

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 13076 of Michael D. Lange, pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Sub-section 7104.2 to change a non-conforming use from a beauty salon, first floor, to a travel agency, first floor, in an R-4 District at the premises 306 Independence Avenue, S. E. (Square 788, Lot 804).

HEARING DATE: October 24 and December 12, 1979
DECISION DATE: January 9, 1980

FINDINGS OF FACT:

1. This application was scheduled initially for the public hearing of October 24, 1979. At the public hearing counsel for the applicant requested that the Board waive the requirements of Section 3.33 of the Supplemental Rules of Practice and Procedure before the BZA which requires that the subject property be posted at least ten days prior to the public hearing and that an affidavit to that effect be filed at least five days prior to the public hearing. In the instant application the property was posted for five days and the affidavit was filed three days late. The Board found no good cause was established to waive Section 3.33. The application was continued to the public hearing of December 12, 1979.
2. The subject property is located at 306 Independence Avenue, S. E. and is in an R-4 District. The property fronts along Independence Avenue and is landlocked with private property abutting the remaining three lot lines. It does not have a rear or side access either to a public alley or street.
3. The subject lot is approximately 1,242 sq. ft. in land area. It is improved with a two-story brick structure which has two addresses, the subject address and 304 Independence Avenue, S. E. The structure occupies approximately ninety percent of the lot.
4. By BZA Order No. 8458, dated November 24, 1965, the Board approved the use of the first floor of the subject premises as a beauty salon. By BZA Order No. 12491, dated February 28, 1978 the Board approved the change of a non-conforming use from beauty salon to a real estate office, first floor. The Board denied the extension of the real estate office to the second floor of the subject premises.

5. The applicant appealed to the District of Columbia Court of Appeals that part of the BZA Order which denied the extension of the real estate office use to the second floor of the premises 304 and 306 Independence Avenue, S.E. The appeal was argued January 25, 1979. By Order dated September 21, 1979 the Court of Appeals affirmed the decision of the BZA.

6. Counsel for the applicant advised the Board that the owner of the subject premises had not applied for Certificate of Occupancy within the prescribed six months period for the real estate office use, first floor, which the Board had approved. Pursuant to Section 8205, the approval thus expired.

7. The applicant now seeks a special exception to change a non-conforming use from a beauty salon, first floor, to a travel agency, first floor at the subject premises.

8. In January, 1979 the present lessee, the subject travel agency, leased the subject premises and has been operating it to date. The applicant leased the property to the lessee and advised him to obtain a Certificate of Occupancy. Within six weeks the applicant was denied the Certificate of Occupancy.

9. The applicant's counsel stated that in August, 1979 again he applied for a Certificate of Occupancy for the subject premises as a travel agency use. By letter of August 22, 1979 the Certificate of Occupancy was denied and counsel was advised to file with the BZA. On August 23, 1979, the subject application was filed with the BZA.

10. The travel agency operates from 8:30 a.m. to 6:30 p.m. The operating staff consists of three persons.

11. The subject property provides no on-site parking. There is some meter parking in the immediate vicinity. There is also residential parking permit only, in the immediate vicinity. The lessee parks two blocks away from this business. The lessee testified that ninety-eight percent of his business is walk-in. Where it is inconvenient for the clients to come to the office the lessee mails the tickets, etc. or the lessee personally drops off the purchased items at the client's home or office.

12. A beauty salon use and an office for a travel agency are both first permitted as a matter of right in a C-1 District.

13. To the west and north of the subject premises are non-conforming uses. To the south is a C-2-A District and to the east there are residential uses. The general land use within 300 feet to the north, east and west are residential row houses interspersed with non-conforming uses.

14. A petition in support of the application with fifteen signatures of residents of the immediate area was submitted to the record. There were several letters on file in support of the application. There was one letter in opposition.

