

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 15264 of Eugene A. Thompson, pursuant to 11 DCMR 3105.1 and 3200.2, from the decision of Hampton Cross, Administrator, Building and Land Regulation Administration of the Department of Consumer and Regulatory Affairs, made on December 21, 1989 to the effect that the certificate of occupancy for a "Bed and Breakfast" use should be revoked for the Adams Inn in an R-5-B District at premises 1744-46 Lanier Place, N.W., (Square 2580, Lots 360-824).

HEARING DATE: March 28, 1990
DECISION DATE: May 2, 1990, April 3, 1991 and July 10, 1991

RECONSIDERATION ORDER

INTRODUCTION:

The Board voted to deny the appeal at its public meeting of May 2, 1990. The order denying the appeal became final on February 22, 1991. The Board concluded that the actual use of the premises is inconsistent with the rooming house certificate of occupancy and that the appellants had the responsibility of applying for the occupancy permit that most accurately described the intended use.

The appellant filed an appeal of the Board's decision with the District of Columbia Court of Appeals. The appellant also filed with the Board a motion dated March 21, 1991, to stay the effectiveness of the Board's February 22, 1991 order denying the appeal. On April 3, 1991, the Board granted the stay pending resolution of the matter by the Court of Appeals. Based on another decision made by the Board on April 3, 1991 favoring appellants in a similar case, the subject appellant requested that the court remand the case to the Board. The government consented to this request. The case was remanded on June 6, 1991. On June 14, 1991, the appellant filed with the Board a motion for reconsideration of the decision in the appeal. In support of his motion, the appellant argued that the government is estopped from revoking the certificate of occupancy and that the doctrine of laches bars the revocation.

Contrary to the finding by the Board that only the first three elements of estoppel are met, the appellant argued that all of the elements are met in this appeal. The appellant pointed out that in good faith, he relied on the guidance provided to him by the Zoning Administrator when he asked what use category he should apply for to operate his bed and breakfast facility. Relying on what the Zoning Administrator told him, the appellant maintains that he sought and was issued a rooming house certificate of occupancy. Appellant also indicated that he made substantial financial

investments in acquiring and renovating the property. The appellant argued that the equities are strongly in his favor because he will lose his livelihood if the permits are revoked. He will be deprived of the reward of his investment and labor and his employees will lose their jobs. Furthermore, the city will lose a valuable resource, reasonably-priced lodging for visitors and neighbors' guests. He stated that the only factor favoring the government which the Board identified in its decision was the government's obligation to enforce the laws. He argued that the obligation to enforce the laws is not a proper factor to consider in balancing the equities because the government always has this obligation. To invoke this as a factor would nullify the operation of the doctrine of equitable estoppel as a defense. He also pointed out that neither the government nor the intervenors introduced any specific evidence of equities favoring the government or of any specific negative consequences of the Adams Inn. On balance, the appellant argued that the equities are strongly in his favor and that all of the elements of estoppel have been met.

The appellant's second main argument is that the doctrine of laches precludes revocation of the certificates of occupancy. Laches requires a showing of prejudice to the appellant caused by an unreasonable and unexplained delay in government action. The appellant pointed out that the Board found the delay by the government to be insufficient to warrant the application of laches. The appellant believes that the Board was correct, however, in determining that he had expended considerable sums in reliance upon the promised and actual issuance of the certificate of occupancy. The appellant cited Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 925 (D.C. Ct. App. 1980), which states that "[t]he principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself," (citation omitted). Therefore, it is argued that the Board must consider the prejudice to the appellant. Here, appellant argues that the prejudice is shown by loss of the investment in the purchase of the building, the expenditure of \$75,000.00 on the building as well as the additional investment of time and energy in establishing the business.

Next, the appellant pointed out that the Board must determine when the government became aware of the use and whether there was an unreasonable and unexplained delay in action. The appellant argued that the government became aware of his intention to operate a bed and breakfast when he informed the Zoning Administrator, Mr. Fahey, of his intentions in 1982. Therefore, the government was aware of the use much sooner than after the 1987 survey. The appellant maintained that the Zoning Administrator had actual notice of the intended use. The government should not be able to

disclaim this knowledge simply because there was no inspection of the premises at the time of the certificate of occupancy application.

