

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 13340, of Page Associates, pursuant to Sections 8102 and 8206, of the Zoning Regulations, from the decision of the Assistant Chief, Permit Branch, Department of Licenses and Inspections revoking building permit No. B274885 and Certificate of Occupancy No. B115647 and from the decision of the Chief, Zoning Review Branch, Department of Licenses and Inspections, disapproving an application for Certificate of Occupancy and the cancellation of Certificate of Occupancy No. B115646 in an R-5-C District at the premises 1701 - 16th Street, N.W., (Square 192, Lots 815 and 818).

HEARING DATES: September 24, October 7 and December 17, 1980
DECISION DATE: March 4, 1981

FINDINGS OF FACT:

1. At the public hearing of September 24, 1980, the Chair permitted the Chastleton Tenant's Association, and Advisory Neighborhood Commission - 2B to be intervenors in the subject appeal. The Chair also ruled that the Zoning Administrator is the appellee rather than his subordinates or other persons in the Permit Branch.

2. The appellant made several preliminary Motions. The Chair upon hearing the arguments of the appellant, the Corporation Counsel on behalf of the Zoning Administrator and counsel for the Chastleton Tenant's Association ruled (a) That the Zoning Commission has the power to adopt emergency amendments to the Zoning Regulations; (b) That the Zoning Commission has the power to successively re-adopt the same emergency Order; (c) That the Zoning Commission has the power to adopt permanent changes to the Zoning Regulations where those changes include blanks which have not been filled in in this version of the amendment published in the D.C. Register. In this instance the effective day of the Order was left blank. The Chair ruled that the effective date of the Order was the date on which it was published in the D.C. Register; and (d) That the Board had jurisdiction to apply the Zoning Regulations only and not the jurisdiction to consider the emergency acts of the Council of the District of Columbia. The Chair deferred a ruling until the merits of the appeal were heard, whether Z.C. Order Nos. 291, 302 and 309 were intended to apply to conversions of additional units within a building which already had at least thirty hotel units and a restaurant capable of seating at least thirty persons.

3. The subject property is located on the northeast corner of the intersection of 16th and R Streets and is known as premises 1701 - 16th Street, N.W. It is in an R-5-C District.

4. The subject site is improved with a 315 unit residential structure known as the Chastleton. It is owned by Page Associates, the appellant.

5. The appellant also owns a contiguous parcel of real property in the subject square which is used as a parking lot serving the residents and guests of the Chastleton. The Board last approved this parking lot for a period of five years in BZA Order No. 12229, dated March 29, 1977.

6. The Chastleton was built in 1927 as a hotel and was operated as a hotel until 1967, at which time it was converted to an apartment building.

7. The appellant in November 1978 contracted to purchase the Chastleton and the parking lot from Columbia Realty Venture. It was the intent of the contract purchaser to reconvert the apartment units in the Chastleton back to hotel use as they became vacant. In order to accomplish this, the appellant paid Columbia Realty Venture to keep vacant those apartment units which became vacant in the pre-settlement period. In addition, the appellant provided a restaurant on the premises capable of seating thirty people.

8. On January 17, 1979 Columbia Realty Venture, on behalf of Page Associates, submitted a blanket application No. B112476 for a certificate of occupancy to use the entire premises as a hotel, consisting of 315 units.

9. On March 1, 1979 a second application was filed by Columbia Realty Venture on behalf of Page Associates for a certificate of occupancy to use the forty-one units which were then vacant as hotel units.

10. In March, 1979 the appellants retained Norman M. Glasgow, Jr., Esq. to assist it in the conversion process.

11. On March 22, 1979, the application for the forty-one hotel units was disapproved for failure to provide the required off-street parking.

12. On March 23, 1979, the Zoning Administrator's office advised the agent for Columbia Realty Venture that the application for the 315 units was disapproved for lack of the additional parking spaces that would be required for conversion of the units from apartment use to hotel use.

13. Immediately following the disapproval of the application for forty-one units, Mr. Glasgow met with the Zoning Administrator to discuss various proposals concerning the manner in which the required off-street parking could be provided. These discussions culminated in a March 23, 1979 letter from Norman M. Glasgow, Jr., to the Executive Director, Zoning Secretariat, proposing to establish the seven off-street parking spaces required for conversion of forty-one units to hotel use on the adjoining parking lot.

