

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 14110, of the Residential Action Coalition, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Zoning Administrator dated September 12, 1983 approving the issuance of Building Permit No. B297887 to construct a hotel and office building in a CR District at premises 2445 M Street, N.W., (Square 24, Lot 108

HEARING DATE: March 28, 1984

DECISION DATE: March 28, 1984 (Bench Decision)

FINDINGS OF FACT:

1. The property which is the subject of this appeal is located on the north side of M Street between 24th and 25th Streets and is known as premises 2445 M Street, N.W. It is zoned CR.

2. The subject appeal was filed on February 3, 1984, challenging the decision of the Zoning Administrator approving Building Permit No. B-297887, dated September 12, 1983, for the construction of a mixed-use hotel and office project on the subject premises.

3. The subject appeal alleges that Building Permit No. B-297887 was issued erroneously in that the plans approved by the Zoning Administrator did not comply with all of the provisions of the Zoning Regulations governing the CR District. Specifically, the appeal alleges that the approved plans are in violation of the height and bulk requirements, two roof structures are provided instead of one, there are violations of the parking requirements for the hotel and the prohibition against providing a parking lot in the CR District, and violations of the requirements for loading berths and platforms.

4. The subject appeal was filed by the Residential Action Coalition, hereinafter the appellant, on behalf of its members that live and/or own property in abutting and nearby squares.

5. The owners of the subject property, represented by counsel, appeared as a party to the case, pursuant to Section 100.7 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment.

6. As a preliminary matter, the Board considered a motion made by counsel for the owners of the subject property to dismiss the appeal on the following grounds:

- a. The appellant lacks standing.
- c. The allegations made by the appellant lack specificity and are premature.
- d. The appeal herein was not "timely" filed as required by Section 201.1 of the Supplemental Rules of Practice and Procedure governing the appellate jurisdiction of the Board.
- e. The appeal is barred by the doctrine of laches.
- f. The appeal is barred by the doctrine of equitable estoppel.

7. In March, 1982, an application requesting the closing of four public alleys in the subject square was filed with the Office of the Surveyor as Case No. 82-70. A public hearing on the requested alley closing was held on September 23, 1982, and the requested alley closings were subsequently approved under Bill No. 4-524, dated October 13, 1982. Subsequent to the adoption of Bill No. 4-254, the alley closings were recorded with the Office of the Surveyor in August, 1983.

8. On May 11, 1983, the architect for the subject project applied to the D.C. Department of Consumer and Regulatory Affairs (DCRA) for a building permit for a mixed-use development on the subject site consisting of a nine-story hotel and an eight-story office building with two levels of underground parking providing 145 parking spaces. The total estimated cost of the project was \$34,000,000.

9. Subsequent to the recording of the alley closings referred to in Finding of Fact No. 8 and review and approval of the submitted plans, the DCRA issued Building Permit No. B-297887 on September 12, 1983. In reliance upon the issuance of that building permit, the initial stages of construction of the first phase of the project began in October, 1983. The owners had no notice of the intent to appeal the issuance of the subject building permit.

10. The owners of the subject property contend that at the time that the subject appeal was filed in February, 1984, the total costs incurred on the project exceeded \$15,000,000.

11. By February 3, 1984, the excavation work for the project had been completed, the first tower crane was in place, fifty percent of the footings and the first section

of the slab on grade had been poured, and excavation of the elevator pit was underway.

12. Subsequent to notice of the filing of the subject appeal in February, 1984, construction on the project has continued and additional expenses totalling \$535,000 were incurred by the date of the public hearing on the appeal.

13. The revocation of the subject building permit at this point would result in substantial detriment to the owners as a result of the substantial expenditures and permanent improvements made by the owners in reliance, in good faith, upon the issued building permit during the five months which elapsed between the issuance of the building permit and the filing of the subject appeal. Counsel for the owners contended that the elements of estoppel and laches are also present in the subject case and the Board is therefore precluded from granting the subject appeal.