The appellant argued that the government waited six years before acting on the certificate of occupancy. This, he claimed, is an unreasonable period of time. He also claimed that the delay was without an adequate explanation by government officials. Between 1982 and 1987 no action was taken. In 1989 there was the notice of intention to revoke. The government explained that the delay between the 1987 survey and the 1989 action was to give the appellant an opportunity to come into compliance with the Zoning Regulations. The appellant argued, however, that he did not agree to comply with the government's position because he believed he was in compliance with the regulations. Appellant noted the government's argument that a further delay was created because it agreed not to bring an enforcement action against the appellant. The appellant argued, however, that by filing the enforcement action before the Administrative Law Judge in December 1988, the government, itself, failed to act in accordance with any agreement to forego enforcement action.

Based on the foregoing, the appellant maintained that the elements of laches, prejudice and delay which are unreasonable and unexplained, are present in the subject appeal. In his view, the government's action to revoke the occupancy permits should, therefore, be barred.

On June 25, 1991, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") filed a statement in opposition to the appellant's motion for reconsideration. In its statement DCRA incorporated by reference its previously-filed pleadings and stated that the appellant raises no issues of fact or of law which were not considered and ruled on by the Board.

The Kalorama Citizens Association ("KCA" or "Association") filed a statement on June 25, 1991, also opposing the motion for reconsideration. The KCA stated that all of the arguments offered by the appellant in support of his motion for reconsideration were fully heard and considered by the Board and found to be without merit. Further, the appellant raised no new issues or identified any errors of law or fact that entitle him to a rehearing.

KCA argued that the appellant was afforded ample opportunity to argue the merits of his appeal. The proceedings before the Board complied with all of the requirements of law and the decision reached by the Board is valid and enforceable.

The Association noted that substantial testimony was entered into the record from a number of entities in opposition to the appeal. It also indicated that the government introduced detailed testimony from the Zoning Administrator and the Office of Compliance officials that the appellant had knowingly and deliberately violated the zoning laws in operating his inn and expanding his business on the premises cited as well as onto three adjoining sites.

Finally the KCA argued that considerable evidence was received from all parties on all of the matters now addressed again by the appellant in his motion to reconsider. In its decision of February 22, 1991, the Board rejected all of the appellant's arguments, basing the decision on compelling evidence and statutory grounds. Both the Zoning Administrator and the Board have determined that the certificates of occupancy are invalid. In the KCA's view, the appellant has failed to present a good reason to modify those decisions.

Upon review of the motion, the responses thereto, the transcript of the proceedings and its final order, the Board concluded that its determination that the Zoning Administrator did not err in deciding to revoke the rooming house certificates of occupancy, is not supported in the record. At its public meeting of July 10, 1991, the Board voted to reconsider its decision in the subject appeal and finds as follows:

FINDINGS OF FACT:

1. The properties that are the subject of this appeal are Lots 360, 359, and 824 in Square 2580. They are located on the south side of Lanier Place, N.W. There has been some discrepancy about the addresses of these lots, each of which is improved. Officially, the building and the lot numbers are as follows: Lot 360 - 1744 Lanier Place; Lot 359 - 1746 Lanier Place; and Lot 824 - 1748 Lanier Place. In 1983, the appellant, owner of these properties, removed the house numbers from 1744 and 1746, and changed them to 1742 and 1744 respectively. Consequently, the building addresses and lot numbers presently correspond as follows: Lot 360 - 1742 Lanier Place; Lot 359 - 1744 Lanier Place; Lot 824 - unchanged from 1748 Lanier Place. For purposes of this order, the lot numbers and the original (and official) addresses will be used.

2. Lot 360, 1744 Lanier Place, is improved with a brick, semi-detached, three-story structure with basement. There is also a carriage house, or garage, at the rear of the site. The structure contains 13 rooms and seven bathrooms.

3. Lot 359, 1746 Lanier Place and Lot 824, 1748 Lanier Place, are each also improved with a brick, semi-detached, three-story structure with basement. At 1746, there are 11 rooms and three baths. At 1748 Lanier Place, there are nine rooms and three baths.

4. On or about October 17, 1982, the appellant applied for a certificate of occupancy for 1744 Lanier Place, N.W. The appellant indicated to the office of the Zoning Administrator that he wished to operate a bed and breakfast establishment at the premises. Appellant was informed by that office that no such use existed under the Zoning Regulations and that he would have to examine the uses defined and select the one that best fits the intended use. Mr. Fahey, the Zoning Administrator, told the appellant that for a bed and breakfast use, a rooming house certificate of occupancy should be requested. This is because without a dining room, the facility would not be a hotel. Furthermore, hotels are not permitted in residential districts. Pursuant to these instructions, the appellant applied for a rooming house certificate of occupancy.

