeal on March 8, 2011, and kept the record open for further information from the Appellant and DCRA, the Appellee. This information was received, and the Board, at its March 29, 2011 decision meeting, deliberated on the appeal. At the close of the deliberations, the Board voted 3-1-1 to grant the appeal and ordered the SWO to be lifted.

FINDINGS OF FACT

History and Background

1. The subject property is located at address 527 Irving Street, N.W. (Square 3048, Lot 63), in an R-4 Zone District.

2. The subject property is a long rectangular lot, 19 feet wide by 142.50 feet long, with frontage on Irving Street and a 15-foot wide public alley at its rear.

3. The subject property has a lot area of 2,707.50 square feet.

4. The Appellant purchased the subject property on January 8, 2010 for $72,000. At that time, the subject property was vacant except for a small storage shed.

5. The Appellant hired an agent, a Mr. Agipong, to assist it in obtaining the necessary permits from DCRA. (*See,* Exhibit 15, Attached Affidavit.)

6. The Appellant's agent, a structural engineer, had been the Chief Structural Engineer for the District of Columbia until approximately 2004. He now acts as a consultant, assisting firms and individuals in obtaining building permits.

7. The Appellant obtained a Raze Permit, No. R1000078, from DCRA on April 26, 2010, permitting it to raze the shed on the subject property. (Exhibit 2, Attachment D.)

The Affirmative Act of the District

8. The Appellant razed the shed and, on February 18, 2010, applied to DCRA for a building permit to allow construction on the subject property.

9. The building permit application filed by the Appellant included detailed architectural drawings depicting both graphically and in words a new three-unit apartment building. (Exhibit 2, Attachment E.)

10. On May 7, 2010, DCRA issued Building Permit No. B1003393 ("building permit") to the Appellant, permitting construction pursuant to the submitted architectural drawings. (Exhibit 2, Attachment C.)

11. The May 7, 2010 issuance of the building permit was preceded by all the necessary approvals within DCRA, including Zoning Review Approval, which occurred on May 3, 2010.

12. A print-out of the "Building Plan Review Status" for the building permit from DCRA's website, dated December 16, 2010, shows Zoning Review and approval on May 3, 2010, of an "*(R-4) New* Cellar + 3 stories *(3-Units)* Apartment Building. The required two parking spaces at rear (POD)." (Emphasis added.)

The Appellant's Reliance on the District's Act

13. Relying on the building permit and all the approvals that led up to its issuance, as well as his prior development experience discussed in findings of fact 22 through 25, the Appellant began construction on the subject dwelling sometime after May 7, 2010.

14. Construction, including all necessary inspections, continued apace, resulting in 100% completion of the structure's exterior shell, including the roof, by November 18, 2010.

15. On November 18, 2010, a DCRA inspector arrived at the subject property and issued a SWO to the Appellant, at the direction of the ZA. (Exhibit 2, Attachment A.)

16. Two reasons for the SWO were given: (1) a three-unit apartment building is not a matter-of-right use in an R-4 District, and (2) the building previously on the property was demolished without a raze permit.

17. The second reason given for the SWO is without merit, as a raze permit had been issued, but the first reason given for the SWO has merit, as only "a building or other structure existing before May 12, 1958" may be converted to an apartment house in an R-4 Zone District. (11 DCMR § 330.5(c).)

18. The Appellant was surprised by the SWO and on November 22, 2010, the Appellant's representative met with the ZA to try to correct the situation.

19. At that meeting, the Appellant was told by the ZA that DCRA had issued Building Permit No. B1003393 in error; therefore, the SWO was necessary to halt construction. The ZA refused to rescind the SWO.

20. Subsequently, on November 23, 2010, the Appellant e-mailed the then-Director of DCRA, explaining the situation, and was told to appeal to the BZA.

21. Appellant filed this appeal on December 15, 2010, stating on the Office of Zoning's Appeal Form that it was appealing the November 18, 2010 issuance of the SWO by the ZA. (Exhibit 1.)

Appellant Acted in Good Faith and Justifiably Relied on the District's Act

22. The Appellant's representative stated that he had developed approximately 10 properties in the District. (T., p. 123, lines 16-19.)

