

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Appeal No. 15893 of Woodrow D. Malone, pursuant to 11 DCMR 3105.1 and 3200.2, from the decision of Hampton Cross, Administrator, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs made on or about May 31, 1993, to the effect that Certificate of Occupancy No. B-164998 was issued in error and is revoked for a carryout/delicatessen on the first floor and basement in an R-4 District at premises 1000 O Street, N.W. (Square 339, Lot 803).

HEARING DATES: February 16, April 13 and June 8, 1994  
DECISION DATE: July 6, 1994

ORDER

SUMMARY OF THE EVIDENCE:

The property which is the subject of this appeal is located at 1000 "O" Street, N.W., and is zoned R-4. The appellant is the owner of the property, a three-story and basement brick structure built about 100 years ago. The first floor and basement have been used for commercial purposes. There are apartments on the second and third floors.

The Zoning Administrator, Joseph Bottner, testified that there were Certificates of Occupancy for the first floor and basement since 1950, initially as a grocery store. In February 1976, the Board approved a change of nonconforming use from retail grocery to retail grocery and delicatessen (no seating) in BZA Application No. 12077. Several Certificates of Occupancy for that use and subsequently, a carryout/delicatessen (no seats) had been issued.

The appellant purchased the property in 1985. The last Certificate of Occupancy issued prior to the permit that is the subject of this appeal was issued to Eunice Talley in 1988. Ms. Talley leased the property from the appellant and operated the carryout/deli at the site.

In February 1990, an inspector from the Food Protection Branch of the Department of Consumer and Regulatory Affairs inspected the premises and noted it appeared to be out of business. On May 4, 1990, Ms. Talley was evicted pursuant to a case in the Landlord and Tenant Branch of the Superior Court. The owner's rental agent, Lawrence Willoughby, testified that, from the food that was set out at the time of the eviction, the tenant appeared to have been operating her business as of that date. Neighborhood resident and ANC representative, Merle Sykes, stated she saw no evidence of business operation on that date but understood that

various household furnishings were removed from the premises during the eviction, and that the food may have been the tenant's personal property.

The appellant submitted documentary and testimonial evidence of his numerous continuing efforts to lease the property as a carryout/delicatessen between May 1990 and April 1992. These efforts included newspaper advertising and posting a "For Rent" sign at the premises. Ultimately, the appellant leased the property to Haywood Liles who made efforts to use the property. In early April 1992, Mr. Liles (the tenant) filed an application for a florist shop. He later learned that a variance would be needed to establish a flower shop. Consequently, on April 24, 1992, the tenant applied for a Certificate of Occupancy to operate a carryout/delicatessen. The appellant and his agent encouraged and monitored the tenant's progress in this matter once the property was leased.

On April 24, 1992, the prior nonconforming use was noted on the application. Inspections by construction, fire, plumbing and electrical branch inspectors were scheduled for October 9, 1992. The appellant was under the impression that the process was moving forward without problems.

The tenant testified that he worked as quickly as he could, considering his shortage of capital, to make the repairs required by the inspectors and otherwise prepare the premises for the carryout. He said that when conditions were not properly remedied prior to reinspection, inspectors did not warn him of time restrictions. Instead, they casually told him to contact them when the work was completed.

In early February 1993, a notice was sent to the tenant by the Occupancy Branch, advising him of the impending expiration of the period to complete the repair and inspection process, the failure of which would result in the closing of his application for a Certificate of Occupancy. He had changed his residence since filing the application and had not notified the Branch of his new address. As the notice was sent only to his former residence, and not to either the subject premises or the owner's agent, the former tenant, Mr. Liles, did not receive it. After he failed to call the inspectors or request an extension of time, the application was closed. Related inspection records were discarded with that action.

The Advisory Neighborhood Commission requested an inspection of the premises by the Food Protection Branch in early February 1993. An inspection was made and a report issued on February 18, 1993 to the ANC that "Eunice Delicatessen" was found "out-of-business" on February 6, 1990 and February 9, 1993. A copy was

delivered to the Zoning Administrator who issued a notice to the Occupancy Branch not to issue a certificate for commercial use for this property as a nonconforming use because the period of discontinuance exceeded three years.

On March 12, 1993, Mr. Liles returned to the Occupancy Branch to report the completion of repairs required by the inspectors and to receive his certificate. He was advised that the file had been closed and he would have to reapply. He did this and in the normal process took the application to the attending zoning technician for review. The technician approved it and the Certificate was issued the same day.

In May 1993, the Zoning Administrator received complaints from residential neighbors opposed to the resumption of the commercial use that the store was operating. After investigating the issuance of the certificate of March 12, 1993, he recommended to his superior, Mr. Hampton Cross, Administrator, Building and Land Regulation Administration, that the certificate be revoked, pursuant to 14 DCMR 1406, as issued in error.