5. At the time that the appellant applied for the certificate of occupancy, the procedure in the office of the Zoning Administrator was to issue a certificate of occupancy without inspecting the property if the same type of certificate of occupancy previously existed on that property. The appellant indicated on the certificate of occupancy application that the prior use of 1744 Lanier Place was a rooming house. He based this assumption on seeing people enter and leave the property regularly while he lived across the street for several years at 1749 Lanier Place. However, there is no record of a prior certificate of occupancy existing on the property.

6. On August 9, 1983, appellant was issued Certificate of Occupancy No. B132960 for a rooming house at 1744 Lanier Place, N.W., Lot 360 Square 2580. No certificate of occupancy was applied for or received for Lots 359 or 824. The appellant changed the addresses after the certificate of occupancy was received. The addresses were changed so that mail addressed to 1744 Lanier Place would be delivered to the building known as 1746 Lanier Place, the new location of the appellant's office. Also, visitors to 1744 would be directed to the building originally containing the 1746 address.

7. The lots are located in an R-5-B District. While rooming houses are permitted in residential districts, inns are not.

8. The appellant invested \$75,000 renovating the property for the proposed use. Subsequently, he and his wife opened their

establishment and called it the "Adams Inn". The sign bearing this name appears on 1746 Lanier Place.

9. In describing the establishment, the appellant testified that 1744 Lanier Place has 17 bedrooms and seven baths. On the first floor there is a fireplace and telephone. The television set is kept there, as well as games and puzzles for use by the guests. Coffee is provided for refreshment and pre-packaged continental breakfasts are served. The appellant maintains that there is no dining room or kitchen. The Adams Inn serves out-of-town tourists as well as guests of neighbors.

10. Around 1987 a number of city residents began to complain to their Councilmembers about the proliferation of inns in residential districts and the negative impact that they have on these neighborhoods.

11. In September of 1987, at the request of Councilmember John Ray, Chairman of the Committee on Consumer and Regulatory Affairs, DCRA conducted a regulatory survey of bed and breakfast facilities in the District of Columbia. They were compared with rooming and boarding houses located in the city.

12. The survey team consisted of inspectors in the following fields: food, zoning, housing, electrical and construction. There was also an Office of Compliance (OCOM) investigator.

13. While conducting the survey at the Adams Inn, the OCOM investigator was informed by appellant's wife, Mrs. Thompson, that the average length of stay of guests at the Adams Inn was from one to three days and that rooms were rented on a daily basis. He also learned that continental breakfasts were served. The inspectors concluded that the facility contains a kitchen and central dining area. Based on the information gathered in the survey, the DCRA determined that the Adams Inn operated as an inn rather than as a rooming house.

14. Responding to the concerns raised over inns in residential districts, the Zoning Commission held hearings in February of 1988 on the issues of home occupations and transient accommodations. At these hearings, DCRA presented the information gathered in its survey.

15. In March 1988, Diana Haines, Director of the Office of Compliance, directed the appellant and other owners of bed and breakfast establishments to attend a compliance meeting held on or about March 9, 1988. Appellant was directed to bring to the compliance meeting information about any licenses that he possessed with respect to the business, any certificates of occupancy, tax

information, and any communications he had with DCRA concerning how the appellant determined that the business was a rooming house. Appellant failed to attend this meeting.

16. By letter dated June 7, 1988, the Office of Compliance directed the appellant to obtain a certificate of occupancy and business license for an inn within two weeks of receiving this letter. Appellant was also informed that penalties would result for failure to comply with these directions. Appellant did not comply with the mandate of OCOM.

17. On or about August 9, 1988, the appellant was issued a Notice of Infraction from the Office of Compliance. He was cited for using a building without complying with the certificate of occupancy, in violation of 11 DCMR 3204.4.

18. In September 1988, Diana Haines, Acting Chief, OCOM, met with Hampton Cross, Administrator of the Building and Land Regulation Administration (BLRA); Patricia Montgomery, Assistant Administrator, BLRA; Paul Waters, Enforcement Officer, OCOM; and Jonathan Farmer, an attorney representing another bed and breakfast establishment. They discussed the enforcement action that DCRA would take concerning bed and breakfast establishments that were operating without an inn certificate of occupancy.