23. All of its past apartment house projects in R-4 Districts involved conversions. (T., p. 123-24, lines 20-22 and 1-2.)

24. Having previously succeeded in constructing apartment houses in R-4 Districts, the Appellant did not consult the Zoning Regulations to determine whether the fact that the instant project involved new construction made a difference.

25. The application for the building permit went through the normal course of business at DCRA, and was reviewed, and approved, by nine disciplines within DCRA, as well as the Zoning Division.

26. From May 2010 to November 2010, DCRA, or other appropriate District agency personnel, did all necessary inspections of the construction.

27. At no time during these inspections did any DCRA person state that the new three-unit dwelling being inspected was not permitted as a matter-of-right in the R-4 Zone until the SWO was issued on November 18, 2010.

28. The issuance of the SWO was triggered by the Appellant's application for a building permit to allow a roof deck on the top of the subject dwelling.

29. A print-out of the "Building Plan Review Status" from DCRA's website, dated December 16, 2010, shows that DCRA's Zoning Reviewer approved the issuance of the roof deck permit on October 27, 2010. The website states:

> Zoning Review Approved. A NEW ROOF DECK FOR THE NEW 3-UNIT 3-FLOOR & CELLAR APARTMENT BUILDING WITH #B1003393 – 5/7/10 IN R-4 RESIDENTIAL ZONE.

30. Apparently, the ZA was made aware of the roof deck permit request and/or approval, and investigated the three-unit nature of the subject dwelling, determining that it was new apartment house construction disallowed in the R-4 Zone District, and resulting in the issuance of the SWO on November 18, 2010.[3]

The Appellant Made Expensive and Permanent Improvements

31. On November 18, 2010, the dwelling's structure was complete, with a closed roof and the

[3]It appears that, at that time, the roof deck permit was approved, but not issued.

exterior siding finish already in place.

32. On November 18, 2010, all electrical, plumbing, and HVAC rough-ins were done, and ready to be closed by drywall. Also on that date, the sprinkler system and ductwork were done, awaiting drywall as well.

33. By November 18, 2010, the Appellant had expended approximately $350,000 in construction costs.

The Equities Strongly Favor the Appellant

Costs of Compliance

34. A two-unit building would be a matter-of-right use on the subject property.

35. The subject dwelling was designed for three units, and the layout would have been completely different for two units.

36. Now that all three stories plus cellar are constructed, two units within this structure would be unusually large, with undesirable layouts, making them difficult to sell.

37. For the Appellant to demolish all or a significant part of the subject dwelling in order to make two smaller and/or more saleable units would be a waste.

38. The cost to change the subject dwelling to a two-unit building would be significant, and, as set forth in the "Financial Losses " list attached to Exhibit 15, would include:

    (a) Cost of new drawings and permits – approximately $12,000;
    (b) Cost of electrical, telephone, and cable alterations – approximately $12,000;
    (c) Cost of HVAC alteration – approximately $24,000;
    (d) Cost of framing modifications – approximately $14,000;
    (e) Cost of plumbing modifications – approximately $14,500; and
    (f) Cost of gas line modifications – approximately $4,000.

39. Changing the subject dwelling to a two-unit building would cause the Applicant's current bank loan, financing the three units, to be in default, and a new loan for two units would have to be obtained. (Exhibit 15, attached letter from Alliance Bank.)

40. The Appellant's lending bank has warned that it may not issue a new loan if the subject dwelling is changed to two units, because the project cost will be significantly increased and the sales price likely decreased; therefore, the project may not fit the bank's lending criteria. (See, Exhibit 15, Attached Letter from Alliance Bank.)

41. The new loan would have to be re-underwritten, and would include new costs, also set forth in the letter from Alliance Bank attached to Exhibit 15:

    (a) A new appraisal for approximately $1,500;
    (b) Modification fees of ½%, which could be up to $3,000;
    (c) Legal fees associated with the modification;
    (d) Loan origination fees; and
    (e) Title policy fees.

