

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 15347 of Olga M. Mazza, Trustee, on behalf of the Louise B. Mazza Family Trust, pursuant to 11 DCMR 3200.2 and 3105.1, from the decision of Joseph F. Bottner, Zoning Administrator made on May 15, 1990, to the effect that Certificate of Occupancy No. 1891667 shall be revoked as issued in error due to rezoning of a rugs and antique store in an R-2 District at premises 2815 Ordway Street, N.W., (Square 2068, Lot 72).

Appeal No. 15350 of Ali R. Farshneshani, pursuant to 11 DCMR 3200.2 and 3105.1, from the decision of Joseph F. Bottner, Zoning Administrator, made on May 15, 1990 to the effect that Certificate of Occupancy No. 1891667 shall be revoked as issued in error due to rezoning of a rug and antique store in an R-2 District at premises 2815 Ordway Street, N.W., (Square 2068, Lot 72).

HEARING DATE: October 10, 1990
DECISION DATE: November 7, 1990

FINDINGS OF FACT:

1. The property which is the subject of these appeals is located at 2815 Ordway Street, N.W. It is currently zoned R-2.

2. The lot is improved with a two-story with basement brick row structure built in 1929.

3. On August 6, 1973, Certificate of Occupancy No. B86689 was issued on the property to Gaylord Originals, Inc. for retail sales of lampshades, lamps, antiques and decorative accessories. The exact period of time that the property was used for this purpose is undetermined.

4. On August 20, 1986, the owners of 2815 Ordway Street, N.W. conveyed the property to the Louise B. Mazza Family Trust, Olga M. Mazza, Trustee.

5. In 1987, the trustee leased the property to Shanghai Express, Inc. On November 12, 1987, Certificate of Occupancy No. 151756 was issued to Shanghai Express for use of the property as a delicatessen on the first floor and offices in conjunction with the deli on the second floor. The deli/carryout operated at this site for a period of time, then it broke its lease with the owner.

6. The owner leased the property to Ali R. Farshneshani who moved in about one month after Shanghai Express, Inc. vacated the premises. During this short vacancy period, Farshneshani had some renovations done on the property.

7. Upon the request of Advisory Neighborhood Commission (ANC) 3C, the Cleveland Park Historical Society, the Woodley Park Community Association and others, the Zoning Commission held hearings on the rezoning of lots 72 (the subject lot), 73 and 74 in Square 2068. At that time the lots were zoned C-2-A. The proposal was to rezone them to R-2.

8. The Zoning Commission voted to rezone the lots. Notice of proposed rulemaking was published in the D.C. Register on March 3, 1989. On May 8, 1989, the Zoning Commission adopted the rezoning (See Z.C. Order No. 616).

9. On September 26, 1989, Ali R. Farshneshani applied for a certificate of occupancy to operate FARS Oriental Rugs, Inc. at the subject premises. On November 9, 1989, Certificate of Occupancy No. 1891667 was issued to use the basement, first and second floors for retail, wholesale and auction of rugs.

10. Three days prior, on November 3, 1989, the Zoning Commission's notice of final rulemaking was published in the D.C. Register.

11. Concerned about the activities of FARS Oriental Rugs, Inc., members of the neighborhood lodged complaints with the Historic Preservation Division and the Inspection Division of the Department of Consumer and Regulatory Affairs (DCRA). On February 13, 1990, the Cleveland Park Historical Society (CPHS) submitted a written complaint to the Zoning Administrator questioning the validity of the November 6th certificate of occupancy issued on the subject property in light of its rezoning to R-2. CPHS requested that the Zoning Administrative investigate the matter and bring the property into compliance with applicable D.C. Zoning Laws and Regulations.

12. After examination of the documents and applicable regulations the Zoning Administrator determined that the certificate of occupancy had been issued in error. By letter dated May 15, 1990, the Zoning Administrator notified FARS that he proposed to revoke Certificate of Occupancy No. 1891667 because the permit was issued in error since the property had been rezoned. He also informed FARS of the right to appeal the proposed revocation.

13. On May 23, 1990, Olga M. Mazza, Trustee for the owner of the property, filed an appeal of the proposed revocation. (Appeal No. 15347). On May 25, 1990, Ali Farshneshani, the business operator, also filed an appeal. The two appeals were consolidated and at the hearing before the Board, the Cleveland Park Historical Society was permitted to intervene.