19. At that September meeting, Mr. Farmer, attorney for other property owners, requested that DCRA hold in abeyance any enforcement action against the bed and breakfast facilities pending the publication of the Zoning Commission's final rules on transient accommodations. Considering this a reasonable request, DCRA agreed to honor it.

20. On December 16, 1988 the hearing on the appellant's case was held before an Administrative Law Judge (ALJ). The government moved for dismissal of the case, stating that the issues were unclear. The appellant did not join the government in the request for dismissal.

21. The Office of Adjudication issued its Decision and Order on December 16, 1988. The ALJ found that the respondent (appellant herein) did not receive notice of the hearings. It was also noted that the government moved for dismissal. The case was dismissed based on the government's motion.

22. DCRA waited a year for final action by the Zoning Commission. Because no final action was taken by October 1989, DCRA sent a letter, dated October 26, 1989, to the appellant indicating an intention to revoke the rooming house certificate of occupancy on 1744 Lanier Place.

23. On November 3, 1989, Zoning Commission Order No. 614 (Case No. 87-31) on Transient Accommodations became effective. The new regulations more clearly delineate the guidelines for determining whether an inn or rooming house use is being made of the property.

24. By letter dated December 21, 1989, Hampton Cross, Administrator, BLRA, advised the appellant of his intention to revoke the certificate of occupancy issued for 1744 Lanier Place unless review was sought by the Board of Zoning Adjustment.

25. On December 31, 1989, the appellant filed this appeal with the Board of Zoning Adjustment. The appellant maintained that to revoke the certificate of occupancy would be an error because the use complies with the rooming house use as that term was defined in 1983. The appellant submitted an extensive statement to the Board in opposition to the proposed revocation. The appeal was set for hearing on March 28, 1990.

26. A rooming house survey was conducted on March 27, 1990. The Adams Inn was inspected again. The findings were substantially the same as in the bed and breakfast survey that took place in 1987. It was found, however, that in addition to 1744 Lanier Place being operated as a bed and breakfast facility, the appellant had expanded his business to 1746 and 1748 Lanier Place as well as to the second floor of the garage on Lot 360.

27. At the hearing before the Board, the appellant first argued that because the case was dismissed by the ALJ, there is no final decision of the Zoning Administrator from which to appeal and that the Zoning Administrator has the burden of proving that the bases for his intent to revoke are valid. He maintains that the government is in the position of "appellant" in this case.

28. The Board finds that the decision of the Zoning Administrator is final in that it represents the department's determination to revoke the rooming house certificate of occupancy. The Zoning Administrator effectively stayed final action to afford the appellant an opportunity to come into compliance. The failure to comply would effectuate final revocation. Because the decision to revoke was final, the property owner is the appellant who bears the burden of proving error.

29. The appellant maintains that the rooming house certificate of occupancy should not be revoked, and he bases his argument on the following:

- a. The use fits the definition of rooming house that was effective in the Zoning Regulations in 1983;
- b. The Zoning Administrator is precluded from relitigating the validity of the certificate of occupancy;
- c. estoppel;
- d. laches; and
- e. lack of authority of the Zoning Administrator to interpret and construe the Zoning Regulations.

30. In 1983, the definition of rooming house was silent as to kitchens and dining facilities. Therefore, they were not prohibited. The appellant indicates that the establishment contains a sink and refrigerator, but that this does not constitute a kitchen. The continental breakfasts served are pre-packaged, not prepared on the premises.

31. The Zoning Administrator's office relied on the conclusions reached by the inspectors that there is a kitchen and a dining room and that guests rent the rooms on a daily basis for an average stay of three to seven days. These factors led the Zoning Administrator to conclude that the use of the facility more closely fits the "inn", rather than the "rooming house", definition.

32. Appellant asserted that the Zoning Administrator's office is precluded from relitigating the issue of whether their certificate of occupancy is valid, because the District of Columbia government had a full opportunity to litigate this issue at the hearing before the Administrative Law Judge (ALJ).

33. The doctrine of issue preclusion prevents the same parties from relitigating an issue actually decided in a previous, final adjudication, whether on the same or a different claim.

34. The Board finds that the issue was not litigated at the hearing before the ALJ, that the case was dismissed because the issues were unclear. Therefore, the hearing before the Board is not a relitigation of an issue previously decided.

35. At the hearing appellant argued that the government is estopped from revoking the certificate of occupancy.

36. The elements of estoppel, as set forth in Goto v. District of Columbia Board of Adjustment, D.C. App., 423 A.2d 917, 925 n.15 (1980), are as follows:

(1) actions taken by petitioner in good faith, (2) some affirmative response by the District, (3) that petitioner made expensive and permanent improvements in reliance, and (4) that the equities are strongly in petitioner's favor.

