

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 15588 of the Brookland Civic Association and Advisory Neighborhood Commission (ANC) 5A, pursuant to 11 DCMR 3105.1 and 3200.2, from the decision of Joseph F. Bottner, Zoning Administrator, to issue Building Permit Nos. B-350852, dated June 26, 1991 and B-351225, dated July 16, 1991, to the effect that said permits incorrectly authorize renovations and repairs to a three-unit apartment building in the R-2 District in violation of the provisions of Chapter 2000 of the Zoning Regulations relative to nonconforming uses and structures at premises 1003 Kearney Street, N.E. (Square 3878, Lot 10).

HEARING DATE: December 11, 1991
DECISION DATE: January 8, 1992

ORDER

The property which is the subject of this appeal is located on the south side of Kearney Street N.E., between 10th and 12th Streets N.E., and is known as premises 1003 Kearney Street, N.E. It is located in an R-2 District.

The property is improved with a building which contains two stories plus a basement, and is approximately 7,000 square feet in land area.

Certificates of Occupancy dating back to 1944 describe the building at 1003 Kearney Street as an apartment house, a nonconforming use in an R-2 zone. The certificates of occupancy are as follows:

- A. Occupancy Permit No. 91258, issued on November 7, 1944, lists the building as an apartment house.
- B. Certificate of Occupancy No. A-9489, issued on April 30, 1951, describes the property as an apartment house.
- C. Certificate of Occupancy No. A-11944, issued on October 10, 1951, describes the building as "Apartments (nonconforming)."
- D. Certificate of Occupancy No. A-15663, issued on June 10, 1952, describes the building as an apartment house.
- E. Certificate of Occupancy No. 61993, issued on July 13, 1967, describes the building as an apartment house.
- F. The most recent Certificate of Occupancy, No. B-79345, was issued to James and Dorothy Featherson on February 7,

1972 and describes the building as an "apartment house - 1st floor & basement - 1 unit - 2nd floor 2 units."

On December 24, 1990, So Others Might Eat, Inc. (hereinafter S.O.M.E.) purchased the subject property.

Building Permit No. B-350852 was issued June 26, 1991 and Building Permit No. B-351225 was issued July 16, 1991, by the Zoning Administrator, permitting S.O.M.E. to make interior renovations to the property.

The appellants, Advisory Neighborhood Commission 5A (hereinafter ANC 5A) and Brookland Civic Association, appealed the Zoning Administrator's decision to issue the building permits. This appeal raises the issue of whether the Zoning Administrator erred in determining that the property continued to be used in a nonconforming manner by the owner of the property who sold it to S.O.M.E.

As a preliminary matter the appellants argue that the burden in this appeal should rest on S.O.M.E. to prove that the nonconforming use existed when it purchased the property from Mr. Featherson. The Board denied appellants' request to shift the burden of proof to S.O.M.E. based on 11 DCMR 3324.2 which provides that "In all cases before the Board the burden of proof shall rest with the appellant" Therefore the Board determined that the burden remains with the appellants to establish that the Zoning Administrator erred in deciding to issue the building permits.

The Zoning Administrator testified about the circumstances and events surrounding the issuance of the subject building permits. The Zoning Administrator noted that on November 7, 1944, the subject property was issued Certificate of Occupancy No. 91258 for an apartment house. He stated that the certificate of occupancy record indicates that it was a five-unit apartment house at one time, however, the latest certificate of occupancy, No. B-79345, was issued on February 7, 1972 to a James David Featherson as an apartment house, first floor and basement, one unit; second floor two units. The use of the building as an apartment house is considered a nonconforming use since the property is zoned R-2.

The Zoning Administrator stated that the architect for S.O.M.E. applied for building permits for the subject property. The permit application indicated that the existing use was a four-unit apartment house and that the proposed use is a three-unit apartment house.

On June 26, 1991, Building Permit No. B-350852 was issued to S.O.M.E. authorizing "demolition of interior partitions, door and windows, and existing finishes as per plans."

On July 16, 1991, Building Permit No. B-351225 was issued authorizing interior renovations including new partitions, updated electrical and plumbing and installation of air conditioning. It also authorized the addition of a deck to the rear as per plan and plat; separate electrical, plumbing and mechanical insulation permits are required.

On July 19, 1991, Plumbing and Refrigeration Permit No. B-361506 was issued authorizing air conditioning for remodeling of an apartment building. Subsequent to this on July 22, 1991, Plumbing Permit No. B-361511 was issued to do work in a shelter. This permit authorized one sewer waste; one bathtub; five showers; six water closets; nine basins; two sinks; two dishwashers; two gas ranges; and relocation of a washer stand pipe.