An undated notice of revocation was prepared, addressed to Mr. Liles at his former address, and signed by Mr. Cross' deputy. While the rules provide for service by certified mail at least 10 days before a proposed revocation, no evidence of mailing was presented. Mr. Bottner testified that on or about May 28, 1993, representatives of DCRA attempted to deliver the notice and that a report was made that Mr. Liles refused to sign for receipt of it. Mr. Liles denied that he refused to sign for any such delivery. Finally, on or about July 5, 1993, representatives of the department delivered the notice and retrieved the certificate from the premises, and the business was closed. The owner knew of no undue delay or difficulty with the permit until after the Certificate was revoked. Mr. Liles applied for a variance approximately one month later. Then the owner filed this appeal.

The appellant maintains that the certificate of occupancy was revoked in error and that the Board does not have the authority to eliminate nonconforming uses.

The appellant noted that 11 DCMR 2000 - Nonconforming Uses and Structures - General, provides for the strict regulation of nonconforming uses and structures "to the extent permitted by the Zoning Act of June 20, 1938, as amended" (2000.3) and that such uses may be "continued, operated, occupied, or maintained, subject to the provisions of this chapter." (2000.4)

The appellant's main argument is based on 11 DCMR Section 2005 (Nonconforming Uses and Structures - Discontinuance) which provides:

Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impeded 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. (2005.1)

The regulations noted above were effective upon publication on August 5, 1983 after staff proposals, public hearings, revisions and comment periods beginning two years earlier. The section pertaining to discontinuance had no precedent in the prior regulations, and the section adopted was significantly different from the originally proposed language, especially regarding the issue of "intent." The rejected proposal was as follows: (Section 7107.1):

If a nonconforming use of a structure or of land or of structure and land in combination is discontinued for any reason (except where governmental action for a period of more than one hundred eighty (180) consecutive days or for a total of three hundred sixty five (365) days during any three-year period, any subsequent use shall conform to the regulations for the district in which the use is located. Intent to resume active operation as a nonconforming use shall not alter the provisions of this subsection. (emphasis added)

The appellant noted that prior to the adoption of the regulation, the controlling legal authority on the subject of resuming nonconforming uses after a period of discontinuance of use was governed by rulings in cases by the District's Court of Appeals and its predecessor, the Municipal Court of Appeals. The first case, Wood v. District of Columbia, 39 A.2d 67 (Mun. Ct. App. D.C. 1944) involved the resumption of the use of stables for horses after a period of six years of nonuse, but during which period, starting in 1937, it was advertised for rental as a stable. The Court adopted the prevailing rule of other jurisdictions that irreversible discontinuance of nonconforming use followed only from "(1) the intent to abandon and (2) some overt act or failure to act which carries the implication of abandonment." Id. p.68. The ruling in the Wood case was followed in the last published Court case to consider the issue of "abandonment", George Washington University v. D.C. Board of Zoning Adjustment, 429 A.2d 1342 (D.C. App. 1981). In both cases, the courts noted that the mere lapse of a period of nonuse was not enough to lead to the forfeiture of the right to a use.

The appellant stated that Section 2005.1 now provides that the mere passage of time - three continuous years - of nonuse constitutes "prima facie" evidence of intent to discontinue,

essentially requiring the owner to come forward to prove that it was not his intention to abandon the use. The appellant argued that if the owner comes forward, then the result will depend on whether there was evidence to support the intention to continue the nonconforming use. At that point, the standard is the same as that set forth in the Wood case. The Board must weigh the "prima facie" evidence of discontinuance against the owner's evidence, by overt acts or otherwise, of his intention to continue the use.

The appellant argued that this result differs from the result of the rule first proposed in 1981 which clearly set a time limit and then provided: "Intent to resume active operation of a nonconforming use shall not alter the provisions of this Subsection" (emphasis added by appellant). Rather, the rule as adopted only provides that nonuse for three years will be "construed as prima facie evidence," not conclusive evidence, of intent to abandon. The owner has the right to present contrary evidence. The misleading phrasing of the last sentence of the regulation, which appears to speak in absolute terms of "subsequent use" conformity, must be attributed to the imprecise process of substantially revising draft regulatory language. In the end, it must be read consistently with the other revisions to the very thrust of the section, and be viewed as being subject to them, meaning if the "prima facie" evidence is un rebutted and the nonconforming use is deemed lapsed, then any subsequent use must "conform to . . . the regulations." Any other interpretation would be to read the phrase "prima facie" evidence as the equivalent of "conclusive evidence." The appellant maintains that this is simply impermissible.

Relying on this interpretation of the Zoning Regulations, the appellant maintains that a number of factors evidence his intention to continue the deli/carryout use at the site. Among the actions taken are the following:

- The owner evicted the former tenant in May of 1990 for nonpayment of rent.
- The appellant hired a real estate agent to find a tenant to use the property as a deli/carryout.
- Mr. Liles rented the property with plans to use it as a deli/carryout.
- Mr. Liles renovated the site by installing counters, a hooded stove, a cabinet freezer and display equipment; up grading plumbing and electrical systems; and erecting partitions to alter the size of the carryout space.
- Mr. Liles spent approximately \$12,000 between August 1992 and early March 1993 to repair, upgrade and equip the property for use as a carryout.

