

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Appeal No. 13769, of the Citizens Association of Georgetown, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of James J. Fahey, Zoning Administrator, made on September 18, 1981, to approve Certificate of Occupancy No. B-125735 for a non-conforming use, "electrical sales and service (retail)" as a continuation of a use permitted under the previous Certificate of Occupancy No. 107609, issued November, 1946, in an R-3 District at the premises 3535 O Street, N.W., (Square 1247, Lot 115.)

HEARING DATE: June 16, 1982 and July 7, 1982  
DECISION DATE: August 4, 1982

FINDINGS OF FACT:

1. The appellant, the Citizens Association of Georgetown, hereinafter referred to as the CAG, appealed the decision of the Zoning Administrator in issuing Certificate of Occupancy No. B-125735, dated September 18, 1981, authorizing the use of the basement of the subject premises for "electrical sales and service (retail)."

2. The owner, Joyce Sargent, the contract purchaser, SR Associates III, and the lessee, Sound Electronics, of the subject premises, hereinafter referred to as the intervenors, as a preliminary matter to the hearing of the appeal on its merits, filed a Motion to Dismiss the appeal on the grounds that the appellant lacked standing to challenge the issuance of the certificate of occupancy for the basement use. The intervenors argued that the BZA lacked jurisdiction to hear the appeal unless the CAG could establish that it is a person aggrieved or that members of the CAG are aggrieved and the CAG has authority to represent them.

3. The appeal was filed on March 19, 1982, signed by the Zoning Chairman of the CAG. In response to the question to state the manner in which the appellant was aggrieved, the appeal form recited that "members of our Association who live near 3535 O Street reside in an R-3 area are threatened by university expansion on one side and commercial expansion along 36th Street. We do not need to increase the non-conformities here."

4. On June 15, 1982, the CAG filed a resolution dated June 14, 1982, authorizing the Chairman of the Zoning Committee to represent the interests of the effected neighbors who had requested its assistance as well as the CAG in the subject appeal. Attached to the resolution was a letter dated June 12, 1982, addressed to the Zoning Chairman and signed by Lorraine and Mary E. Gallagher of 1409 36th Street, N. W. and Helen Carroll of 3527 O Street, N. W. The said letter stated that having the subject electrical establishment:

"in the neighborhood will greatly depreciate the value of our homes. The gigantic delivery trucks are a public nuisance and the boxes piled high in the back of the dwelling could pose a health hazard. We would appreciate it if you would represent us in this matter."

The premises 1409 36th Street is immediately adjacent to the subject site. The premises 3527 O Street is a few houses removed from the subject site, but on the same block.

5. The appellant argued that the CAG, based upon prior appearances before the Board, had the necessary standing as a person aggrieved to appeal to the Board. The appellant noted that the Articles of Incorporation and the By-Laws of the CAG expressly authorized the organization to represent the interests of Georgetown residents and homeowners, including non-members of the Association, even without a formal action or resolution on the part of CAG.

6. The CAG further argued that the question of standing should be resolved on the basis of the CAG's representation of the three homeowners who signed the letter noted above.

7. The Board took the Motion to Dismiss under advisement and proceeded to hear the appeal on its merits. At its Public Meeting of August 4, 1982, upon consideration of the motion, the response of the appellant and the arguments of counsel, the Board determined that the signatories of the letter dated June 13, 1982 were persons aggrieved and that they had given the CAG the authority to represent them on the appeal. Finding that the CAG has standing as a representative, the Board makes no determination if the CAG in se has standing to appeal.

8. The subject site is located at the northeast corner of the intersection of 36th and O Streets and is known as premises 3535 O Street, N. W. It is in an R-3 District. Certificate of Occupancy No. B-125735, was issued September 18, 1981, to Joyce S. Sargent for the use of the basement for "electrical sales and service (retail)."

9. The site is improved with a two story, brick semi-detached structure with basement. Entrance to the first and second floors of the structure is both from O Street and 36th Street. Entrance to the basement is from 36th Street. None of the three levels are connected on the interior of the building.

10. Certificate of Occupancy No. 107609 was issued on November 15, 1946, to Ray Ehrmantraut for the use of the basement of the subject premises for "Electric Sales & service retail." At that time, the property was zoned First Commercial, 60, C.

11. Certificate of Occupancy A-24562 was issued on January 13, 1954, for a flat on the first and second floors. At that time the property was zoned Residential, 40, B Restricted.

12. In September, 1958, the use of the basement as "electric sales and service (retail)" was registered as a non-conforming use as required by the Zoning Regulations.

13. On November 1, 1979, Joyce S. Sargent contracted to sell the subject property to SR Associates III, a partnership of which John Katkish is the general partner.

14. Mr. Katkish has leased the subject basement to Sound Electronics of Georgetown. The lessee has been using and will use the subject basement pursuant to the certificate of occupancy dated September 18, 1981.

15. At the time that Mr. Katkish contracted to purchase the property, the first and second floors and the basement were occupied as three residential units. No certificate of occupancy existed authorizing use of the basement for a residential unit.

16. Certificate of Occupancy No. B-125734, was issued August 11, 1981, to Joyce S. Sargent for the use of the first and second floors as a flat, two units, one unit first floor, one unit second floor.

17. The CAG appealed the decision of the Zoning Administrator in issuing Certificate of Occupancy No. B-125735. The appellant contends that any non-conforming rights to use the basement for "electric sales and service (retail)" terminated when Mr. Ehrmantraut vacated the premises and moved his electrical business to a new location and the basement then became a residential unit.