42. The Appellant has already paid the following amounts, also set forth in the "Financial Losses" list attached to Exhibit 15, which would be lost, and largely unrecoupable, if now made to change from a three-unit to a two-unit building:

    (a) Loan origination fees for three-unit loan - $7,500;
    (b) Appraisal for three units – $2,800;
    (c) Plans/Drawings for three units - $12,000;
    (d) Permit fees for three units - $5,500;
    (e) Attorney fees for BZA Appeal - $15,000; and
    (f) BZA Appeal filing fees - $1,040.

43. The anticipated sales price for three units in the fall market would be $1,000,000, with Unit #1 selling for $400,000, and Units #2 and #3 selling for $300,000 each. If only two units are sold in the fall market, the total sales price would be $825,000, with Unit #1 selling for $400,000, and Unit #2 selling for $425,000, for an overall loss of $175,000.

44. The Appellant is a small developer, and its existence could be in danger if forced to sustain the losses resulting and a change to a two-unit building.

Expenses incurred during period of construction inactivity

45. During the period in which the SWO has been in effect, the Appellant has incurred the following recurring expenses:

    (a) Mortgage cost of $5,000;
    (b) Insurance cost of $1,200; and
    (c) Property taxes of $800.

Public Interest Considerations

46. The three-unit density of the subject dwelling is not out-of-character with the R-4 District, as three or more units would be permitted, at 900 square feet of land area per unit, if this were a conversion of a pre-1958 building.

47. The subject dwelling, as built, complies with all the area requirements of the Zoning

Regulations that would be applicable if this were a conversion of a pre-1958 building.

48. Although three units, the subject dwelling is a residential use, a matter-of-right use in this R-4 Zone.

CONCLUSIONS OF LAW

Section 8 of the Zoning Act of 1938 authorizes the Board, (D.C. Official Code § 6-641.07(g)(2) (2008 Supp.)) to hear and decide appeals where it is alleged by the appellant that there is error in any decision by any administrative officer in the administration or enforcement of the Zoning Regulations. In such an appeal, the burden of proof rests with the appellant. (11 DCMR § 3119.2.) The Board is authorized to reverse, affirm, or modify, in whole or in part, a decision appealed from.

The Appellant appealed the November 18, 2010 issuance of the SWO, which required it to halt construction of the subject dwelling because a three-unit apartment building is not a matter-of right use in an R-4 District. The ZA did not err, however, in issuing the SWO. He was correct in asserting that the subject three-unit-dwelling, as a new residential structure with more than two dwelling units, cannot be constructed in an R-4 Zone District as of right. The Appellant concedes that no error was made, but nevertheless asserts that the ZA should be estopped from maintaining and enforcing the SWO. For the reasons stated below, the Board agrees.

The Legal Basis for Estoppel

The elements of estoppel have been oft repeated by the District of Columbia Court of Appeals ("DCCA"). They are:

> (1) that a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine.

Saah v. D.C. Bd. of Zoning Adjustment, 433 A.2d 1114, 1116 (D.C. 1981). *See also, Rafferty v. D. C. Zoning Comm'n.,* 583 A.2d 169, 175 (D.C. 1990); *Interdonato v. D.C. Bd. of Zoning Adjustment,* 429 A.2d 1000, 1003 (D.C. 1981); and W*ieck v. D.C. Bd. of Zoning Adjustment,* 383 A.2d 7, 11 (D.C. 1978). Reliance must be "justified" in order to satisfy the "reliance" requirement of the third element. *See, e.g., Interdonato,* 429 A.2d at 1003. (Setting forth a slightly different repetition of the estoppel elements, *Interdonato* lists the third element as "justifiable and reasonable reliance.") In order to prevail with an estoppel argument, the party invoking the doctrine must meet all four elements.

Also oft repeated by the DCCA is the admonition that estoppel is "disfavored in the zoning context because of the public interest in enforcement of the zoning laws." S*isson v. D.C. Bd. of Zoning Adjustment,* 805 A.2d 964, 971 (D.C. 2002). *See also, Nathanson v. D.C. Bd. of Zoning Adjustment,* 289 A.2d 881, 884 (D.C. 1972), and *Rafferty,* 583 A.2d at 175, and cases cited therein. If, however, the elements of estoppel are met, meaning both the facts and equities demand it, estoppel may be invoked against a municipality. *See, e.g, Saah, supra,* and *District of Columbia v. Cahill,* 60 App. D.C. 342 (Ct. App. D.C. 1931).