14. The doctrine of laches comprises two basic elements, namely (a) unreasonable delay in bringing the appeal, and (b) prejudice to the party asserting laches Goto v. District of Columbia BZA, 423 A.2d 917, 923 (D.C. App., 1980).

15. The elements of estoppel as set forth in Wieck v. District of Columbia BZA, 383 A.2d 7 (D.C. App., 1978) comprise "[A] party (a) acting in good faith, (b) on affirmative acts of a municipal corporation, (c) makes expensive and permanent improvements in reliance thereon, and (d) the equities strongly favor the party invoking the doctrine. ... Furthermore, the reliance of the party must be justifiable."

16. As to the issue of timeliness, counsel for the owners contended that the "time to file and appeal ordinarily commences to run when notice, actual or constructive, is given the party affected by the order to be appealed." Counsel argued that the subject appeal is not timely filed in that notice of the proposed project has been a matter of public record since 1982, when the processing of the alley closings in the subject square commenced. In any event, the appellant was aware of the issuance of the subject building permit five months before the filing of the appeal, and on the initiation and continuation of construction on the project four months prior to the filing of the appeal. The appellant's delay in bringing the subject appeal gives rise to the doctrine of laches.

17. As to the issue of laches, counsel argued that the community has had knowledge of the proposed construction since 1982 when the City Council conducted public hearings to close public alleys in Square 24. Members of Advisory Neighborhood Commission 2A and the Dupont Circle Citizens Association and an adjacent property owner participated in the proceedings. The property owner filed for the permit in

May, 1983. Further, the permit was issued in September, 1983, and construction began the following month, but this appeal was not filed until February, 1984. Since substantial work under the building permit has been completed, the prejudice to the owners if the building permit were revoked would be enormous.

18. As to the issue of estoppel and the elements of good faith and reliance on acts of a municipal corporation, the property owner proceeded to meet procedural and substantive requirements in good faith in obtaining all issued permits for the construction of the building. Through the issuance of building permits with prior zoning approval, the property owner reasonably assumed it was proceeding in full conformity with the Zoning Regulations and the Building Code. All required plans were filed. Such plans were reviewed and determined to be in compliance by the appropriate city officials. Permits were obtained and substantial expenditures incurred as a result of that reliance.

19. As to the element of expensive and permanent improvements, after the initial issuance of a building permit on September 12, 1984, the property owner broke ground at the site and began construction on October 28, 1983. The property owner's costs have been approximately \$15,125,100 since the issuance of the permit to the time of filing of this appeal. An additional \$535,000 has been spent since the appeal was filed. These expenses would not have been incurred if the District of Columbia Government had not given its approval to the construction of the building or the appellant had filed the appeal in a timely manner. The property owner had no reason to suspect that an appeal would be filed in February, 1984, since the project had been known to the community for two years and construction had commenced in October, 1983. Also, the property owner was not given any notice of the appeal until after it was filed.

20. As to the equities strongly favoring the property owner, the subject appeal, if upheld by the Board, would cause the revocation of a building permit for a nine-story mixed-use structure six months after the building permit was issued and five months after construction was started. The appellant sat by while the property owner changed its position to its substantial detriment. If the appellant had timely filed the appeal, the issues raised in the appeal could have been resolved before the property owner made substantial expenditures pursuant to the issuance of the building permit on September 12, 1983.

21. Reliance by the property owner in this case was justifiable because the persons who approved the building permit as to zoning compliance were the properly empowered administrative officials to make such a decision.

22. The appellant opposed the motion to dismiss the appeal filed on behalf of the owners.

23. The appellant contended that the appeal was filed in a timely manner in that although the appellant was aware of the issuance of the building permit and that construction has been started on the project, the appellant had no concrete evidence of the existence of violations of the zoning requirements until the appellant obtained a copy of a covenant, dated September 15, 1983, pertaining to parking on the subject site.