The Zoning Administrator testified that the Zoning Division started receiving phone calls from neighbors questioning the proposed use at 1003 Kearney Street, N.E. The Zoning Administrator stated that this prompted him to have the file pulled from the Records Management Branch within the Department of Consumer and Regulatory Affairs (DCRA). The question that immediately came to his mind was the proposed layout for the three apartments because one apartment showed nine bedrooms.

He then called Peter Horton, the architect, who referred him to S.O.M.E. After calling S.O.M.E. and speaking to Richard Gerlich, S.O.M.E.'s housing coordinator, the Zoning Administrator understood the proposed building would be that of a three-unit apartment building with no more than six unrelated people living together in an apartment as a family, within the definition of "family" as found in the D.C. Zoning Regulations.

He then questioned why there were nine bedrooms in one apartment if the intent was to have only six people within an apartment unit. This inquiry resulted in the issuance of Building Permit No. B-351677 on August 9, 1991, revising the original permit B-351225, to reduce the second floor apartment from nine bedrooms to six. This application was filed by Peter Horton, the architect.

The Zoning Administrator stated that he then received a letter dated August 7, 1991 from Mary B. Currie and Brian K. Flowers, ANC 5A, raising questions about the proposed use and renovation of the property. Further research and review of the records revealed that the zoning technician did not request from the applicant documentation or proof of the continuation of the nonconforming use when the applicant came in for the building permit. The Zoning Administrator stated that it is the policy of the zoning division to request documentation that will substantiate the continuation of a nonconforming use.

On August 9, 1991 he wrote a letter to Richard Gerlich requesting that documentation be submitted no later than August 16, 1991. The letter also advised Mr. Gerlich that failure to produce sufficient documentation could result in a stop work order being issued and also may result in a Board of Zoning Adjustment case.

On August 16, 1991, the Zoning Division received a letter from Richard Gerlich. Also enclosed was a statement from the real estate broker, and an appraisal that had been performed on December 1, 1989. Subsequent to this, a letter dated August 19, 1991 was received from Father John Adams, the Director of S.O.M.E, which included a letter from James D. Featherson, former owner of the property, explaining the use of the building.

The Zoning Administrator testified that when he was on vacation, the Deputy Zoning Administrator reviewed the documentation received and requested that a partial stop work order be placed on the property. The stop work order related to the second floor which was to be used as one apartment.

The Zoning Administrator stated that on September 4, 1991 the issue of an addition to 1003 Kearny Street was brought to his attention. The addition involved a deck and a rear stairway. Realizing the addition was a violation of Section 2002.5 which prohibits an enlargement to a structure devoted to a nonconforming use, he requested the issuance of a stop work order relating to the addition.

The stop work order prompted the Zoning Administrator to meet with Mr. George Keyes, the former attorney for S.O.M.E., and other officials from S.O.M.E. They discussed the issue of a continuation of the nonconforming use. The Zoning Administrator advised S.O.M.E. officials that if they would put the letters or documentation in the form of affidavits he would accept them as sufficient evidence of the continuation of an apartment house use. The affidavits were accepted because S.O.M.E. could not produce copies of lease agreements or licenses.

The Zoning Administrator testified that the day after meeting with S.O.M.E.'s attorney and the officials from S.O.M.E. he met with Michael Behn and his wife, who are area residents at 1003 Kearney Street, N.E., and who are also representing the neighbors. He explained the Zoning Division's actions to them and also advised them that he had accepted the affidavits as evidence for proof of the continuation of the nonconforming apartment house use. They then discussed their points of view which, they believed undermined the documentation submitted by S.O.M.E.

On August 19, 1991, the Zoning Administrator received a letter from Mary B. Currie and Brian Flowers, ANC 5A, requesting that the Department of Consumer and Regulatory Affairs revoke the building

permits. Also, on the same day he recieved affidavits from area residents, Lavina Jernagin and Gloria Alston about the past operations at 1003 Kearney Street, N.E.

The Zoning Administrator testified that he met with the Director of DCRA, as well as the Administrator for the Building and Land Regulation Administration (BLRA) to discuss the subject property. He testified that he also met with officials from S.O.M.E., S.O.M.E.'s attorney and the BLRA administrator to discuss the department's position with respect to permit approvals and stop work orders. S.O.M.E was advised that the addition could not be allowed and that the deck which had been started must be removed. They were also advised that new plans must be submitted. S.O.M.E. submitted to the Zoning Division revised plans which show the rear stair being replaced and put inside of the existing structure. The plans also show that the deck will be removed.