14. The Executive Director, in a memorandum to the Acting Corporation Counsel dated March 29, 1979, requested advice concerning the March 23 proposal by Mr. Glasgow and the additional issue of whether the entire building would be considered a hotel if forty-one hotel units were established in the Chastleton. The Corporation Counsel's opinion was that the off-street parking could be provided in the manner suggested by Mr. Glasgow, provided an access easement was created to provide continuing access to the parking spaces. The Corporation Counsel also expressed his opinion that the Chastleton could be used partially as a hotel and also as an apartment house.

15. Thereafter, Columbia Realty Venture incorporated land from the adjacent parking lot into the improved lot sufficient to provide the seven additional parking spaces required for the conversion of forty-one units from apartment to hotel use. In addition, the owners executed and recorded a driveway easement over a separate portion of the adjacent lot to provide the required access to the parking spaces.

16. On April 2, 1979, an application for forty-one hotel units was filed by the appellant's attorney. The Appellant's attorney also filed an application for a Certificate of Occupancy to use 203 units as a hotel, the remainder for apartments, except for the forty-one units on the separate application. Both applications were filed in the name of the previous owner.

17. On May 10, 1979 a certificate of occupancy, No. B113015, for forty-one units was issued after Page Associates provided proof that sufficient parking spaces had been added to the Chastleton's lot from the accessory lot. These apartments was the same as had been applied for on March 1, 1979 and April 2, 1979.

18. On June 20, 1979 Page Associates purchased the building from Columbia Realty Venture.

19. On June 26, 1979 a certificate of occupancy was issued to Page Associates for the same forty-one units previously given to Columbia Realty Venture.

20. A letter dated July 20, 1979 from the Zoning Administrator's Office was received by Mr. Glasgow's lawfirm denying the the application for 203 hotel units filed on April 2, 1979.

21. On August 1, the Appellant filed two applications for Certificates of Occupancy: a "blanket" application for 268 hotel units, and a "partial" application for a second group of forty-one hotel units which were vacant and ready for conversion. Mr. Glasgow testified that filed with the application were certain parking garage plans but that there were problems with these plans. Later these plans were retrieved by him. The Zoning Administrator testified that there was no record of any plans. Copies of these plans were submitted to the Board at the public hearing of October 7, 1980.

22. On August 7, 1979 Page Associates filed an amended application for a certificate of occupancy, No. B115646, for 254 hotel units and fifty-eight apartment units.

23. On August 9, 1979, Appellant filed an underground parking garage plan for twenty-four parking spaces, together with an application for a building permit to build the parking garage. Under this plan, if the parking garage were built, only ten parking spaces would have to be provided on the adjacent lot in addition to the seven parking spaces which had already been provided. The August 1 application for 268 hotel units, the application for forty-one hotel units, and the August 7 amended application for 254 hotel units were all stamped "Complies With Zoning Regulations."

24. Mr. Glasgow in his testimony conceded that he was "surprised" that the applications for Certificates of Occupancy filed on August 1 and August 7 were stamped "Complies with Zoning Rgulations," as the normal stamp in such circumstances, according to his testimony, is "Accepted for Filing." The Zoning Administrator testified that the applications were erroneously stamped. The Board so finds.

25. The Zoning Administrator testified that his review of the records on file convinced him that no plans for providing required off-street parking had been submitted along with the "blanket" application of August 7, 1979 to convert 254 units to hotel use, and that the application was improperly accepted. Accordingly, once he had made the determination that the application was erroneously accepted, the Zoning Administrator acted to cancel the August 7 application and revoke and cancel all subsequent applications, Certificates of Occupancy, and building permits based upon that "blanket" application.

26. On August 9, 1979, the Zoning Commission issued Emergency Order No. 291 prohibiting the conversion of residential structures to hotel use.

27. On October 9, 1979, Page Associates filed a driveway easement with the Recorder of Deeds showing sufficient parking for seven spaces.

28. On October 11, 1979 a certificate of occupancy No. B115647 was issued for forty-one hotel units which had been applied for on August 1, 1979.

29. On November 7, 1979 new plans were submitted to Mr. Bottner showing forty-one parking spaces in the underground parking garage.

30. In December, 1979, a building permit application was filed to construct the parking garage.

31. On December 3, 1979, the Zoning Commission issued an emergency Order No. 302, enacting emergency regulations to be in effect for no more than 120 days.

32. On January 18, 1980, the building permit No. B274885 was issued for the construction of the parking garage. No construction was ever commenced.

33. On March 7, 1980, Page Associates applied for an additional certificate of occupancy for fifty hotel units, under application No. B115646.