37. Appellant asserted that the elements of estoppel are present in this case. He maintained that in good faith, he informed the Zoning Administrator, Mr. Fahey, of the intended use of the premises and the amenities that would be offered. Mr. Fahey told him that the proper certificate of occupancy would be one for a rooming house. The appellant then purchased the premises and the government issued a rooming house permit. Since the purchase, the appellant has permanently improved the premises by investing \$75,000 in reliance on the certificate of occupancy. He also leased and improved parking spaces for use by their patrons. Finally, he argued that in four years of operating the facility, the government failed to raise any questions about the validity of the certificate of occupancy, that there is no prejudice to the District of Columbia because the facility is an asset in the community and that the equities are strongly in his favor.

38. The government maintained that three of the four elements of estoppel were not met. The government stated that by altering the addresses on the subject premises and adjacent buildings to allow for impermissible expansion of the facility, the appellant did not act in good faith. It is asserted that these acts of the appellant cannot be based upon any action taken by the government. Finally, the government argued that the equities do not favor the appellant.

39. The Board finds that the good faith action at issue is that of applying for the certificate of occupancy and that actions taken subsequent to that are irrelevant to the good faith argument herein made.

40. The Board finds that the appellant made a good faith effort to ascertain what type of permit would be proper for the use he described to the official at the Zoning Administrator's office; that the official advised the appellant that a rooming house certificate of occupancy would be proper; and that the appellant made improvements in reliance on the information provided. The Board also finds that the government wishes to have the appellant comply with the Zoning Regulations by either scaling down the use, applying for a certificate of occupancy for an inn, or seeking relief from the Board for such use. Since, as the government is

aware, inns are not allowed in an R-5-B District, the Board finds that to apply for a permit to operate an inn does not represent a viable option because any certificate of occupancy application for an inn will be denied forthwith.

41. The appellant argues that laches bars the attempted revocation. The doctrine of laches is defined in Wieck v. D.C. Board of Adjustment, 383 A.2d 7, 11 (D.C.. Ct. App. 1978) as:

the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches.

The appellant maintains that the certificate of occupancy was issued in 1983, at which time the government was fully aware of the intended use of the property. He further argues that the government waited until 1987 to question the validity of the certificate of occupancy and it did not begin to proceed with its action against him until 1989. The appellant argues that no explanation was offered for these delays.

42. The government, on the other hand, maintains that it was unaware that the appellant was operating an inn until the bed and breakfast survey was conducted in 1987. The government asserts that no immediate enforcement action was taken so that the appellant would have an opportunity to come into compliance with District of Columbia law. The appellant was informed of this in September 1988 at the compliance meeting. The government also notes that it delayed enforcement action further upon the request of an attorney for persons in the same position as the appellant.

43. The Board finds that the government was aware of the intended use of the property when the appellant initially applied for the certificate of occupancy in 1982. It was not until 1988 after the bed and breakfast survey that the government decided to revoke the certificate of occupancy that was validly issued in 1982. The government has not provided the Board with a satisfactory explanation for its lack of action between 1982 and 1987. The government's failure to act left the appellant with the impression that his operations could proceed as planned. He then invested money, time and labor into his business. If his operations are forced to cease, his investments will be lost.

44. The appellant argued that the Zoning Administrator has no authority to interpret and construe the Zoning Regulations, that to do so is to usurp the authority of this Board.

45. The Board finds that the Zoning Administrator has the authority to revoke a certificate of occupancy if it is invalid according to the applicable Zoning Regulations.

46. The appellants ultimately argued that the regulation pursuant to which the Zoning Administrator bases his authority to revoke the certificate of occupancy (14 DCMR 1406 et.seq.) and the law promulgating these provisions, are invalid.

47. The Board has no authority to determine the validity of these two pieces of legislation.

48. Joseph J. Bottner, the current Zoning Administrator, testified about the procedures for processing certificate of occupancy applications. He stated that when an applicant seeks to establish a use that is not defined in the Zoning Regulations, the applicant is told that the use is not defined and he will be shown the uses that are defined. The applicant will then be asked to select the use category whose definition best fits the use proposed. He stated that if a rooming house certificate of occupancy is requested for property zoned R-5-B and the criteria are met, the Zoning Administrator's office would approve the application for zoning purposes. He further indicated that prior to 1987 the occupancy permit would be issued without an inspection as long as the previous certificate of occupancy was also for a rooming house. After August 1987, there would have been an inspection because it was at this point that the Office of Planning and Zoning Commission proposed text amendments to require inspections for all rooming house and boarding house certificate of occupancy permits.