14. The appellants argued that the commercial use of the subject property goes back to 1973 with Gaylord Originals, Inc. The commercial use continued with Shanghai Express and subsequently with FARS, the appellant. The commercial uses predate the downzoning of the property by the Zoning Commission and there is no evidence to indicate that the prior nonconforming commercial use has been retreated from or surrendered. Therefore, the appellants argued, the owner has a vested property right in the commercial use of the property pursuant to 11 DCMR 3203.7 which states as follows:

Any use of a structure or land, or part of any structure or land, for which a certificate of occupancy has been issued before May 12, 1958, may be continued or established in accordance with the terms of that certificate of occupancy.

The appellant requested that the revocation of the certificate of occupancy be held in abeyance to give the appellants an opportunity to apply for a special exception to change a prior non-conforming use.

15. Joseph F. Bottner, Zoning Administrator, testified that the certificate of occupancy should be revoked. He stated that the zoning classification placed on the September 26, 1989 certificate of occupancy application was C-2-A. It was approved by the Zoning Technician. The certificate of occupancy records indicated that a use change was being made from a delicatessen to a rug business and an October 4, 1989 inspection date was scheduled for the premises. Inspection approvals for the proposed rug business were received from the Construction Office on October 5, 1989; from the Electrical Branch on October 10, 1989; from the Fire Department on November 1, 1989 and from the Plumbing Branch on November 6, 1989.

16. On November 3, 1989, the D.C. Register published the notice of final rulemaking to, among other things, rezone the subject property from C-2-A to R-2. The Zoning Administrator stated that on November 6, 1989, the certificate of occupancy was issued to the rug business, classifying the zoning as C-2-A.

17. On January 30, 1990, a question was raised by the ANC regarding the validity of the certificate of occupancy. The Zoning Administrator stated that initial research by his staff indicated that the occupancy permit was valid. However, he received a letter from the Cleveland Park Historical Society raising further concerns about the occupancy permit. This letter led him to further investigate the matter. It was determined that, based on laws relating to certificate of occupancy issuances, the certificate of occupancy had been approved and issued in error. This is because the subject property was being considered for R-2 residential zoning when the certificate of occupancy application

was filed. When a certificate of occupancy application comes in to the Zoning Administrator's office, the Zoning Technician has the responsibility to indicate what the current zoning is. He or she is also responsible for changing this zoning designation if there is a proposal being considered by the Zoning Commission for that property. In this case, however, no change was made and the technician reviewed the application with the C-2-A designation rather than the more restrictive R-2 residential classification. For this reason, the Zoning Administrator stated, the certificate of occupancy application should have been denied and the certificate of occupancy should now be revoked.

18. Advisory Neighborhood Commission (ANC) 3C, by report dated October 3, 1990, resolved to oppose the appeals because the property is zoned R-2 and the proposed commercial business is inappropriate in this residential district.

19. By letters dated October 5, 1990, and through testimony at the hearing, the Cleveland Park Historical Society (CPHS), intervenor, expressed opposition to the appeals. CPHS is a non-profit corporation created to protect the historic character of the Cleveland Park Historical District. Its membership consists of approximately 400 families in the Cleveland Park neighborhood.

20. CPHS testified that it helped to initiate the rezoning proposal for the subject property and that Louise Mazza, appellant, attended the meeting at which the Zoning Commission decided to approve the R-2 rezoning classification. CPHS pointed out that the Zoning Commission's decision was made in May of 1989, months before the certificate of occupancy application was filed by FARS Oriental Rugs, Inc. Therefore, the issuance of a certificate of occupancy to operate a commercial business at the site was erroneous.

21. First, CPHS argued that the appellant, owner of the property, has no vested property rights in a prior nonconforming use which constitutes an entitlement to a certificate of occupancy for a commercial use. CPHS stated that District of Columbia Zoning Regulations specifically regulate the issuance of certificates of occupancy where property is in the process of being rezoned. At the time FARS filed its application for a certificate of occupancy for the property, these regulations did not provide for the vesting of occupancy rights upon the filing of an application for a certificate of occupancy. Such vesting of occupancy rights had earlier been eliminated by decision of the Zoning Commission on January 20, 1989. (Z.C. Order No. 588 at No. 4). In this decision, the Zoning Commission repealed Sub-section 3203.8 and replaced it with a new provision which permitted the certificate of occupancy to "be established and continued pursuant to the terms of the certificate and the provisions of this title in

effect on the date that the certificate is issued..." (Ibid.) CPHS noted that no mention was made of rights vesting when the certificate of occupancy application is filed.