15. The Capitol Hill Restoration Society in its letter filed October 23, 1979, stated that in its membership meeting of October 10, 1979 the Society voted unanimously to oppose the application. The grounds of opposition were as follows:

a. The neighboring property owners, who either reside in their property or rent to persons who reside on the property, are opposed to the commercial use of any of the properties in this R-4 district. The property at issue has been used commercially for many years. However, now that the original commercial use has ceased, the neighbors favor using the property for residential purposes as intended by the framers of the Zoning Regulations. The Board finds that although the original commercial use has ceased the status of the premises as a non-conforming use did not.

b. The property has not been used as a beauty shop for several years and, subsequent to the cessation of such use, a change of use was granted by the BZA for use as a real estate office. Thus, the property does not qualify for the change sought by the applicant. As stated before, the Board found that the applicant did not obtain his Certificate of Occupancy for the real estate use within the prescribed six months period.

c. The special exception sought by the applicant under Section 8207.2 fails to meet the criteria for such exception in that a commercial use in a residential neighborhood is clearly not "in harmony with the general purpose and intent of the zoning regulations" which have designated the area as R-4 and a continued commercial use of the property will "affect adversely the use of neighboring property" for residential purposes. The Board finds no evidence to support these conclusions.

d. The BZA has no authority under the Zoning Regulations to grant the applicant's request. Section 1202 of the Zoning Regulations defines "nonconforming use" as: "any use of a building, structure, or of land, lawfully existing at the time these regulations become effective, which does not conform to the use provisions of these regulations for the district in which such use is located. (Emphasis supplied.)" Thus, whatever other definition might be used in common parlance, the above definition must be used for the purpose of making determinations as to the legality of a particular use under the Zoning Regulations.

Section 7104.2 provides that a "nonconforming use /ie a use existing at the time the Regulations took effect/ may be changed to a use which is permitted in the most restrictive district in which the existing nonconforming use is permitted." Substituting the definition for the term "nonconforming use" in Section 7104.2, it can be seen that once a use existing at the time of the passage of the Regulations has been changed, it is no longer a "nonconforming use" and the use can no longer be changed without a change in the zoning of the property. The Board finds these conclusions contrary to the Zoning Regulations.

16. Advisory Neighborhood Commission 6B made no recommendation on the application.

17. The Board at the public hearing left the record open for counsel for the applicant to submit a memorandum addressing the issues of whether the non-conforming use was abandoned and whether current use of the subject property without a Certificate of Occupancy precludes the Board from granting the requested relief.

18. In his memorandum applicant's counsel reported that in November 1965, pursuant to B.Z.A. Order No. 8458, applicant's father was granted permission to change a non-conforming use tin and sheet metal shop to a beauty salon at the first floor of 306 Independence Avenue, S. E. A certificate of occupancy, No. B54733, was issued on March 7, 1966 for such use. The beauty salon use existed for approximately ten years.

That use was discontinued in late 1974 due to a termite problem in the building which necessitated renovation of the entire first floor.

After completion of the renovation work in early January 1975, the entire first floor of premises 304-306 Independence Avenue, S.E. was leased to Independence Reporting Company. A certificate of occupancy, No. B92136, was issued on January 20, 1975 for premises 304 Independence Avenue permitting the establishment of office use by Independence Reporting, Incorporated in that premises. A companion certificate of occupancy for premises 306 Independence Avenue was never obtained although it was part of the same use and on the same floor of the building as the office use occupancy permit obtained for 304.

Independence Reporting's occupancy of the premises continued from January 1975 until December 1978. After the termination of Independence Reporting's occupancy the subject premises was leased to the present lessee. At no time has the subject premises been used for residential purposes nor any other conforming use since the beauty salon occupancy of 1966. In view of the use history, counsel contended that the non-conforming use rights to the subject premises have not been abandoned. There was no intent to abandon and there was no overt act or failure to act which earned the implication of abandonment. The Board concurs that the non-conforming use was not abandoned.

As to the second issue counsel urges that pursuant to the decisions of the D. C. Court of Appeals, an applicant in a special exception case is entitled to the requested relief providing that all requirements of the Regulations are complied with. See, Stewart v. D.C. B.Z.A., 305 A.2d 516 at 518 (D.C. App. 1973) and Kenmore Joint Venture v. D.C. B.Z.A., 391 A. 2d 269 (D.C. App. 1978).