Application of Estoppel to the Facts of this Case

It is undisputed that Building Permit No. B1003393 was issued in error. Upon catching that error, the ZA brought construction authorized by that building permit to a halt by issuing the SWO on November 18, 2010. The issuance of the building permit was an affirmative act of the District government, satisfying the second element of estoppel laid out above.[4] *Basken v. D.C. Bd. of Zoning Adjustment,* 946 A.2d 356, 364 (D.C. 2008) ("Ordinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure, and its intended use as described in the permit application, conform to the zoning regulations.") The issuance of the building permit, based on plans unambiguously showing a new three-unit apartment building in an R-4 District, initiated the chain of events leading to this appeal.

There is no evidence that the Appellant acted with anything other than good faith. DCRA, in its post-hearing submission, questions the Appellant's "lack of due diligence," (Exhibit 16, at 2), but stops short of claiming a lack of good faith. The original plans, and all the actions of the Appellant, as well as the credible testimony of the Appellant's representative at the hearing, demonstrate good faith on the Appellant's part, satisfying the first element of estoppel.

Similarly, the Board finds sufficient evidence of "expensive and permanent improvements" to satisfy the first part of the third estoppel element. The mostly completed three-story building is, under the circumstances of this case, a sufficient "expensive and permanent improvement." *Cf., Saah,* 433 A.2d at 1116. (Sixty percent completion of building reconstruction at a cost of approximately $225,000, and cost of compliance estimated at $110,000 found to satisfy estoppel requirement.)

There are, then, two pieces of the estoppel elements left for the Appellant to meet. First, the Appellant's reliance on the issuance of the building permit (and arguably, the other affirmative acts of the District which flowed from that issuance) must have been "justified." Second, the equities must strongly favor the Appellant. The Board finds that the Appellant satisfies these two elements as well.

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[4]There were also other affirmative acts of the District government which flowed from the issuance of the building permit, including the issuance of other permits by DCRA authorizing plumbing, electricity, and the like, for a three-unit building, and inspections of the ongoing construction by District government personnel.

Justifiable Reliance

The Court of Appeals in the *Saah* case seemed to have found justified reliance based merely upon the approval of plans that clearly showed a violation of lot occupancy minimums. The court found such reliance reasonable because it could not be said that the applicant or DCRA were "negligent in failing to discover the problem at that time". *Saah*, 433 A.2d at 1117. The court later cautioned that "*Saah* announced no general rule excusing an applicant's unjustified and unreasonable reliance on such approval." *Rafferty v. District of Columbia Zoning Com'n,* 662 A.2d 191, 194 (D.C. 1995). In this case, the Board concludes that the Appellant's reliance on the issuance of the building permit was both justified and reasonable.

Unlike *Saah,* this case does not involve an applicant and an agency that both understood that a requirement existed. Here, although DCRA clearly understood that an apartment house in an R-4 Zone could only be established through the conversion of an existing structure; the Appellant just as clearly did not. And while ordinarily this Board would not excuse such ignorance, this case presents a unique circumstance. For based upon its prior experience, the Appellant had no reason to suspect that the limitation existed. By sheer happenstance, all of its prior apartment house projects in R-4 Districts involved conversions. It did not dawn on the Appellant that the new construction involved in its latest project might pose an obstacle, and it therefore did not consult the Zoning Regulations to see if it might. The Board finds this to be a reasonable oversight, particularly since this distinction between conversion and new construction appears nowhere else in the Zoning Regulations for this or any other use. Therefore, when DCRA issued the developer yet another building permit to construct this apartment house in an R-4 Zone, the Appellant had no reason to believe that an error had been made. DCRA's affirmative act merely corroborated the Appellant's belief that the use was permitted on the subject property, and therefore its reliance upon that act was both reasonable and justified.