Secondly, CPHS argued that 11 DCMR 3203.7, the provision upon which the appellants rely, has also been amended by the Zoning Commission. The amendment denies vesting of occupancy rights where an application for a certificate of occupancy is filed after a decision has been made by the Zoning Commission to hold a hearing on a rezoning proposal. (Z.C. Order No. 636, Nov. 10, 1989). This was the case with the September 26th filing by the applicant.

Finally, CPHS argued that the appellants may not rely on the occupancy permits issued on the property prior to the rezoning to justify a commercial use that is inconsistent with the zoning plan. CPHS stated that when the rezoning decision was published, the property was vacant. Before the vacancy occurred, the property was occupied by a deli, Shanghai Express. Therefore, the wholesale and retail sale of rugs was not an existing prior non-conforming use of the property at the time of the rezoning. Accordingly, the Zoning Administrator could not legally have issued the FARS certificate of occupancy on the basis of a prior non-conforming use.

For the foregoing reasons, CPHS opposed the appeals and requested that the Board uphold the proposed revocation.

22. Mr. and Mrs. O'Sullivan, two neighbors, presently residing at 3410 Newark Street, N.E. testified in opposition to the appeals. Both are members of the Cleveland Park Historical Society, as well as co-chairs of the Society's architectural review committee. Mr. O'Sullivan testified that until about one and a half years ago, he and his wife resided at 2821 Ordway Street, in close proximity to the site. He stated that during their residency of approximately ten years, they passed by the site several times a day. To his knowledge the subject site was never used as a retail establishment before Shanghai Express came in. He had never before heard of Gaylord's.

Mr. O'Sullivan testified that there was adequate notice of the Zoning Commission's hearings on the rezoning proposal. Furthermore, the appellant, Mazza, attended those hearings and was therefore aware of the rezoning.

23. Both Mr. and Mrs. O'Sullivan testified that the appellant, Farshneshani, was uncooperative in regard to seeking the necessary permits from historic preservation entities and DCRA.

24. No testimony was presented by neighbors in support of

the appeals.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing Findings of Fact and evidence of record, the Board concludes that the appellants are appealing the proposed revocation of Certificate of Occupancy No. 1891667 issued on November 6, 1989 for the retail, wholesale and auction of rugs at 2815 Ordway Street, N.W.

Appellants argue that the certificate of occupancy should not be revoked because there is a vested property right in the prior nonconforming use of the site as a retail establishment. They point out that they only wish to continue the nonconforming use. Appellants rely on 11 DCMR 3203.7, the actual wording of which is not set forth by the appellants. The Board must assume, therefore, that the appellants base their argument on the original version of Sub-section 3203.7 which states as follows:

3203.7 Any use of a structure or land, or part of any structure or land, for which a certificate of occupancy has been issued before May 12, 1958, may be continued or established in accordance with the terms of that certificate of occupancy.

The Board concludes that the appellants have not established the applicability of this provision to their case. They have submitted no evidence of a certificate of occupancy on this property issued before May 12, 1958. They have provided evidence of uses only as far back as 1973. Therefore, the validity of the current certificate of occupancy cannot be established or sustained based on Sub-section 3203.7 of the Zoning Regulations.

In his statement to the Board, the Zoning Administrator also relied on Sub-section 3203.7 in proposing to revoke the certificate of occupancy. Apparently, however, the Zoning Administrator relies on the most recent amendment to this regulation which provides as follows:

3203.7 If an application for a certificate of occupancy is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed use, the processing of the application, and the establishment of the occupancy shall be governed as follows:

- (a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment,

the processing of the application and completion of the work shall be governed by sub-section 3203.8;

- (b) Except as otherwise provided in sub-section 3203.11, if the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any use authorized by the certificate of occupancy may be established and maintained, only in accordance with the most restrictive provision of the zone district classifications being considered for the site, or in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding;
- (c) For purposes of paragraph (b) of this sub-section, the phrase "zone district classifications being considered for the site" shall include any zone district classification that the Zoning Commission has decided to notice for adoption and the zone district classification that is in effect on the date the application is filed;
- (d) The limitation that is set forth in paragraph (b) of this sub-section shall not apply to a decision to hold a hearing on an application that is filed by an owner of property, pursuant to paragraph 102.2(a) of this title; and
- (e) The limitation that is set forth in paragraph (b) of this sub-section shall not apply to an application for a certificate of occupancy that only changes the identity of the owner or occupant, and does not change a use authorized by a certificate of occupancy that was issued either before the decision to hold a hearing or pursuant to (a) of this sub-section.