34. On March 20, 1980, the Zoning Commission adopted Emergency Order No. 309.

35. On May 8, 1980, the Zoning Commission in Order No. 314 issued permanent regulations on the subject of hotels. Where the emergency regulations had addressed conversion of residential structures to hotels, the present regulations permitted no new hotels in residential districts.

36. By letter of May 23, 1981, the office of the Zoning Administrator advised Mr. Glasgow, Jr. that the application for a certificate of occupancy, dated March 7, 1980, to use the subject property as a hotel of fifty units was disapproved. The application was filed as a partial to a prior Certificate of Occupancy application No. 3115646. The Zoning Administrator determined that application No. 3115646, filed August 7, 1979 must be cancelled, since the plans for parking were not filed with the application as required under Paragraph 8104.71 of the Zoning Regulations.

37. By letter of May 28, 1980, the office of the Zoning Administrator advised the appellant that the application for a certificate of occupancy applied for on August 7, 1979 for a hotel of 254 units and an apartment building of fifty units were cancelled and that the certificate of occupancy No. B115647, issued October 11, 1979 authorizing a hotel of forty-one units at the subject site is revoked on the grounds that the application does not comply with the Zoning Regulations, that the Zoning Commission Orders 291, 302, 309 and 314 prohibit conversions of apartment houses to hotels and that the application and occupancy permit conflict with Paragraph 8104.71 of the Zoning Regulations.

38. By letter of May 29, 1980, the office of the Zoning Administrator advised the appellant that the building permit B274885, issued January 18, 1980 authorizing construction of a parking entrance and exit ramps was revoked on the grounds that the certificate of occupancy B115647 and the application filed on August 7, 1979 was erroneously approved by the Zoning Section. The building permit was issued based on certificate of occupancy No. B115647 and thus the building permit was issued in error.

39. The appellant testified that between August 9, 1979, and May 28, 1980, the appellant, with knowledge of and in reliance upon the actions taken by the Office of the Zoning Administrator, sustained more than \$200,000 in net vacancy losses upon rental units held vacant for the purpose of conversion. In addition, the appellant expended over \$200,000 during this period in reliance upon those actions. These expenditures and losses were in addition to the irrevocable loss of the land incorporated into the improved site from the adjacent lot in October, 1979.

40. The appellant further testified that the vacancy losses sustained by the appellant can never be recovered. While some of the expenses incurred during this period could, possibly, be recovered in the event that the building were reconverted to apartment use, most of them could not. Since approximately May 28, 1980, appellants have suffered net operating losses of approximately \$40,000 per month as a result of the administrative decisions taken.

41. The appellant further testified that the Chastleton cannot be operated as a forty-one unit hotel or even as an eighty-two unit hotel. The appellant applied for and expected to receive a total of 254 units. The appellant decided not to convert all 254 units at one time in order not to have to evict the existing tenants. This resulted in expenditures and losses being incurred over an extended period of time. None of these expenditures and none of these losses would have been incurred, nor would the land from the adjacent lot been irrevocably incorporated into the improved lot, had the appellant not firmly believed, based upon all the actions taken by the Office of the Zoning Administrator, that it had the right to continue the conversion process which had begun prior to August 9, 1979.

42. The appellant testified that as to laches, there appears absolutely no reason for the delay of nine and one half months between the submission of the 254 unit hotel application and underground parking plans on August 7 and 9, 1979, respectively, and the decisions of the Zoning Administrator; that there can be no doubt during this period, cognizant District officials were fully apprised of the facts upon which the decisions were ultimately made and had focused upon the legal and factual issues involved during the period of August, September, October and November, 1979, and that the appellant was substantially prejudiced by this delay is demonstrated by the expenses incurred in the process of hotel conversion and the losses incurred from keeping apartment units vacant pending their conversion to hotel use.

43. Advisory Neighborhood Commission - 2B submitted a written resolution, dated December 17, 1980, passed by a majority of Commissioners at a regular public meeting at which a quorum was present, in support of the Zoning Administrator's actions. The resolution expressed the ANC's concern that hotel use of the Chastleton would adversely affect the residential quality of the neighborhood, especially with regard to traffic congestion. The Board is required by statute to give great weight to the issues and concerns of the ANC. The Board finds however, that the subject resolution does not go to the merits of the subject appeal. The resolution does not address the issues presented at the public hearings.

CONCLUSIONS OF LAW AND OPINION:

The Board has considered the entire record including the briefs and replies of the appellant, the intervenors, Chastleton Tenant's Association and the Zoning Administrator. The Board is of the opinion that the appellant has not met the burden of proof and that the appeal should be denied, and the decisions of the Zoning Administrator are UPHELD.