The Zoning Administrator testified that the total number of bedrooms in the basement apartment will be three. The total number of bedrooms in the first-floor apartment is to be five, and the total number of bedrooms on the second floor will be six.

Summarizing, the Zoning Administrator stated that the Zoning Division erred in approving the original permit by failing to obtain proof or documentation on the continuation of the nonconforming use; by allowing an enlargement to a structure housing a nonconforming use; and also by approving the original plans showing nine bedrooms in one apartment.

He stated that action was taken by the Zoning Division which required the applicant to reduce the number of bedrooms, delete the enlargement to the structure, and produce evidence on the continuation of the nonconforming use. He stated that while the affidavits may appear to be weak, he told the applicant that he would accept the evidence and he has not changed his position. Stop work orders remain in effect at this time and will remain in effect until this appeal is decided, after which time appropriate action will be taken.

S.O.M.E., the intervenors, submitted into the record copies of the various documents reviewed by the Zoning Division when deciding this matter.

There is a letter addressed to Mr. Bottner dated August 19, 1991 from James D. Featherson which discussed the use of the property during his ownership. There is also a typewritten statement titled "affidavit" which affirms that the statements made in that August 19, 1991 letter "are true and correct and based on . . . personal knowledge." However the copy of this "affidavit" was neither signed by Mr. Featherson, dated, nor notarized.

Mr. Featherson addressed another letter to Mr. Bottner dated September 9, 1991 reaffirming what was written in the letter of August 19, 1991. Both of these documents were handwritten.

The record contains a third document entitled "affidavit" of James D. Featherson. This document is typewritten, dated October 31, 1991, notarized and signed by Mr. Featherson. In this affidavit, Mr. Featherson stated that he and his wife owned the apartment house located at 1003 Kearney Street, N.E. from 1979 to 1990. Additionally, Mr. Featherson made the following statements:

1. Our apartment house contained four separate apartments: a large apartment on the first floor, two apartments on the second floor, and a small apartment in the basement.
2. My wife and I lived in the first floor apartment during the entire time we owned the apartment house. The first floor had one kitchen and two bathrooms. We did not share the first floor with any of the other tenants in the apartment house.
3. The two apartments on the second floor were rented continuously when we owned the apartment house. These two second floor apartments were identified on their doors as Apartment #3 and Apartment #4. Apartments #3 and #4 each had their own lock, and each contained a full kitchen and bathroom.
4. Our daughter, Latonia Featherson, rented Apartment #3. Latonia and her children occupied and used Apartment #3 exclusively during the time she rented. Latonia paid rent for the apartment. Latonia bought her own groceries, kept them in her kitchen, and cooked for herself and her children. My wife and I did not enter Latonia's apartment unless invited by her.
5. Mabel Banks rented Apartment #4 from 1974 to 1990. Ms. Banks and her family occupied and used Apartment #4 exclusively during the time she rented. Ms. Banks paid rent for her apartment. Ms. Banks bought her own groceries, kept them in her kitchen, and cooked for herself and her family. My wife and I did not enter Ms. Banks' apartment unless invited by her.

The foregoing facts are based upon my personal knowledge.

The Zoning Administrator also considered the letter of Martin J. Carroll, Jr. dated August 12, 1991. In that letter, Mr. Carroll states, "since I was the real estate agent that listed the property during the recent sale in the late 1990 [sic], I am very familiar with the property." In describing the property he stated that:

The building appears to be an attractive single-family Dutch Colonial home when observed from the street. However, it is a huge building which stretches 74 feet from front to back. The main level alone is 2,308 square feet which is bigger than most of the homes in the area. Counting bathrooms there are over 40 rooms. It was set up as a five-unit apartment building with two units on the main level, two units on the second floor, a unit in the basement and a large unfinished attic. When I was last inside there were six electric meters - one for each of five apartments and one for the common areas such as the laundry room, furnace room and stair wells. There are stairwells front and rear which provide access to the apartments. The property also has two driveways providing substantial off-street parking.

With regard to the use of the property he stated that:

The previous owners were Mr. and Mrs. Featherson who owned and lived at the property from 1971 until 1990. When they first occupied the property, they took over the two apartments on the first floor as their home by turning one of the kitchens into a spare room and providing access between the two. The two apartments on the second floor were maintained as they were.

When I first saw the property in late 1989, both upstairs apartments were occupied. The basement was occupied by a son in 1990. I don't recall how long he had been there.

In summary the realtor stated that "when you look at 1003 Kearney, you realize that it was built to be an apartment building. Any other use would be incompatible with the building or would require it to be gutted and rebuilt."

Another document submitted into the record was the appraisal report. This report is headed "Small Residential Income Property."