49. Mr. Bottner told the Board that he was unaware of the bed and breakfast use until 1986 when people began to complain.

50. The Board finds that Mr. Bottner was not the Zoning Administrator in 1982, and although his policy is to require the applicant to ultimately select the use category, Mr. Fahey may have told the applicant which category to select. The Board finds that it is not unusual that the current Zoning Administrator was unaware of the use before the issue was raised in 1986. The Board finds, however, that based on discussions held with the appellant, Mr. Fahey, the former Zoning Administrator was aware of the use. The Board further finds that the Pre-Occupancy data sheet of the Department of Licenses, Investigations and Inspections, dated January 18, 1983 and signed by Gladys Hicks describes the proposed uses: "Rooming House - 12 guest Bedrooms". (emphasis added)

51. Finally, the Zoning Administrator testified that in his view the central dining area located at the site, takes the use of

the rooming house category. He conceded, however, that the rooming house definition does not make a provision for dining facilities or kitchens.

52. Diana Haines testified that the Councilmembers wanted the bed and breakfast establishments to be compared to other facilities with rooming house or boarding house certificates of occupancy. They were interested in what, if anything, was being done differently. During the survey it was learned that at other rooming houses, the guests stayed longer (about one month), they were residents of the District of Columbia, they had jobs and simply stayed at the facilities. Ms. Haines testified that the inspectors used the information gathered in the survey to distinguish the various uses, i.e. apartments, hotels, rooming houses, boarding houses and inns.

53. Ms. Haines further testified that after examining the survey results and the pre-1989 definitions of rooming house and inn, she determined that the "animal" before her was more like an inn than a rooming house. She thought that the facility, although licensed as a rooming house, may be misclassified. She was also of the view that the central dining room takes the facility out of the rooming house category.

54 The Kalorama Citizens Association (Association) requested that it be permitted to intervene in the subject appeal on behalf of owners of property within 200 feet of the site. The Board granted the Association's request.

55. The Association expressed opposition to the appeal and requested that it be denied. In its statement to the Board, the Association addressed all of the major issues raised by the appellant and the government, and expressed its support for the government's position on these matters. The Association argued that the Adams Inn is not a rooming house, but an inn that provides accommodations to transient guests. As an inn, it is improperly located in a residential district.

56. Responding to the issue raised by the Kalorma Citizens Association, the Board finds that the Zoning Regulations in effect at the time that the Adams Inn began operating defined the term "inn" with more particularity than the term "rooming house". The definition of "rooming house" did not describe length of stay while the "inn" definition explicitly included "habitable rooms or suites reserved exclusively for transient guests who rent these rooms or suites on a daily basis". The Board finds that the transient use of a rooming house was not prohibited by the Zoning Regulations.

57. By letter dated March 21, 1990, Advisory Neighborhood Commission (ANC) 1C expressed the position that the certificate of occupancy should be revoked. By resolution adopted March 7, 1990, the ANC 1C noted that for the past ten years it has reviewed the issues arising from the operation of bed and breakfast establishments in residential zones. ANC 1C observed that such operations cause the following problems:

- a. They increase noise;
- b. disturb neighbors;
- c. deprive residents of public parking;
- d. create additional trash with attendant trash disposal problems;
- e. increase traffic on residential streets, both automobile and service supply vehicles, private and commercial;
- f. artificially inflate property values;
- g. reduce the availability of residential housing; and
- h. unlawfully and unfairly compete with similar businesses in commercial zones.

The ANC concluded, therefore, that it is an inappropriate use, that there is no justifiable reason for a zoning adjustment and the appeal should be denied.

58. The Board appreciates the concerns of ANC 1C which address the inappropriateness of commercial uses in residential areas. However, because the ANC's concerns do not address the definitional issues raised in this appeal, the Board does not base its decision on the position of ANC 1C.

59. A representative of the Residential Action Coalition testified in opposition to the appeal. She indicated that property owners should be required to comply with the Zoning Regulations and anti-conversion laws, that the city and citizens acted in a timely fashion to prevent the continuation of unlawful uses and that there is a great concern over the loss of housing stock in the District of Columbia.