In addressing first the preliminary motions raised by the appellant as to the jurisdiction of the Board to hear the appeal, the Board concludes that its authority under the Zoning Act to hear and decide appeals relates to the "carrying out or enforcement of any regulations adopted pursuant to this Act." The Board concludes that it must accept the orders of the Zoning Commission as being the regulations which the Commission desires to have carried out and enforced. The Board is of the view that that the Commission does have the authority to adopt emergency legislations. The Board believes that the decision of the D.C. Court of Appeals in the case of District of Columbia, et al. v. the Washington Home Ownership Council, Inc., D.C. App., No. 79-1053, May 28, 1980, overturning successive emergency enactments of the City Council is not applicable to the Zoning Commission.

The Board believes that the failure to include a date in the Order of the Commission which was published in the D.C. Register and which contained the adopted permanent amendments to the Regulations concerning hotels was not material, since the Rules of the Commission provide that all amendments are effective upon publication. The Board concludes, however, that it is not the appropriate forum in which such issues can be raised, and that the Board must accept the Regulations as adopted by the Commission.

The appellant raised three arguments to support its appeal. First, the appellant argues that its application filed on August 7, 1979 for the 254 hotel units was filed prior to August 9, 1979 the effective date of Zoning Commission Emergency Order No. 291 and therefore, the Order does not apply to them. The second argument is that the District of Columbia's officials are estopped from revoking the applications for 254 units, the certificate of occupancy and the building permit. The third argument is that the terms of the emergency order do not apply to it. The Board concludes that all of the appellant's contentions are erroneous.

The appellant contended that the actions of the Zoning Administrator were erroneous, because the application for 254 units was filed prior to the effective date of the emergency order, and therefore, under Sub-section 8104.7 of the Zoning Regulations, the emergency order would not apply. The Zoning Administrator testified that the application was not sufficiently complete to allow processing under Sub-section 8104.71, and therefore, the application was not grandfathered. The Zoning Administrator testified that there was not sufficient proof of parking at the time the application was filed.

The appellant presented two separate bases upon which the Board could conclude that its application was complete. The appellant contended that the parking plans filed with the August 1, 1979 applications was sufficient information to satisfy the requirements of Sub-section 8104.7, and further, if these plans were not sufficient that the Zoning Administrator knew or should have known that the appellant had the right to use accessory parking. Neither argument is availing to the appellant.

Initially, the Board notes that the appellant never had a clear idea itself as to how the parking would be supplied. During the testimony of both Mr. Glasgow and the representative of the appellant, Ms. Page, it was pointed out that the parking garage was an option, and that they knew that they had the right to use the adjacent lot as an option.

It would be incongruous to conclude that sufficient information as to how the parking would be supplied was within the knowledge of the Zoning Administrator, when indeed, the appellant was not certain how it was going to be supplied. The mere fact that the Zoning Administrator knew the options open to the appellant does not mean that the Zoning Administrator should know what final decision was going to be made. The Zoning Administrator's approval or refusal should be based upon the final plans, not potential plans.

There is some question as to what type of plans were in fact submitted with the August 1st and August 7th applications. The Zoning Administrator has no record of any plans being submitted. The appellant maintained that plans were submitted on August 1, 1979, but they were simply rejected. The appellant, however, claimed that based upon problems with its first set of plans, it reduced the number of apartment units it was requesting and on August 9, 1979, submitted new plans. There were problems with these plans as well, and new plans were developed. Each set of plans showed different numbers of spaces being supplied. On the early plans some of the spaces were to be surface parking and some in the garage. Later plans had all of the spaces in the garage. Plans were being submitted up until November, 1979. The Board concludes that the appellant cannot reasonably argue that the information was complete prior to the effective date of the emergency order when the plans and the number of spaces provided were being changed even through November. To further substantiate this point, even as of the time of the public hearing in this matter, no work had commenced on the parking garage.

The appellant's second contention, that the Zoning Administrator's knowledge of its right to use the adjacent lot for required parking presented sufficient information, is likewise unavailing. Mr. Glasgow initially indicated on March 23, 1979 that the appellant only wanted to use enough of the lot to provide seven parking spaces. Nothing was submitted with the applications of August 1, or August 2, 1979 to show that the appellant intended to use the surface parking. The appellant stated that there was sufficient information on file in the Zoning Review Branch office to satisfy the requirements of Sub-section 8104.7. The appellant, based this on the fact that in BZA Order No. 12229, dated March 29, 1977, the Board had approved the parking spaces on the adjoining lot for use with the apartment building, upon the letter from the Corporation Counsel to Mr. Fahey informing him that the lot could be used, and upon the letter from Mr. Glasgow inquiring about the use of the seven spaces. The Zoning Administrator maintained that something more is required of an applicant than an assumption that the Zoning Administrator has knowledge of its entire file.