The report indicates that the property is a 45 year old detached structure with two stories, four units and 20 rooms. There are four bathrooms and one parking space. It also indicates that the typical rent is between \$200.00 and \$650.00.

The addendum attached to the appraisal report states:

The subject property is currently configured for 3 units, 1 on the first level, 2 on the second. At one time the basement level contained a rental unit, however at this time much of this unit has been removed to facilitate some plumbing work. The property is approved for 5 units. It is the appraisers opinion that the unit is best served by 4 units, as 5 or more units subjects the building to rent controls . . . Although the first level is currently 1 unit, it is actually configured for 2 with a central dividing wall needed to separate the units.

The subject property is currently owner occupied on the first level and one unit on the upper level with the remaining unit rented at \$200/month. For appraisal purposes the rentals are considered at market rates as if fully renovated. Rents utilized are considered moderate for utilities included and the subject property's location (close proximity to metro and universities) good.

Appellants contest the decision of the Zoning Administrator to allow the multi-unit use. Appellants set forth the following arguments in support of their position:

1. The Zoning Administrator's office erred by deciding to accept as evidence the affidavit of the former owner, and of the realtor and the appraisal report. Instead, the Zoning Administrator should have requested direct evidence that the subject property had been rented.
2. The subject property reverted back to single-family use.

The sufficiency and Weight of the Evidence

The appellants argue that they were informed that affidavit evidence would not be accepted as proof of the continuing use. However, affidavit evidence was accepted and relied upon in determining what the prior use had been. Appellants maintain that the statements made by the previous owner, Mr. Featherson, and the

realtor are self-serving statements and should not be relied upon. The appellants assert that both the owner and realtor have a vested interest in making sure that S.O.M.E. can use the property as it desires. Otherwise, S.O.M.E. will have a claim against them since the property had been represented as a multi-unit building.

The appellants argue that the affidavit evidence should not carry much weight because the credibility of the prior owner and the realtor cannot be discerned from a piece of paper.

The appellants argue that the Zoning Administrator should have required S.O.M.E. to submit other types of evidence such as leases, licenses, tax records, rent checks, or utility bills, to show what the use of the property has been. However, they argue that there is no evidence to support S.O.M.E.'s claim that the property housed four apartments. Instead, the existing certificate of occupancy, the District engineer's reports, the massive extent of S.O.M.E.'s renovations, the tax records, and the business permit records indicate that the house was being used as a two-family dwelling.

The appellants stated that S.O.M.E.'s original building permit applications dated March 28, 1991 and June 26, 1991 repeatedly represented that the property's existing use was as a four unit apartment. S.O.M.E. again reiterated this position at a recent community meeting held on July 30, 1991. In support of its position, S.O.M.E. relies on the existing certificate of occupancy dated February 7, 1972. However, the 1972 certificate of occupancy can only be read to permit, at most, three apartments, and may instead be read to have permitted only two units in the building.

In addition, the engineers reviewing S.O.M.E.'s application stated that the plans showed the existing use to be as a one or two family residence, or as a boarding house. The massive scale of the renovations alone, costing nearly \$200,000, demonstrates the extent of the changes to the facility that are required. S.O.M.E. only paid \$150,000 to buy the house.

The appellants further stated that the tax records indicate that the property was used as a two-family dwelling. The house was not being taxed as a nonconforming use. This is highly significant, given the added value of a nonconforming use in a residential area. Instead, since at least 1986 (and probably before), the tax use code was a "2325." This means that the Featherston home was classified within the "Residential - Multi-family" category. Its "highest and best" use for tax purposes was as a "Conversion-5 units," but its current use was as "Flats-Less than 5 units." Under the zoning regulations, a "flat" is a two family dwelling. The tax regulations reveal no other definition.

The appellants stated that to further support the conclusion that the home was used by two families, there is a Claim of Exemption Statement filed by the apparent owner on January 29, 1980 with the Rental Accommodation Office representing that the use of the property was as a "multi-family housing accommodation containing 2 rental units." Further research reveals that the only documentary evidence that the property was actually used in the past decade as apartments is an unexplained handwritten note in the tax files from 1984 stating that the property was used as three apartments, not five. This unsupported assertion notes no actual inspection or interview, and was apparently based on an assessment record from 1965.

The appellants assert that the records of the Business Services Division of the Department of Finance and Revenue further contradict the position that apartments existed. That Division has represented to the ANC Commissioner that there is no record of a Housing Business License for that address. Under the D.C. Code, only "single-family or 2-family dwellings" and "rooming house(s) offering accommodations for no more than 4 roomers" are exempt from obtaining such a license. 47 D.C. Code Section 2828. There is also no indication that any apartments at 1003 Kearney Street complied with any provisions of the housing or building codes.