This version of 11 DCMR 3203.7 reflects the amendment in Zoning Commission Order No. 636, Case No. 87-2 (Vesting of Construction and Occupancy Rights II - Text Amendments). The Board notes that this Order did not become final and effective until November 10, 1989, four days after the certificate of occupancy was issued. The Board concludes that this amended version of 3203.7 is therefore inapplicable to this case and that the Zoning Administrator's reliance on it was misplaced. Had this

regulation been in effect, Sub-section 3203.7(b) would have required the Zoning Administrator to process the application taking into consideration the R-2 zone classification. This is because the certificate of occupancy application was filed after the Zoning

Commission set the hearings for proposed rezoning of the property and because the R-2 District was the most restrictive of the zone district classifications being considered for the site. The R-2 District is also the zone classification that the Zoning Commission adopted for the site in its final decision. But since this regulation did not become effective while the certificate of occupancy application was pending, the Zoning Administrator was not required to consider the proposed R-2 zoning when reviewing the application.

In light of the foregoing, the question which remains is, if a lot has one zoning classification when a certificate of occupancy application is filed and that classification is changed before the certificate of occupancy is issued, which zoning classification applies to this application? The answer to this question requires an examination of 11 DCMR 3203.8. It must first be noted, however, that this provision was amended by Z.C. Order No. 588, effective date January 20, 1989. As amended, Sub-section 3203.8 provides in pertinent part:

"Any use ... may be established... pursuant to the provisions of this title in effect on the date that the certificate [of occupancy] is issued,..."

The certificate of occupancy in this case was issued on November 6, 1989. Thus, the certificate of occupancy must be issued pursuant to the provisions of Title 11 in effect on this date. By Z.C. Order No. 616 (Case No. 86-26 and 87-27) the zoning map was amended to change lot 72 from C-2-A to R-2. This Order became effective on November 3, 1989, three days before the certificate of occupancy was issued. The amendment set forth in this order are therefore applicable to this case.

Following the mandate of Z.C. Order No. 616, the use proposed in the certificate of occupancy application must be permitted as a matter-of-right in the R-2 District for a valid certificate of occupancy to be issued without relief from this Board. Clearly a retail establishment is not a matter-of-right use in a residentially zoned district. The Board concludes, therefore, that the certificate of occupancy allowing this use was issued in error.

The Board concludes that when the change in zoning went into effect on November 3, 1989, there existed a certificate of occupancy on the property issued to Shanghai Express to use the property as a delicatessen. This use then became a nonconforming

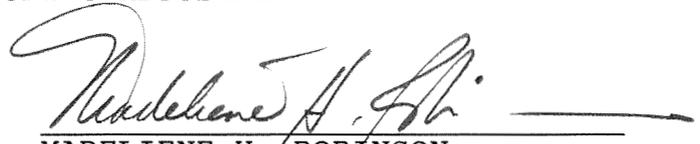
use in the R-2 District. Based on this fact, the Zoning Administrator had two options with regard to handling the pending certificate of occupancy application by FARS. He could have either a) denied the application and required the applicant to seek a special exception to change a nonconforming use or b) denied the application because the proposed use is not permitted by the regulations governing uses in R-2 Districts.

The Board concludes that, given the circumstances in this case, the certificate of occupancy should have been denied and the decision of the Zoning Administrator to approve it was erroneous. The Board therefore concludes that the Zoning Administrator's decision to revoke the certificate of occupancy is proper and the appeals challenging the revocation are hereby **DENIED**.

VOTE: 4-0 (Paula L. Jewell, Charles R. Norris and Carrie L. Thornhill to deny the appeals and uphold the Zoning Administrator's decision; Lloyd D. Smith to deny and uphold by proxy; Sheri M. Pruitt not voting, not having participated in the case).

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

ATTESTED BY:



MADELIENE H. ROBINSON
Acting Director

FINAL DATE OF ORDER: _____

NOV 1 1991

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."

ord15347-15350/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



APPLICATION/APEAL NO. 15350 & 15347

As Acting Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that a copy of the Order in this application/appeal dated NOV 27 1991 has been 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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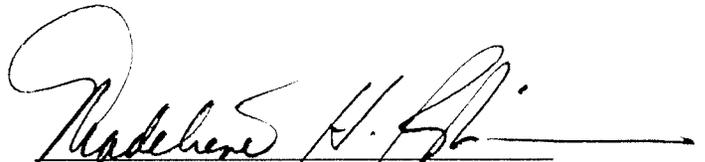
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MADELIENE H. ROBINSON
Acting Director

DATE: NOV 27 1991