24. The appellant obtained a copy of the subject building permit in September, 1983. The appellant further attempted to review the approved plans at that time but was unable to locate them in the Zoning Administrator's office.

25. Approximately one week later, the appellant was provided with a partial copy of the approved plans, used for topographic approval, by the Deputy Zoning Administrator. The appellant was unable to determine, based on review of those plans, whether violations of the Zoning Regulations existed. The zoning computation sheets for the subject project had been approved by the duty authorized zoning technician in accordance with standard office procedure, but the Deputy Zoning Administrator had not yet reviewed those figures.

26. During October and November, 1983, the appellant spoke with the Zoning Administrator and the Deputy Zoning Administrator on several occasions. The Zoning Administrator informed the appellant that no certificate of occupancy would be issued for the hotel use if the project was not in compliance with the parking requirements.

27. The Deputy Zoning Administrator located a copy of the full set of plans approved, instructed the zoning technician to present the zoning computation figures to him in a more orderly fashion, and made an appointment with the appellant to review those plans and computations. That meeting took place on December 6, 1983.

28. The appellant testified that subsequent to the meeting with the Deputy Zoning Administrator on December 6, 1983, the appellant was not able to determine in what respects, if any, the plans were in violation of the zoning requirements. No copy of the zoning computations were given to the appellant. The Zoning Administrator testified that the representative of the appellant could have copied the information if she so desired.

29. The appellant became aware, in January, 1984, of the existence of a covenant between the owners of the property pertaining to parking on the subject site which the

appellant alleged indicates a violation of the parking requirements and use regulations of the CR District. The appellant obtained a copy of that covenant, dated September 15, 1983, on approximately February 2, 1984. The subject appeal was filed on February 3, 1984. The appellant contended that the appeal was, therefore, filed in a timely manner. The appellant did not testify as to how it was made aware of the existence of the covenant.

30. The Zoning Administrator testified that the covenant, which the appellant argues is evidence that the approved plans do not comply with the applicable zoning requirements, was not considered when the building permit application was approved. The covenant, therefore, is not germane to the subject case. The Zoning Administrator further noted that the District of Columbia was not a party to the subject covenant, and further, that the covenant was not filed with the Recorder of Deeds until September 15, 1983, three days subsequent to the approval of the building permit, dated September 12, 1983. The Board so finds.

31. Counsel for the owners contended that the covenant which was the basis for the appellant's action in filing the subject case can not be considered as germane to the subject case in that said covenant was not before the Zoning Administrator at the time of the decision which is being challenged. Counsel further contended that the covenant was a matter of public record, recorded on September 15, 1983, subsequent to the approval of the building permit but nevertheless approximately five months prior to the filing of the subject appeal. It was counsel's opinion that diligent pursuit by the appellant would have obliged the appellant to seek appropriate relief, based on the issuance of the building permit and the recording of the covenant, in a manner more in keeping with the "timely" requirement of the Supplemental Rules of Practice and Procedure before the BZA.

32. The appellate jurisdiction of this Board is conferred by the Zoning Act, Section 5-424, D.C. Code (1981 Ed.) as set forth by the Zoning Commission in the Zoning Regulations. Section 201.1 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment further requires that an appeal be filed in a "timely manner".

33. Even though the Rules do not specify a specific number of days within which a decision must be appealed, inherent in the "timely" requirement is a jurisdictional criteria that an appeal may not be brought after an unreasonable period of time has elapsed. Even without such an express requirement, appeals must be brought within a reasonable period of time in order to invoke the appellate jurisdiction of the Board. The Board may not waive a

jurisdictional impediment and, consequently, may not waive the requirement that an appeal be "timely" filed.

34. The subject appeal was filed on February 3, 1984, approximately five months after the issuance of Building Permit No. B-297887, dated September 12, 1983. The appellant was clearly aware, based on the evidence and testimony submitted, that construction on the project was taking place for at least four months prior to the filing of the appeal. The appellant was able to review the plans and computation sheets relative to the proposed project on December 6, 1983, approximately two months prior to the filing of the appeal. The Board finds that the appeal was not timely filed pursuant to Section 201.1 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment.