Thus, the appellant argue, there is no evidence to support S.O.M.E.'s contention that the existing use of the building was for four apartments. Instead, the documentary evidence leads to two apartments. The documentary evidence supports the conclusion that there were only two apartments. The documentary evidence leads to two possible conclusions. Either the house was used as a two-family dwelling, or the nonconforming use was being illegally maintained. The evidence certainly supports a conclusion that the house was being used for two families, but even if the use was as a boarding house or three apartments, the failure to pay proper taxes and maintain the proper license establishes that such a use would have been illegal. An illegal nonconforming use cannot be extended as a matter of right. Lange v. D.C. Board of Zoning Adjustment. 407A.2d 1058, 1060-1062 (D.C. App. 1979).

In sum, the appellants argue that the documentary evidence on this issue alone gives the Zoning Administrator a strong basis upon which to issue a stop work order and revoke the permits that have been issued to date. As demonstrated above:

1. S.O.M.E. repeatedly represented on its building permits that the existing use was as a four-unit apartment house;
2. The existing certificate of occupancy shows that the home was only permitted to house two units, or at best three;

3. The reviewing engineers found the existing plans to show that the building was being used as a one or two-family residence, or as a rooming house;
4. The massive extent of the proposed work is incompatible with the representation that there were four existing apartments in the building;
5. The tax records show that the building was not being taxed as a nonconforming use, but was instead being taxed as a residential, multi-family flat;
6. A submission by the apparent owner states that there were only two rental units in the building.

The appellants argue that, over and above this extensive documentation, the burden is on S.O.M.E. to establish its entitlement to a nonconforming use, due to the strong public policy against extending a nonconforming use. Consequently, a cessation of the current project and a revocation of the current permit is required, and no further permits or certificates should be granted.

At the public hearing, the appellants presented neighboring residents as witnesses of the former use of the property. Gloria Alston, who has resided at 1014 Kearney Street since 1950, stated that her home is located across the street from the subject property. She stated that she knew the Featherson family members who lived in the house: Mr. and Mrs. Featherson, their daughter and their son when he was home from the service. There were also several grandchildren. She stated that she did not know the children well but that the daughter was quiet. She further stated that she often saw Mrs. Featherson and her daughter together.

Ms. Alston testified that she often spoke with the Feathersons while outside. She also did favors for them such as accept UPS deliveries for them. She stated that she had not been inside the house except to deliver their packages to them.

On cross examination, Ms. Alston stated that she had been inside the building but not for any length of time, nor on a regular basis. While she had heard something about the physical layout of the building, she did not know for herself how many separate dwelling units there were inside. She had never been in to count the rooms. She testified however that she knew there were three levels and a partial attic.

On cross examination, Ms. Alston further testified that she knew of a Mabel Banks who also lived at the site. She thought Ms. Banks was the wife of the Feathersons' son. When asked about her familiarity with Leo and Donna Brown or Chico Stewart, Ms. Alston stated that she was not familiar with these names.

On redirect, Ms. Alston testified that 20 years ago the building was an apartment. But when the Featherasons moved in, the acitivity at the site decreased because they appeared to be one family.

Next, the appellants called Cynthia Alston, the daughter of Gloria Alston, to testify about the relationship between the Featherson and Banks families, and to provide any other information on the living arrangements at the subject site. Ms. Alston testified that she would occasionally talk to Mr. Featherson while they were both outside. They had casual conversations about what was going on in the neighborhood and in their lives. With regard to who lived in the house, she testified that she always had the impression that it was one family, three generations - the Featherasons, their son, their daughter and two grandchildren.

With regard to Mabel Banks, Ms. Alston testified that she saw Ms. Banks in the house but assumed that there was some relationship between Ms. Banks and someone in the Featherson family because of the way she interacted with them.

Ms. Alston testified that she was unfamiliar with the names Leo and Donna Brown, that she "didn't know everyone's name ...", that she "knew some of the people just by face ..." She did testify that she remembered the name Chico Stewart.

Finally Ms. Alston testified that she had been in the house only to deliver packages that were dropped off at her house. While she was not familiar with the physical layout of the structure, she believed the residents to be as one family although they did some things separately.

The appellants' next witness was Ms. Jernagin who resides two doors away from the subject site at 1021 Kearney Street. Mrs. Jernagin testified that the Featherasons lived in the house and that Mr. and Mrs. Banks came in the early 1970's, about 1973. Mr. Banks left about three or four years thereafter. Mrs. Banks stayed until 1987. The Bankses had three sons that were later left at the house with the Featherasons.

