

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Appeal No. 13154, of C & P Building Limited Partnership, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Deputy Zoning Administrator that the present use of the subject premises is not a lawful non-conforming use in an R-4 District at the premises 629 Constitution Avenue, N.E., (Square 867, Lot 18).

HEARING DATE: January 23, 1980  
DECISION DATE: April 2, 1980

FINDINGS OF FACT:

1. The subject property is on the south side of Constitution Avenue between 6th and 7th Streets, N.E. and is known as 629 Constitution Avenue, N.E. It is in an R-4 District.
2. The subject site is forty-five feet wide and 136.29 in depth. There is a 14.75 foot wide public alley to the east of the subject site and a thirty foot wide public alley to the rear of the property.
3. The site is improved with a three story brick building with basement which was constructed in 1906.
4. The subject premises were located in a first commercial 60C zone from 1920 until 1950. In 1950 the subject property was rezoned to residential 60C. On May 12, 1958 the residential zoning became R-4 under the existing Zoning Regulations.
5. On October 14, 1949, a Certificate of Occupancy No. A637 was issued to the Chesapeake and Potomac Telephone Company to use the subject premises as "telephone exchange and auxilliary services, training school for employees and office building." On January 29, 1979 a Certificate of Occupancy No. B112614 granted permission to the Chesapeake and Potomac Telephone Company to use the subject premises for the same uses as listed on Certificate of Occupancy No. A637.
6. On July 27, 1956 the BZA in Appeal No. 4530 granted to the Chesapeake and Potomac Telephone Co., a variance on the subject premises from the lot occupancy requirements to permit a two story addition to an existing office building.

7. On November 12, 1958, the Chesapeake and Potomac Telephone Co., filed a notarized certificate for registration of a non-conforming use registering the subject property as a non-conforming office building in an R-4 District.

8. Liberty Lobby, Inc., intends to lease the subject premises as its national headquarters. It is an office structure organization reporting on legislative activity. It also publishes a weekly newspaper and has a radio program.

9. On August 24, 1979, Liberty Lobby, Inc., applied for a Certificate of Occupancy to use all floors and basement of the subject premises as offices. By letter of October 2, 1979 the Deputy Zoning Administrator denied the application for the Certificate of Occupancy on the grounds that the subject property is located in an R-4 residential district which does not permit the proposed use unless it is approved by the BZA.

10. The subject appeal is an appeal from the decision that the present use of the subject premises is not a lawful non-conforming use. The appellant contends that the office building use on the subject premises was a lawfully existing non-conforming use on May 12, 1958, the effective date of the current Zoning Regulations, which remains non-conforming and may be continued as offices by Liberty Lobby, Inc.

11. The appellant contends that the aforementioned Certificates of Occupancy the BZA Order No. 4530, the registration of the non-conforming use all evidence the use of the subject premises as office use. The Board does not concur.

12. The Zoning Administrator contends that there has never been a non-conforming use of the subject property. The property was zoned first commercial 60C up to 1950 which permitted the use of the building in accordance with the certificate of occupancy that was issued, namely a telephone exchange with auxillary services for employees and some office space. The principal use was as a telephone exchange. When the property was changed from first commercial to residential, the use was still a permitted use under the Zoning Regulations by a special exception. The Zoning Administrator argued that if the use is permitted as a matter of right or by a special exception it could not be a non-conforming use.

The Zoning Administrator further contends that the use of the language "office building" in the Board's Order No. 4530 was not material to the application. The reference to an office building was a misnomer. The use of the property was not before the Board. If the building was non-conforming in 1956, the date of Order No. 4530, the applicant would have had to come before the Board for permission to do structural alterations for a non-conforming building. Such relief was never requested. The Board concurs with the reasoning of the Zoning Administrator as to the 1956 order.

13. Advisory Neighborhood Commission - 6A and the Capitol Hill Restoration Society recommended that the decision of the Deputy Zoning Administrator be upheld. Neither organization requested to intervene.

14. There was no probative evidence introduced into the record by the applicant to demonstrate the number of staff employed in the subject building, the specific functions of the staff and the space they occupied within the building.

15. Two long-time area residents testified that the building had been primarily used as a telephone exchange.

CONCLUSIONS OF LAW AND OPINION:

This matter is before the Board as an appeal by the C & P Building Limited Partnership of the decision of the Zoning Administrator to deny an application for a Certificate of Occupancy to use the subject premises as an office. The basis for the denial was that the property is located in an R-4 District which does not permit the proposed use. Inherent in the denial was the reasoning that no non-conforming office use was associated with the subject property.

In any appeal, pursuant to Section 4.53 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment, "the burden of proof shall rest with the appellant..." In the appeal, the Board concludes that the appellant has not carried the burden. The appellant introduced no evidence to show exactly what portions of the building were devoted to which use, to establish that office use was in fact a principal use of the building. Based on the information in the record, the Board concludes that the principal use of the building was as a telephone exchange, and that all the other uses listed on the last recorded certificate of occupancy were accessory uses, incidental and subordinate to the principal use of the premises.

The Board concludes that the contention of the Zoning Administrator that the telephone exchange is not a non-conforming use because it is now permitted as a special exception is erroneous. According to Section 1202, a non-conforming use is defined 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." In an R-4 District, one of the "use provisions" applicable to a telephone exchange is that the use is permitted "if approved by the Board of Zoning Adjustment." The subject use was never approved by the Board. The Board concludes that the telephone exchange therefore was a non-conforming use when the R-4 District was created, and that use could continue indefinitely without Board approval. The Board further concludes that whatever non-conforming rights do exist with respect to the use of the subject building are limited to those associated with a telephone exchange.

The appellant further contends that at some point after the telephone exchange was established and the certificate of occupancy issued, the use of the telephone exchange was terminated and the building was used as office space. The Board notes that, even though a certificate of registration of a non-conforming use was filed for an office, no certificate of occupancy was ever requested or issued for such use. The Board therefore concludes that no "lawful" office use was ever established, and that no non-conforming rights can be derived from such a use, if it did exist.

The Board notes one additional matter. In the case of the Sheridan-Kalorama Neighborhood Council .v. Board of Zoning Adjustment, the D.C. Court of Appeals ruled that in the case of a change of one non-conforming use to another, the term "permitted" meant either permitted as a matter-of-right or by special exception. Since a telephone exchange is first permitted as a special exception in the R-4 District, the appellant would properly have to seek a use variance from the Board to secure office use of the subject premises. Such an application has been filed with the Board as Case No. 13121. The Board has postponed consideration of that case until this appeal was resolved.

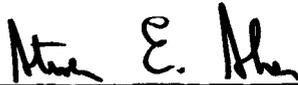
Based on all the foregoing findings and conclusions, it is therefore ORDERED that this appeal is DENIED and the decision of the Zoning Administrator to DENY the Certificate of Occupancy is UPHeld.

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VOTE: 4-0 (Charles R. Norris, William F. McIntosh, Connie Fortune  
and Leonard L. McCants to DENY)

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

ATTESTED BY:

  
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STEVEN E. SHER  
Executive Director

FINAL DATE OF ORDER: 27 JUN 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."