Pursuant to this standard, the applicant in this case is entitled to special exception relief regardless of whether the existing use on the site is illegal, so long as the statutory criteria set forth under Sections 7104 and 7109 are met.

This second issue resolves itself into a question of whether by virtue of the existence of illegal uses of the premises the Board is divested of jurisdiction to grant relief. The District of Columbia Court of Appeals has decided numerous cases challenging Board of Zoning Adjustment Orders where the decision of the Board would permit an existing illegal use to continue and be legitimated through its processes.

This is true in the prior case dealing with the subject premises wherein the Court specifically noted at page 2 of its decision that the first floor of premises 306 was being utilized for office purposes without a certificate of occupancy. The Court did not in any manner state that the Board lacked jurisdiction to grant a change of non-conforming use to a real estate office by virtue of the existing illegal use.

In addition, the Board in its Order recognized in Finding of Fact 7 that,

"The first floor of premises 306 Independence Ave., S.E. is occupied by the same tenant, Independence Reporting. There is no certificate of occupancy for such office use."

Therefore, the Board was well aware in the prior case that the premises was being used for illegal, non-conforming purposes but nevertheless, determined the applicant's prior application as it affected the subject premises herein should be granted since all the provisions of Sections 7104 and 7109 had been complied with so as to permit the granting of special exception relief.

Furthermore, in the actions of Dwyer v. D.C. B.Z.A., 320 A.2d 306 (D.C. App. 1974) and Bernstein v. D.C. B.Z.A., 376 A.2d 816 (D.C. App. 1977), applications were filed before the Board to legitimate existing illegal uses. The Court while sustaining the Board in denying relief in the above-referenced cases did not dismiss the cases on jurisdictional grounds. The cases proceeded before the Board and were tried before the Court on their merits.

The principle that an illegal action by a property owner does not divest the Board of jurisdiction was supported in the action of Gapinski v. Zoning Board of Adjustment, 162 NYS2d 945 (1957) wherein a property owner constructed an improvement which violated the Zoning Regulations and then obtained an area variance to validate such construction.

For reasons hereinafter discussed in the Conclusions of Law the Board will distinguish the subject application from those cited by counsel.

CONCLUSIONS OF LAW:

Based on the record the Board concludes that the applicant is seeking a special exception which requires in this application a substantial compliance with Sub-section 7104.2 of the Zoning Regulations and that the relief can be granted as in harmony with intent, purpose and integrity of the Zoning Regulations, and the relief will not affect adversely the use of neighboring property. The Board concludes that the applicant has substantially complied with Sub-section 7104.2 of the Zoning Regulations.

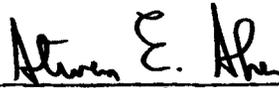
The Board notes that the subject premises was used without a Certificate of Occupancy by the Independence Reporting Company from January 1975 to December 1979. In January of 1980 the applicant leased the property knowing that no valid Certificate of Occupancy existed. The lessee had been operating his business with the owner's knowledge although his application for a Certificate of Occupancy was denied in February 1980 and a second application was not made until August 1979. The Board notes that the owner-applicant is not unfamiliar with the laws of the D.C. Government. The property, to his personal knowledge, had been a non-conforming use for many years. The applicant was aware that the subject property had been before the Court of Appeals as to non-conforming use and a denial of a Certificate of Occupancy at the very time that he leased his property in 1980. The Board concludes that such extreme action on the part of the owner as to the use of his property is contrary to the general purpose and intent of the Zoning Regulations. Accordingly, the special exception can not be granted and is hereby DENIED.

Application No. 13076
Page 8

VOTE: 3-2 (Walter B. Lewis, Connie Fortune and Leonard L. McCants to deny, William F. McIntosh and Charles R. Norris opposed).

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

ATTESTED BY:



STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER:

7 APR 1980

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "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."