Ms. Jernagin testified that she considered the members of the household to be family because they all did their chores together as one family. She stated that the daughter was not working and that the mother and daughter were very close and usually together.

Ms. Jernagin testified that she had not been in the house and she could not tell if any of the residents were paying rent.

Counsel for the appellants conceded that there were separate units in the apartment building but that it reverted to a

conforming use, and that everyone was using the units together as a single housekeeping unit consistent with zoning.

To address the issue of the physical layout of the structure, the appellants called John Gerrety, a real estate agent to testify. The realtor testified that he had been in the house about a year before it was put up for sale. He first testified that Mr. and Mrs. Featherson lived downstairs and while he could not be certain, he thinks there was only one other unit upstairs. He stated that he could be mistaken, that it might have been two units that were occupied by other people upstairs. He noted that there were a number of housing code violations in the building.

Later in the realtor's testimony he stated that he recalls a couple of upstairs units that were not "occupied all together" because of their poor condition. He stated that he did not have his notes but he thought there were three or four units in the building.

The realtor testified that the owner, Mr. Featherson, told him that the building had been used as a three or four-unit house but that in recent years only he and his family occupied the house.

S.O.M.E., the intervenors in the appeal, presented witnesses to testify in opposition to the appeal. Father John Adams, the Director of S.O.M.E., testified about S.O.M.E.'s operations and the events surrounding S.O.M.E.'s plans to locate long-term volunteers at the subject site. Father Adams testified that S.O.M.E. found the three-unit apartment house within two months of its search. He stated that once the neighbors learned that there were no plans to locate a homeless shelter at the site, many of them were in support of the planned use. He testified that complaints by a small group of opponents continued and the Zoning Administrator's office was contacted. Stop work orders were subsequently issued.

Father Adams stated that at the request of the Zoning Administrator, S.O.M.E. provided statements from the prior owner, the real estate agent, a former tenant and the sister of a tenant, all of whom stated that the property's continuous prior use had been as a three-unit apartment house. These statements were later put into affidavit form at the Zoning Administrator's request.

In his testimony, Father Adams characterized the appellants' evidence as "affidavits from two neighbors who stated essentially that all of the prior occupants at 1003 Kearney Street got along with one another." He further stated that from this they decided that the property had been used as a single-family dwelling.

Father Adams testified that S.O.M.E. currently proposes to have 14 rooms rather than 18 rooms in the building.

The remainder of Father Adams' testimony addressed neighborhood sentiment about the proposed use, a matter not at issue in this appeal.

S.O.M.E. introduced Ms. Mabel Banks as a witness in support of its position that the property had been a multi-unit apartment building. Ms. Banks stated that she previously resided at 1003 Kearney Street for 15 years from 1974 to 1989. She lived in Apartment No. 4 on the second floor. She stated that Mr. and Mrs. Featherson occupied the entire first floor and the basement, and rented the two units on the second floor. She and her family rented one unit and the Featherson's daughter, La Tanya Featherson, rented the other unit, Apartment No. 3. Ms. Banks testified that before La Tanya Featherson lived in Apartment No. 3, Leo and Keta Brown lived there. She stated that other tenants lived there before the Browns.

Ms. Banks testified that she and the other tenants had their own locks, they paid rent and their own utilities.

Ms. Banks testified that she is not related to the Feathersons, that when she left the apartment building La Tanya was still there. She noted that La Tanya had two children and was not working.

Ms. Banks testified that she did not have any documents related to her residency at the subject site. She destroyed them once she acquired a new residence.

Ruben Daggett was called as a witness for S.O.M.E. Mr. Daggett testified that he and the Feathersons are close like a family but they are not actually related. He stated that the Feathersons lived on the main level. No one lived in the basement. He stated that he rented Apartment No. 4 from 1989 when the Banks moved out until January 1990. He did not sign a lease but he paid \$70.00 per month to the Feathersons. He had a lock on his door and his own personal telephone line.

Mr. Daggett testified that La Tanya Featherson lived in Unit No. 3 while he was there. While she was not working, she received public assistance and she made monthly monetary contributions toward the household expenses. Mr. Daggett believed that La Tanya also had her own phone.

Mr. Daggett testified that after he moved out, Leo, one of Mr. and Mrs. Featherson's sons moved in for about three or four months. He stated that Leo was later made to vacate the premises for failure to pay rent.

Finally Mr. Daggett stated that his own sister rented Unit No. 4 for three or four months starting in April 1990.

S.O.M.E.'s architect, Peter Horton, testified about the layout of the structure and the history of the use. He stated that upon visiting the site he determined that the square footage on each floor is approximately 2,300 square feet for a total of 6,900 square feet. He testified that based on his experience in reviewing plans for other projects, most typical houses range from 2,000 to 2,200 square feet, some are larger. Therefore, each floor of this building has about the same square footage as a regular single-family dwelling.

