GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 14212 of Advisory Neighborhood Commission 6A, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Zoning Administrator, dated August 8, 1984, in approving the issuance of Certificate of Occupancy No. B139563 for the use of the first floor and basement of the subject premises as a delicatessen and restaurant seating fifteen persons, not sexually oriented, in an R-4 District at premises 320 D Street, N.E. (Square 780, Lot 79).

HEARING DATE: November 28, 1984
DECISION DATE: November 28, 1984 (Bench Decision)

FINDINGS OF FACT:

1. The property which is the subject of this appeal is located on the north side of D Street, between 3rd and 4th Streets and is known as premises 320 D Street, N.E. It is zoned R-4.

2. The subject property is improved with a three-story plus basement row dwelling. The second and third floors of the subject premises are devoted to residential use. The first floor and basement of the subject premises have had a history of nonconforming commercial uses dating back to 1949.

3. Certificate of Occupancy No. B139563, dated August 8, 1984, for a delicatessen and restaurant, seating fifteen, not sexually oriented, was issued for the first floor and basement of the subject premises by the D.C. Department of Consumer and Regulatory Affairs.

4. The subject appeal was filed on September 7, 1984, pursuant to Sections 8102 and 8206 of the Zoning Regulations. The appellant alleges that contradictory decisions were issued in writing regarding the application for the certificate of occupancy and that it is aggrieved by the decision approving issuance of the certificate of occupancy in that a long-abandoned nonconforming use will be resumed to the detriment of the neighborhood.

5. The statement of the appellant, marked as Exhibit No. 16 of the record, indicates that the appellant sought to provide evidence and testimony to prove as follows:

A. The first floor and basement of the building have

not been used for a restaurant and delicatessen for at least eight years and, more importantly, the use of the first floor had reverted to residential use.

B. The Zoning Administrator acted erroneously in not requiring the applicant for the certificate of occupancy to meet the burden of proof that the nonconforming use had not lapsed.

6. As a preliminary matter at the public hearing of November 28, 1984, a representative of the Capitol Hill Restoration Society requested permission to intervene in the subject appeal for the following reasons:

A. The premises involved in the subject appeal are located within the geographic boundaries of the Society as designated by its bylaws.

B. A number of members of the Society live within the immediate area of the premises involved in the subject appeal.

C. The subject appeal involves a number of important issues about the lapse of nonconforming uses and the Society has appeared and taken positions on that issue in cases before the D.C. Court of Appeals, the Zoning Commission and the Board of Zoning Adjustment.

D. The outcome of the subject appeal will directly affect the position of the Society relative to nonconforming uses, property owned by the Society, and its members.

The Chairperson ruled that the Capitol Hill Restoration Society be permitted to intervene and be afforded party status.

7. As a further preliminary matter at the public hearing, counsel for the owner of the subject premises requested that the Board dismiss the subject appeal on the grounds that the issues raised in the appeal are not properly before the Board.

8. In support of the motion to dismiss, counsel for the property owner argued that:

A. The issues raised by the appellant in the subject appeal, as set out in Exhibit No. 16, were not ruled upon by the Zoning Administrator and did not form the basis for the determination to approve the issuance of Certificate of Occupancy No. B139563.

B. Sub-section 7107.1 provides that discontinuance of a use for a period of three years constitutes prima facie evidence of abandonment, and any subsequent use shall conform to the Regulations now in effect. The provisions of Sub-section 7107.1 were in effect at the time that the certificate of occuancy in question was approved, but they cannot be applied retroactively to include the period prior to the effective date of the sub-section in determining whether there was abandonment of an existing nonconforming use.

C. Sub-section 7104.3, cited by the appellant in Exhibit No. 16 is no longer a part of the current Zoning Regulations and was not considered by the Zoning Administrator in approving the certificate of occupancy.

9. The appellant and intervenor opposed the motion to dismiss. The intervenor testified that Sub-section 7104.3 was cited in the subject appeal because Sub-section 7107.1 was not retroactive and, therefore, the regulation in effect prior to the adoption of Sub-section 7107.1 seemed to be in order. The major thrust of the appeal is to provide evidence of the abandonment of the nonconforming use of the subject premises. The intervenor was of the opinion that it was the burden of the applicant for a certificate of occupancy to prove that there had been no abandonment of the nonconforming use.

10. Sub-section 7107.1 of the Zoning Regulations became effective on August 5, 1983 and provides as follows:

> "Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for a period of more than three years, shall be construed as a prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located."

11. Sub-section 7104.3 of the Zoning Regulations was eliminated from the Zoning Regulations subsequent to the revisions of the nonconforming use provisions on August 5, 1983. Sub-section 7104.3 provided that, prior to August 5, 1983:

> "When an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming use or less restrictive use."

12. The Zoning Administrator testified that the normal processing of an application for a certificate of occupancy involving a nonconforming use involves the following steps:

A. An application for a certificate of occupancy is filed and checked for completeness.

B. Records of the prior use, if any, are examined.

C. The application and records of prior use are referred to the zoning technician who checks the zoning of the property and reviews the file to check the prior use of the property, in particular, the last valid use of the property.

D. The last valid use of the property is examined to check whether it pertains to the particular floor or floors which are subject to the application for the certificate of occupancy.