The applicant must in some way call the Zoning Administrator's attention to those items it wants considered, when it files the application. The only information provided in this matter before the issuance of Zoning Commission Order 291, was filed on August 9, 1979 and that consisted of plans for the construction of a parking entrance and exit ramps. The Board concludes that the appellant clearly did not provide sufficient information with its application to be "grandfathered" in under Sub-section 8104.7.

The appellant's second ground for reversal was that, even assuming that the actions of the Zoning Administrator were correct, the conduct of the employees of the Zoning Branch in accepting the applications for filing and issuing the Certificates of Occupancy and the Building Permit estopped the District of Columbia from revoking the Certificates of Occupancy. The elements of estoppel are clear. The party seeking to assert the estoppel doctrine must show (1) that he acted in good faith (2) on affirmative acts of municipal corporation (3) that he made expensive and permanent improvements in reliance thereon, (4) that the equities strongly favor the party invoking the doctrine and (5) that the reliance be justified. Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 8, 11 (D.C. App. 1978); District of Columbia v. Cahill, 60 App. D.C. 342, 54 F.2D 453 (1931).

The first question is whether the appellant acted in good faith. It is clear that the appellant's actions by its own admission were done in an effort to avoid the consequences of Zoning Commission Emergency Order No. 291. The most striking example of this is the fact that the plans for the parking ramp were filed on August 9, 1979. It is clear that the appellant wanted to get something on file, regardless of its adequacy, to get grandfathered in under Sub-section 8104.7.

There can be no question but that there were affirmative acts by the District of Columbia employees in accepting the applications and in issuing the Certificates of Occupancy and the Building Permit. However, the only action taken with regard to the August 1, 1979 application was its being marked "Complies with Zoning Regulations" which the appellant knew was incorrect. In addition, there are serious questions as to the nature of the expensive and permanent improvements claimed by the appellant. First of all it is clear that the appellant has done nothing in reliance on the building permit. The only real expensive and permanent changes the appellant can claim are renovations to the apartments in the building. The appellant asserts that a new switch board and several televisions and air conditioners are expensive improvements. The Board is of the opinion that none of these changes would seem to be permanent, and all of them could be modified for use with the apartment building.

The equities in this case do not favor the appellant at all. The purpose of the Zoning Commission Order 291 was to protect the supply of residential housing in the District of Columbia. While the appellant may not make as much money from an apartment house as it would from a hotel, nonetheless there is a valuable use for the subject property. On the other hand, the supply of rental property has clearly dwindled, and it was of such importance that the Zoning Commission concluded that emergency action was necessary. While there are equities on both sides, the balance is weighted in favor of the Zoning Administrator's decision.

The final question is whether the reliance upon the actions of the Zoning Branch were justified. It is clear that any changes made to the forty-one units for which a Certificate of Occupancy was issued may be justified. However, there is a question as to the remainder of the units. On at least one prior occasion, the overall application for the hotel units had been denied, while the partial application had been granted. The appellant, therefore, should have known that acceptance of the application for filing and the grant of a partial application did not mean that the overall application would be granted. Furthermore, the appellant, because of what had happened to prior applications, should have known that a considerable lapse of time could occur between the filing of an application and action upon it. It follows, therefore, that the appellant could not rely upon the issuance of the partial application as grounds to conclude that the overall application would not at some point be rejected. The appellant's estoppel argument, therefore, only applies, if at all, to the forty-one units granted to them on October 11, 1979.

The appellant's final argument is that the Emergency Orders did not apply to it because the Orders referred to residential structure being converted to hotel use and that it did not apply to residential units in a hotel such as the Chastleton being converted to hotel use. This argument is timely devoid of merit. The stated purpose of these orders were to prevent expansion of hotels in residential areas. The desire was to protect the supply of residential property. The appellant's reading of the Order would clearly defeat that purpose. Accordingly, the last of the appellant's preliminary motions has been disposed of. Accordingly, for all of the above reasons, it is ORDERED that the Appeal is DENIED and the Decisions of the Zoning Administrator are UPHELD.

VOTE: 4-0 (Walter B. Lewis, Connie Fortune, William F. McIntosh and Leonard L. McCants to DENY the Appeal; Charles R. Norris not present, not voting).

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

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 28 SEP 1981

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."