18. The owners of the premises 1409 36th Street, N. W. testified that they had lived at their premises for fifty-eight years and that they were thoroughly familiar

with the Ehrmantraut family which had previously owned the subject premises. They testified that:

- A. Members of this family were electrical contractors and maintained the office for their business in the subject basement from 1941 to 1961.
- B. Some of the family resided on the property. The father, two sons, one daughter and a son-in-law were employed in the business. The daughter managed the office. The men would arrive in the morning, get their calls and leave.
- C. The office comprised one large room, a desk and a phone. There were no sales, nor merchandise on display.
- D. In 1961, the Ehrmantraut family moved its business from the basement to another location. The daughters in the family continued to reside on the premises, including the basement.
- E. There was no office use of the basement until 1981, when the present lessee occupied the basement.

19. The appellant, from the foregoing sequence of events, argued that no sales on the premises were conducted under Certificate of Occupancy 107609 and that the present lessee's use of the basement cannot be deemed a use permitted under said certificate of occupancy. The Appellant further argued that the use of the basement as an electrical business was discontinued and abandoned when the basement was put to residential use.

20. The Appellant did not produce as a witness Mr. Ehrmantraut or any real estate broker who allegedly had rented the basement for residential uses.

21. The Zoning Administrator testified that, in 1980, due to complaints, an inspection was made of the subject premises. It was found that the basement was being used illegally for living quarters. The violation was abated in the latter part of 1980.

22. The Zoning Administrator testified that it has always been the practice of the Zoning Administrator's office to look to the last lawful use as recorded in the records of the Permit Branch of the Department of Licenses, Investigations and Inspections.

23. The Zoning Administrator was of the opinion that one cannot abandon a non-conforming use by using the area illegally. He further testified that the BZA never

permitted the extension or expansion of the non-conforming use of a flat on the first and second floors to the basement portion of the building. There was no record that such an application was filed with the BZA.

24. The Zoning Administrator further testified that the electrical business of the Ehrmantraut family could not qualify as a home occupation in that employees were hired. Also, persons were employed who did not live on the subject premises.

25. Testimony submitted by the intervenors clearly establishes that the present use and the use for which Certificate of Occupancy No. B-125735 was issued is legitimately for the sale and repair of electrical appliances.

26. The last lawful use of the basement of the premises prior to the issuance of Certificate of Occupancy No. B-125735 was for "electric sales and service (retail)," under the Certificate No. 107609 issued to Mr. Ehrmantraut.

27. The appellant presented no compelling evidence or testimony that the last lawful use was ever abandoned. The illegal use of the basement for residential purposes was terminated by action of the District Government in 1980. This reinforces the Zoning Administrator's position that the lawfully permitted use of the basement was and still is the use authorized in 1946.

28. The allegations of the appellants witnesses as to the use of the basement by the former business are contradicted by the owner of that business. In a letter dated June 16, 1982, the owner indicated that sales were conducted as part of the business.

29. The plain language of Certificate of Occupancy No. 107609 indicated its issuance for the retail sales and service of electrical appliances. The certificate establishes no limitation on the intensity of that use.

30. There was no report received from Advisory Neighborhood Commission 3A.

CONCLUSIONS OF LAW AND OPINION:

The Board must first address the issue of whether the Citizens Association of Georgetown has standing to bring the appeal. Section 8 of the Zoning Act (D.C. Code, Section 5-424(f), 1981 Ed.) provides that an organization authorized to represent an aggrieved person may take an appeal to the BZA. The Board concludes that the owners and residents of the immediately adjoining property to the north and of a dwelling a few doors to the east are in such close proximity

that they potentially could be directly and explicitly affected by approval and issuance of the certificate of occupancy. Consequently, these residents have standing. Documents in the record clearly establish the role of the CAG in representing these residents and of the Chairman of the Zoning Committee in representing the CAG. The timing of the filing of those documents is not material. The CAG therefore has standing to take this appeal as a representative of the adjoining residents. The Board therefore takes no position as to whether the CAG has standing in and of itself to appeal as a person aggrieved.

Based on the record the Board concludes that the Appellant has not sustained the burden of proof. The Appellant has not established by persuasive evidence that there were no sales of products in the subject basement while the Ehrmantraut family conducted its electrical business. The Appellant has also failed to establish that the electrical business was in fact abandoned. The Board is of the opinion that the relocation of the business and the failure to use the basement in accordance with the last certificate of occupancy did not extinguish the right to continue the last legal use. The Board concludes that the use of the basement for a residential use was an illegal use and as such did not extinguish the previous non-conforming legal use. The decision of the Zoning Administrator was made on the basis of the record before him. There was no certificate of occupancy on record establishing a use other than the subject electrical sales and service in the basement. There is no reliable evidence to support that the property was ever used as a single family residence, the only use which does not require a certificate of occupancy.

Accordingly, it is ORDERED that the Appeal is DENIED and the decision of the Zoning Administrator is UPHeld.

VOTE on the Motion of intervenor to DISMISS the Appeal:  
5-0 (Walter B. Lewis, Douglas J. Patton, Connie Fortune, William F. McIntosh and Charles R. Norris to deny.)

VOTE on the appeal:  
5-0 (Walter B. Lewis, Connie Fortune, William F. McIntosh, Douglas J. Patton and Charles R. Norris 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: FEB - 4 1983

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 SUPPLEMENTAI RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."