60. The Ward One Council, by letter dated March 28, 1990, expressed its opposition to the appeal. The association expressed

support for the efforts of the government in enforcing the Zoning Regulations and protecting residential areas from nonresidential uses.

61. Councilmembers John Ray, Chairman of the Committee on Consumer and Regulatory Affairs; Betty Anne Kane, at-large Member; and Frank Smith, Ward One representative; testified in favor of the revocation. They expressed concern over the message that will be conveyed if property owners are permitted to circumvent the regulations. The Councilmembers urged the Board to assist the government in its attempt to protect the housing stock in the city. They requested that the appeal be denied.

62. A neighbor residing at 1789 Lanier Place, N.W. testified in opposition to the appeal. He noted that the appellant had adequate opportunity to comply with the requirements of the DCRA but that he did not do so. He also expressed an interest in preventing the intrusion of commercial uses into residential districts.

63. Two letters and a petition containing 13 signatures were received in opposition to the appeal. No letters were received in support.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that the Zoning Administrator erred in deciding to revoke the rooming house certificate of occupancy for premises 1744 Lanier Place, N.W.

When the appellant applied for the certificate of occupancy, "rooming house" was defined in the Zoning Regulations as follows:

Rooming House - A building or part of a building, other than a motel, hotel, or private club, that provides sleeping accommodations for three (3) or more persons who are not members of the immediate family of the operator or manager, and when the accommodations are not under the exclusive control of the occupants.

Section 199.9 of the Zoning Regulations also contained the following definition of "inn".

Inn - A building or part of a building in which habitable rooms or suites are reserved exclusively for transient guests who rent these rooms or suites on a daily basis. Guest rooms or suites may include kitchens, but central dining other than continental breakfast for guests is not allowed. Commercial

adjuncts, function rooms, and exhibit space as permitted in hotels are not allowed. The term "inn" shall not be interpreted to mean motel, hotel, private club, or apartment house.

On November 3, 1989 these definitions were amended by Zoning Commission Order No. 614. They are now defined as follows:

Rooming house - a building or part thereof that provides sleeping accommodations for three (3) or more persons who are not members of the immediate family of the resident operator or manager, and in which accommodations are not under the exclusive control of the occupants. A rooming house provides accommodations on a monthly or longer basis. The term "rooming house" shall not be interpreted to include an establishment known as, or defined in this title as, a hotel, motel, inn, bed and breakfast, private club, tourist home, guest house, or other transient accommodation.

Inn - a building or part of a building in which habitable rooms or suites are reserved primarily for transient guests who rent the rooms or suites on a daily basis. Guest rooms or suites may include kitchens, but central dining, other than breakfast for guests, is not allowed. The term "inn" may be interpreted to include an establishment known as a bed and breakfast, hostel, or tourist home, but shall not be interpreted to include a hotel, motel, private club, rooming house, boarding house, tenement house, or apartment house.

The Board concludes that when the appellant applied for the certificate of occupancy, he was obligated to inform the Zoning Administrator of the intended use of the property. Likewise, the Zoning Administrator was responsible for examining the requirements in the Zoning Regulations and making a sufficient inquiry about the proposed use to allow for an informed decision about the appropriateness of the use category on the certificate of occupancy application.

The Zoning Regulations do not require an applicant for a certificate of occupancy to select the use category that most closely fits the proposed use. The use must simply meet all of the requirements or come within all of the limitations of the Zoning Regulations governing that use.

The Board concludes that the appellant's facility meets the pre-1989 definition of rooming house. The Adams Inn is a building, other than a motel, hotel or private club. It provides sleeping accommodations for more than three persons who are not members of

the appellant's immediate family, and the accommodations are not under the exclusive control of the occupants.

While the Board appreciates the government's efforts to enforce the laws by conducting a survey to ascertain the actual uses that occur at various sites throughout the city, the Board concludes that the survey classifications cannot form the basis for invalidating the certificate of occupancy on the subject property. This is because the government's basic inquiry was improper. In cases such as this, the issue is not whether the actual use more closely fits a use category other than the one on the occupancy permit, the issue is whether the actual use meets the definition of the use category approved. For a certificate of occupancy to be revoked, there must be an inconsistency between the Zoning Regulations and the actual use. The Board concludes that in the subject case, however, no evidence has been presented to demonstrate that such an inconsistency does exist. The Board concludes, therefore, that the certificate of occupancy is valid and should not be revoked.