The Board wishes to stress the exceptional nature of these circumstances and that the failure to consult the Zoning Regulations will ordinarily defeat any claim of estoppel.

The Balance of the Equities

The last element of estoppel is whether the equities strongly favor the Appellant.

If the SWO is left in place, the Appellant will not be able to complete the subject dwelling unless it applies for and is granted a variance or it redesigns the project. Both a redesign and the variance process take time, and carry additional costs. During this period of time the Applicant will continue to pay the mortgage, insurance, and property taxes as detailed in finding of fact 45 with no offsetting income in sight for months to come. A re-design and a variance application carry their own additional costs without any assurance of success. In addition, this structure was designed to accommodate three units. A redesign to two units will either result in unmarketable oversized units or in the wasteful partial demolition of the structure to accommodate marketable

smaller units. There is also no assurance that the Appellant's lender will offer a new loan, and in any event such a loan carries additional costs.

The public interest will not be harmed if estoppel is granted. This three-unit apartment building is a residential use, the favored use in this R-4 Zone. The subject dwelling, with three units, would be permitted if it had been the result of a conversion. Its density – three units – is not so great as to adversely affect the neighborhood. It is providing the required parking and needs no other zoning relief; therefore, the structure itself is a matter-of-right at its current size and massing. Only the internal division – whether into two or three units – is in question. The building is not obtrusive or disharmonious with the neighborhood.

Upon considering all the facts and balancing the equities in this case, the Board concludes that the equities strongly favor the Appellant and that, therefore, the last element of estoppel has been met.

Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected Advisory Neighborhood Commission ("ANC") and to the recommendations of the D.C. Office of Planning ("OP"). D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2008 Repl.). Both OP and ANC 1A, the ANC within which the subject property is located, were properly notified of the filing of the appeal (Exhibits 6, 7, and 13), but neither participated. Therefore, there is nothing to which the Board needs to accord great weight.

For the reasons stated above, the Board concludes that the Appellant demonstrated that it met all four elements necessary to estop DCRA from maintaining and enforcing the stop work order that is the subject of this appeal. The appeal is therefore granted. Section 8 of the Zoning Act , as codified, indicates that the Board, as part of its appellate jurisdiction:

> may, in conformity with the provisions of this subchapter, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from or may make such order as may be necessary to carry out its decision or authorization, and to that end *shall have all the powers of the officer or body from whom the appeal is taken.*

D.C. Official Code § 6-641.07(g)(4) (emphasis added).

The Board has rarely exercised the powers authorized in the italicized text, but is constrained to do so in this case in order to ensure that the Applicant will be able to complete construction of a three-unit apartment house and be able to have the units occupied. However, the Board also wishes to make plain that the structure should be treated as a conforming structure housing a non-conforming use. This means that the three-unit apartment dwelling may not be expanded either in size or in the number of units it contains (11 DCMR § 2002.5), and any replacement

building on the site may only contain conforming uses (11 DCMR § 2002.6), subject to the limited right to reconstruct structures housing nonconforming uses stated at 11 DCMR § 2004).

Therefore, it is hereby **ORDERED** that this appeal be **GRANTED, AND THAT**:

1. The SWO issued on November 18, 2010 is hereby rescinded;

2. DCRA shall take no enforcement action against the subject dwelling based upon it being a new apartment house including, but not limited to, an action to revoke Building Permit No. 1003393 or deny a certificate of occupancy on that ground; and

3. The Applicant may complete construction and cause to be occupied the three-unit apartment house pursuant to the plans approved by DCRA, but may not expand the structure or increase the number of units beyond the three approved, and any replacement structure shall only contain conforming uses, except as may be otherwise permitted by the Zoning Regulation in place at the time.

VOTE: **3-1-1** (Meridith H. Moldenhauer, Jeffrey L. Hinkle, and Konrad W. Schlater to Grant; Nicole C. Sorg, to deny; No other Board member (vacant) participating)

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this Order.

ATTESTED BY: _____
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 07 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 18181

As Director of the Office of Zoning, I hereby certify and attest that on June 7, 2011, 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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ATTESTED BY: _____
JAMISON L. WEINBAUM
Director, Office of Zoning