35. The Board also finds that based on Finding Nos. 17 through 20, the appeal is further barred by laches and estoppel.

36. Advisory Neighborhood Commission 2A, by report dated March 20, 1984, addressed the issues and concerns of the ANC relevant to the merits of the appeal, and did not address the issues in the motion to dismiss. The Board's decision in the subject appeal was based on the jurisdictional question of timeliness and the doctrines of laches and estoppel. The Board, therefore, did not consider the issues and concerns of the ANC relative to the merits of the case.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and the evidence of record, the Board concludes that it must consider the jurisdictional question of timeliness, as well as the applicability in this case of the doctrines of laches and estoppel.

The Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment do not set a specific time limit following a decision within which an appeal may be filed. Because appeals may be filed by persons who are aggrieved by a decision who are not applicants for permits or who are not directly notified of the decisions, it is possible that an appellant may not know of a decision until some other action has occurred, such as the beginning of construction or the opening of a use.

Although this Board has set no specific limit for the filing of appeals, it has uniformly held where the issue has been raised that appeals filed seven to nine months after the Zoning Administrator's action are untimely. See Orders of the Board in the appeal of Robert E. Love, BZA Appeal No. 14054, May 29, 1984 (eight month delay); Appeal of California

Steak House, BZA Appeal No. 13967, November 22, 1975 (eight month delay); Appeal of Arthur H. Fawcett, Jr., BZA Appeal No. 11158, July 22, 1976 (seven month delay); and Appeal of Christian Embassy, Inc., BZA Appeal No. 12142, June 8, 1976 (nine month delay). Under the current Rules, therefore, persons faced with the potential of filing appeals should act promptly to preserve their rights. If subsequent actions can resolve the matter before the Board acts on the appeal, the appellant always has the right to withdraw the appeal.

In the subject appeal, the appellant was aware of the issuance of the building permit in September, 1983, and was further aware of the beginning of construction on the proposed project in October, 1983. The subject appeal was not filed until February, 1984, approximately five months after the issuance of the building permit. The appellant's failure to determine that, in the appellant's opinion, the approved plans did not comply with the requirements of the Zoning Regulations until early 1984, does not lessen the impact that the passage of time has had upon the construction taking place.

The Board further concludes that the doctrine of laches applies in the subject case in that the appellant was aware of the issuance of the building permit and the onset of construction of the subject site and yet delayed filing of the appeal for several months. The appellant did not notify the owners of the property that the issuance of the building permit was disputed at any time prior to the filing of the subject appeal. Construction was undertaken and continued in good faith. The proper course of action for the appellant was to have brought an immediate appeal and to have sought a judicial stay of construction. The appellant's failure to act in a timely manner permitted the owners to incur substantial expense for construction in good faith reliance upon their building permit.

The Board further concludes that the elements of estoppel, as outlined in Finding of Fact No. 15, are in existence in the subject case. The record evidences that the owners acted in good faith, in reliance on the affirmative action of the District of Columbia government, and made expensive and permanent improvements on the subject premises. The equities favor the owners of the property in this case.

Accordingly, it is ORDERED that the appeal is DISMISSED on the grounds that it was not timely filed, that the appeal is barred by laches, and further that the District of Columbia is estopped from revoking the issued building permit. No further action by the Board on the subject appeal is necessary, and the Board makes no findings or conclusions on the merits of the allegations of error raised by the appellant.

VOTE: 4-0 (Maybelle T. Bennett, Charles R. Norris,
William F. McIntosh and Carrie L. Thornhill to
dismiss; Douglas J. Patton not voting, having
recused himself).

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

ATTESTED BY:



STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: JUL 24 1984

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS
AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH
PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE
OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS.

14110order/LJP6