The Board is of the view that the government would be estopped from revoking the certificate of occupancy even if found to be invalid. The elements of estoppel are:

- (1) actions taken by petitioner in good faith, (2) some affirmative response by the District, (3) that petitioner made expensive and permanent improvements in reliance, and (4) that the equities are strongly in petitioner's favor.

In this case the Board believes that the appellant made a good faith effort to ascertain the correct use category for his bed and breakfast operations. The Zoning Administrator led the appellant to believe that rooming house certificates of occupancy were being issued for bed and breakfast uses. The appellant applied for a rooming house certificate of occupancy and the permit was approved. Relying on the permit, the appellant invested substantial amounts of money in purchasing and improving the property. The Board points out that if the permit is revoked, operations would have to cease. The appellant would then be deprived of his livelihood as well as all that he has invested in the business. The Board finds that the government has presented little evidence of any injury it would sustain should operations be allowed to continue. The government primarily expressed its desire to have the actual use and the occupancy permit consistent with one another by requiring the appellant to either, scale down the existing use, apply for an inn certificate of occupancy, or apply for relief from the Zoning Regulations to operate a bed and breakfast. The government's position would carry more weight if the use and the permit were, in fact, inconsistent. The Board therefore concludes that, under the

circumstances, the equities more strongly favor the appellant and all of the elements of estoppel are met.

The Board also concludes that if the certificate of occupancy were invalid, laches would bar its revocation. The doctrine of laches is the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches.

In the subject appeal, the government asserts lack of knowledge of the bed and breakfast use until complaints were registered around 1987. The Board believes that if the government did not know of the intended use it was because no inspection was conducted on the property in conjunction with the certificate of occupancy application. The Board is of the view that there should have been an inspection because there was no record of the previous use. The Zoning Administrator characterized the property's prior use as a rooming house based on a mere assumption made by the appellant. Without a certificate of occupancy for verification, an inspection should have been conducted to determine if the prior use and the proposed use were the same. The government offered no explanation for its failure to inspect the property in 1982 or 1983 in light of the missing certificate of occupancy. The Board believes it was the lack of an inspection that caused the delay in government action. The Board concludes that the five-year period between 1983 and 1988 was an unreasonable amount of time to fail to assert the right to revoke an occupancy permit. Furthermore, had an early inspection been conducted, the government could have raised any issues relative to the appropriateness of the use and the validity of the certificate of occupancy before the appellant made advances toward establishing the business which is now fully operational. Had the government acted within a reasonable period of time, the appellant could have curtailed his investments and activities designed to further his bed and breakfast facility prior to their becoming substantial. The Board therefore concludes that the government failed to assert its right to revoke for an unexplained and unreasonable period of time under circumstances prejudicial to the appellant. The elements of laches have therefore been met.

Ultimately, the Board concludes that the certificate of occupancy is valid and that the decision to revoke it was made in error. Having reached this conclusion, the Board finds it unnecessary to apply equitable estoppel or laches to bar the revocation.

The Board concludes that it has considered the views and concerns expressed by ANC 1C under the "great weight" statute.

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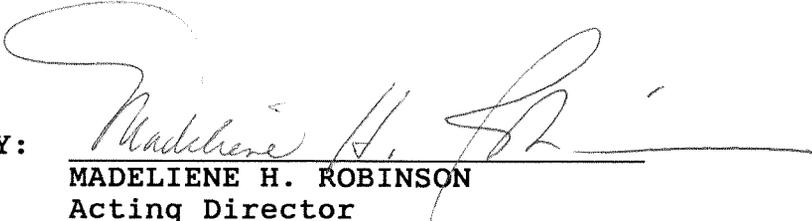
In light of the foregoing it is hereby ORDERED that the decision of the Board is REVERSED and the appeal is GRANTED.

DECISION DATE: July 10, 1991

VOTE: 3-0 (Charles R. Norris, Carrie L. Thornhill and John G. Parsons to grant; Paula L. Jewell not present, not voting, Sheri M. Pruitt not voting, not having heard the case).

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

ATTESTED BY:


MADELIENE H. ROBINSON
Acting Director

FINAL DATE OF ORDER:

FEB 27 1992

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "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."

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.

15264Order/TWR/bhs

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15264

As Acting Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on FEB 27 1992 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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A large, stylized handwritten signature in black ink, which appears to read "Madeliene H. Robinson". The signature is written over a horizontal line.

MADELIENE H. ROBINSON
Acting Director

DATE: FEB 27 1992

15264Att/bhs