The architect then described each level of the building. The basement has two separate entrances with locks. There are two bedrooms, a bathroom, a living room/dining room area, and a kitchen. The first floor is one unit, a separate unit, with five bedrooms; a solarium; one kitchen; two bathrooms with two additional lavatories; a living/dining room area; as well as a common community room. In addition, there is a porch area off from two of the existing bedrooms towards the rear on either side of the steps. On the second floor there are two distinct units; they are mirror images of the first floor without the dividing partition. There are two bathrooms, four bedrooms, and a rear porch area. There are two kitchen areas and living room/dining room areas rather than a community room. All of the units have separate keys and separate locks.

The architect pointed out that on the outside of the building there was a standard apartment building mailbox with five slots.

On cross-examination, he testified that he had no knowledge of how the building had actually been used by the occupants.

One of S.O.M.E.'s volunteers testified about the autonomy with which the volunteer houses are operated.

In closing remarks, S.O.M.E. stated that the only issue is whether the property was formerly used, and will in the future be used, as an apartment house as that term is defined in the Zoning Regulations. S.O.M.E. stated that an apartment house is defined as three or more apartment units. An apartment unit is defined under the Zoning Regulations as one or more dwelling units with occupants having the exclusive use and control of those dwelling units, each of the units having their own separate kitchen and bathroom facilities, and with the tenants having to stay there over a year. S.O.M.E. believes that the evidence demonstrates that the test has been met.

The appellants presented the testimony of two witnesses to rebut S.O.M.E.'s position that only a small number of area residents oppose the proposed use and that most persons only oppose a shelter not a volunteer house.

The first witness was Robert Artisst, Sr., former president of the Brookland Civic Association.

Mr. Artisst testified that there are many community-based residential facilities (CBRF) and group home type facilities in Ward 5. He maintains that the proposed use will be the same as having another CBRF-type facility because of the large number of people that will reside there.

The second witness to testify was Bea Strattner who is the coordinator of the block captains in the neighborhood. She testified about the two petitions that were circulated about the property. The first petition made references to the possibility of a homeless shelter being located at the site. The second petition accurately reflected the proposed use as that of a volunteer house.

She stated that the block captains gathered 121 signatures on the second petition, more than they had on the first petition.

In closing remarks, appellants maintained that the Zoning Administrator improperly relied on affidavit evidence; that S.O.M.E. had the burden of establishing the continuance of the nonconforming use; that S.O.M.E. witnesses, who purported to be tenants, failed to prove that there was any nonconforming use of the property; that the impact on the community was clearly that of a single-family use; and that S.O.M.E. wishes to improperly expand what the property was used for.

FINDINGS OF FACT:

In the instant appeal, the only contested issues of fact are 1) whether the subject property had been used as an apartment building while it was owned by the Featherasons; 2) whether the nonconforming use was discontinued prior to the sale of the property to S.O.M.E.; and 3) whether the evidence presented to the Zoning Administrator was adequate to support his decisions to issue building permits on the property for a nonconforming apartment house use.

Based on the evidence of record, the Board makes the following findings of facts:

1. The Board credits the testimony of Peter Horton, S.O.M.E.'s architect, and the certificates of occupancy issued on the property in finding that the property is configured for more than three units.

2. The Board credits the affidavit of J.D. Featherson and the testimony of Mabel Banks and Ruben Daggett in finding that the Featherasons rented the upstairs units in the building at least from 1974 when Ms. Banks moved in until 1990 when Mr. Daggett's sister

lived in the building. Based on this evidence the Board further finds that Mr. Featherson's daughter rented one of the upstairs units on a continuing basis.

3. Based on its review of the Featherson affidavit, the Board finds that the Zoning Administrator had adequate, unrebutted evidence of the actual continuing use of the structure. The Board finds that the documentary evidence submitted to the Zoning Administrator by the appellants, i.e. the exemption statement, tax records, affidavits, etc., do not rebut the statements made in the Featherson affidavit, that the units continued to be rented throughout the Featherson's ownership.

CONCLUSIONS OF LAW AND OPINION:

The instant appeal raises the issue of whether the property located at 1003 Kearney Street, N.E. had been an apartment building, and had been countinuously used as such prior to the issuance of building permits on June 26, 1991 and July 16, 1991. This issue arises because the property is zoned R-2, a residential classification that does not permit apartment houses as a matter of right. Consequently, any apartment house use in this R-2 District would be a nonconforming use. This appeal involves, not the establishment of a nonconforming use, but rather whether or not such a use has been discontinued. Title 11 DCMR Section 2005 provides as follows:

2005 DISCONTINUANCE

2005.1 Discontinuance for any reason of a non-conforming use of a structure or of land, except where governmental action impedes access to the premises, for a period of more than three (3) years, shall be construed as 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.