E. The last use, date of certificate of occupancy, and zoning district are entered onto the application form. There is space on the application form for the applicant to indicate the last use of the property, as well as the proposed use.

F. The application and records of prior use are compared to identify whether the proposed use is identical to and occupies the identical space as the prior use evidenced by the last certificate of occupancy.

G. If the last use permitted by a valid certificate of occupancy is identical to the proposed use, a certificate of occupancy is approved and issued.

H. In the event that a question is raised as to whether the use was continuous, the Zoning Administrator's staff checks with other agencies to determine whether there are records such as licenses, tax records, affidavits from property owners or operators, and old leases available to verify the use of the premises over the years.

I. If the Zoning Administrator's staff is unable to determine whether a use has been continuous, the applicant for the certificate of occupancy is contacted and requested to furnish any evidence which it has to prove that use has not been discontinued or reverted to a conforming use.

J. If the applicant is able to produce such evidence to the satisfaction of the Zoning Administrator,

and no evidence to the contrary is presented, the certificate of occupancy remains valid for lack of grounds to deny or revoke approval of the certificate of occuancy.

13. In the subject case, the Zoning Administrator testified that an application for a certificate of occupancy was property filed for use of the premises as a delicatessen and restaurant. The prior records were checked and found to be for the same use as proposed. The certificate of occupancy was, therefore, approved and issued.

14. Subsequent to the issuance of the certificate of occupancy, concerns regarding the issuance of the certificate of occuancy were brought to the attention of the Zoning Administrator by a neighboring property owner and representatives of the Advisory Neighborhood Commission who claimed that the nonconforming use of the subject premises had been discontinued for a period of years. No material evidence of the abandonment of use or reversion of the use to a conforming use was presented to the Zoning Administrator by the neighbor or the ANC.

15. In conformance with office policy, the applicant was requested to submit information verifying the continuous use of the subject premises for nonconforming purposes. Based on the review of the materials submitted by the applicant in support of his contention that there was no abandonment of use and in consideration of the Zoning Regulations in effect at the time of the application for the certificate of occuancy, the Zoning Administrator determined that there was no evidence of a discontinuance or abandonment of the nonconforming use.

16. In addition, it was the opinion of the Zoning Administrator that the provisions of Sub-section 7107.1 of the Zoning Regulations could not be applied retroactively. Therefore, the three year period of discontinuance of a use cited to indicate an abandonment of a nonconforming use can only be counted from the effective date of the amended regulations, namely from August 5, 1983.

17. Based on the information before him, the Zoning Administrator determined that there were no grounds for the denial of or revocation of the certificate of occupancy issued for restaurant and delicatessen use of the subject premises.

18. As indicated in Exhibit No. 16 of the record and as set forth in Finding No. 5, the appellant took no position on the Zoning Administrator's opinion concerning the applicability of Sub-section 7107.1 of the Zoning Regulations or its enforcement.

19. The appellant stated that, as part of its presentation, evidence would be offered to prove that the use had been discontinued and, further, that the use of the subject premises had reverted to residential use. The appellant testified that it informed the Zoning Administrator of that intention orally prior to filing the appeal but was of the opinion that it was the burden of the applicant to prove the continuous nonconforming use of the property. Therefore, the evidence which the appellant planned to present at the hearing had not been shown to the Zoning Administrator prior to the public hearing.

20. Based on the information before it, the Board finds that the subject appeal is before it prematurely. The Board must determine the outcome of an appeal based on the evidence upon which the Zoning Administrator based his original decision. In the instant case, the appellant has not presented the Zoning Administrator with sufficient evidence to support its claims. Had the appellant provided the Zoning Administrator with such evidence, his determination regarding the validity of the certificate of occupancy in question may have been different. In any event, the Board can not consider material evidence which was not before the Zoning Administrator at the time of his decision and the appeal would more properly be filed before the Board after a decision has been made by the Zoning Administrator after examining all the evidence available.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and the evidence of record, the Board is of the opinion that the decision of the Zoning Administrator which is the subject of this appeal was not based on the evidence available to the appellant and proposed to be presented by the appellant. The Board concludes that the determination by the Zoning Administrator to issue the certificate of occupancy for the subject premises was based on the evidence available to him, which included evidence contained in the records of the District of Columbia as evidenced by the previous certificate of occupancy and evidence presented by the applicant that there was no abandonment of use. No material evidence was presented to the Zoning Administrator by the appellant to demonstrate that the use had been abandoned or that the use has reverted to a residential use. The Board further concludes that the appeal is prematurely filed. The appellant should more properly present to the Zoning Administrator the evidence available to it. Based on the Zoning Administrator's determination after review of all the available information, the appellant may file a new appeal from that decision, if necessary.

The Board will make a determination based only on the evidence that the Zoning Administrator had before him at the

time of his decision. The Board will not take into account evidence and facts that were not before the Zoning Administrator. Accordingly, it is ORDERED that the appeal is hereby DISMISSED as not being properly before the Board.

VOTE: 5-0 (Douglas J. Patton, Charles R. Norris, William F. McIntosh, Lindsley Williams and Carrie L. Thornhill to dismiss).

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

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

FINAL DATE OF ORDER: 20 FEB 1985

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.

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