Appellants contend that the former owners of the property, the Feathersons, did not continue to use the property as an apartment building, that those who resided in the structure lived together as a single family.

In addressing the issue of nonconforming use, the Board must first establish that the structure is a nonconforming structure - i.e. an apartment house.

The Zoning Regulations define an apartment house as "A building or part thereof in which there are three (3) or more

apartments . . . providing accommodation on a monthly or longer basis." 11 DCMR Section 199.1. An "apartment" is defined as "one or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms." 11 DCMR Section 199.1, as amended.

The architect who testified on behalf of S.O.M.E. established that the physical layout of the building is that of a multi-unit apartment building. He confirmed that there are at least four units in the building. He also established that each unit had its own kitchen and bathroom facilities as well as its own entrance door and locks. Therefore, the Board concludes that the building is physically structured as an apartment house.

Next the Board must determine whether the use was nonconforming. The testimony of Mr. Daggett and Ms. Banks operates to strengthen the affidavit of Mr. Featherson in proving that the two upstairs units were rented to tenants on a monthly basis. The evidence also establishes that while the tenants of the building may have been related or very close to Mr. and Mrs. Featherson, these tenants nonetheless maintained exclusive control over their individual apartment units. Therefore, the Board concludes that the units meet the definition of "apartment" found in the Zoning Regulations.

For purposes of Subsection 2005.1, it is important to establish that the apartment house use did not cease for three years. All of the certificates of occupancy dated back to 1944 refer to the property as an "apartment." The most recent certificate of occupancy issued to the Feathersons on February 7, 1972 describes the building as having a minimum of three units. Furthermore, according to Ms. Banks' testimony, the Feathersons rented Unit No. 4 to her from 1974 until 1989. Also, they rented Unit No. 3 to their daughter, and others before her, during Ms. Banks' tenancy. S.O.M.E. purchased the property in December 1990. Upon review of this evidence the Board concludes that the apartment house use was not discontinued for any three year period of time prior to issuance of the building permits to S.O.M.E.

Finally, the Board must determine whether the Zoning Administrator properly accepted affidavits as evidence of the use. The Board notes that the Zoning Regulations do not make reference to the type of evidence that the Zoning Administrator should require in making decisions about land use. Absent such guidance from the Zoning Regulations, the Board is of the opinion that the Zoning Administrator has the discretion to accept whatever evidence he deems appropriate under the circumstances. In his testimony, the Zoning Administrator stated that S.O.M.E. did not have formal records to demonstrate what use was made of the property. However, S.O.M.E. provided information to the Zoning Administrator in the form of letters which were subsequently made into affidavits.

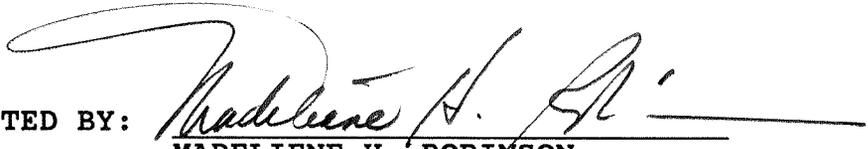
Using his judgment, the Zoning Administrator decided that this evidence was adequate proof of the prior use. No other evidence submitted to the Zoning Administrator rebutted the information in the affidavits. Therefore, the Board concludes that the Zoning Administrator did not err in making a decision about the property consistent with the statements in the affidavits.

The Board further concludes that it is not a sound practice to inform opposing neighbors that affidavit evidence will not be accepted from an applicant while that option is still available to the Zoning Division. Nonetheless, the Board cannot find error in the Zoning Administrator's decision based on the Zoning Regulations.

In light of the foregoing analysis, the Board concludes that the appeal is hereby **DENIED** and the decision of the Zoning Administrator is **UPHELD**.

VOTE: 4-0 (Sheri M. Pruitt, Paula L. Jewell, and Charles R. Norris to deny; Lloyd Smith to deny by proxy; Carrie L. Thornhill not voting, not having heard the case).

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

ATTESTED BY: 
MADELIENE H. ROBINSON
Director

FINAL DATE OF ORDER: AUG 12 1993

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."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



APPLICATION NO. 15588

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on AUG 12 1993 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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MADELIENE H. ROBINSON
Director

DATE

AUG 12 1993

15588Att/bhs