- Mr. Liles arranged to have inspections conducted so that he could open the business.

Mr. Stover, a representative of the Willoughby Real Estate Company, testified that he saw the property in February 1993, and the changes noted above had been made to the property. He stated that in February 1993 it appeared that Mr. Liles was ready to open. It was just a matter of getting inspections approved.

Mr. Stover testified that he manages commercial and residential property in the vicinity of the site, therefore he monitors the area. While in the area he would look in on the subject site, and he stated that there was often activity, sometimes not much activity, but he was comfortable that Mr. Liles was making progress in bringing the property up to code.

Based on the testimony of Mr. Liles and Mr. Stover, the appellant contends that there is substantial evidence of intent to continue the deli/carryout use. The lack of finances kept Mr. Liles from finishing the upgrades sooner, and the inspections, being made 5-1/2 months after the certificate of occupancy application was filed, caused further delays in the process. These problems ultimately cost the appellant his certificate of occupancy. However, he argued that he was not made aware of the time-sensitive nature of his project or the impending revocation.

The Zoning Administrator testified about the chronology of events that lead to revocation of the appellant's certificate of occupancy. He noted that when the application was filed, the employee at the zoning desk should have realized that the permit application was for a nonconforming use and there should have been a request that the applicant submit proof of continuation of the nonconforming use. This was not done. The application was approved based on a prior permit. Consequently, the Zoning Administrator inquired into the matter to determine if building permits had been issued on the property that would serve as evidence of the applicant's intent to continue the use. He found no other permits issued to prepare the property for the proposed use. Therefore, given that the three year period had elapsed, no other permits had been issued and no inspections had been approved, he decided that the nonconforming use had ceased. The Zoning Administrator testified that if building permits were taken out and there was a problem getting the work done, the appellant could have requested a time extension to allow the work to be done. However, he found no evidence of that. Therefore, he proposed revocation of the certificate of occupancy.

Advisory Neighborhood Commission (ANC) 2F submitted a report, dated April 6, 1994, in opposition to the appeal. The ANC representative testified that the neighbors had been monitoring the

property for three years and documenting its use because they wanted the deli/carryout use to cease.

The ANC stated that the owner and his agents, through lack of vigilance and supervision, allowed the special exception for the nonconforming use to expire. The appellant has submitted leases as evidence of intent to continue the use, but it is the ANC's contention that a lease is insufficient to determine actual use of the property. The previous tenant, Eunice Talley, discontinued use of the property as a deli prior to her eviction of May 1990 as evidenced by a DCRA inspection determining it was out-of-business on February 6, 1990. Neighbors have indicated that the business ceased operating at some date in the fall of 1989, prior to the DCRA inspection. Further, neighbors concluded that the premises were used by Ms. Talley as a residence after the deli was closed and prior to her eviction.

The ANC stated that the subsequent tenant, Mr. Liles, applied for a certificate of occupancy in April of 1992 but failed to obtain the required approvals by the various inspectors in a timely manner. He was forced to reapply for the certificate in March of 1993, by which time the community had documented the lapse of three years in the operation as a deli/carryout. In fact, the community requested that a letter be placed in the DCRA files which would indicate discontinuance of the deli/carryout use and compel applicants for deli/carryout certificates of occupancy at the subject address to seek a variance. The letter was not placed in the file and the certificate was issued in error.

The ANC stated that the lapse of the three year time period occurred due to lack of action on the part of the owner and/or his agents: 1) the property was allowed to go unrented for a period just short of two years; 2) the lease did not stipulate a time period by which a deli operation must begin; and 3) the tenant was not supervised sufficiently to ensure that preparations for operations were proceeding in a timely manner.

The community attested to the detrimental effects of the deli/carryout operations at the hearing for the related variance case. The ANC stated that this community should not be made to suffer from this inappropriate use after taking all the actions it is afforded under the law in order to rid itself of this commercial intrusion. Therefore, the ANC requests that the Board deny the appeal.

**Factual Issues:**

The subject appeal raises the following factual issues:

1. Whether the deli/carryout use was operating either when the premises were

inspected in February 1990 or on May 4, 1990 at the time of eviction?

2. Whether there is evidence of the appellant's intention to continue the use at the site?

**FINDINGS OF FACT:**

Based on the evidence of record, the Board finds as follows:

1. The deli/carryout use was not in operation in February 1990 when the property was inspected.
2. The appellant evidenced his intent to use the property as a deli/carryout by hiring a real estate agent to lease the property for this use and leasing the property to Mr. Liles for a deli/carryout use. Mr. Liles evidenced his intent by installing equipment, upgrading the electrical and plumbing systems, arranging for inspections, and applying for a certificate of occupancy.

**CONCLUSIONS OF LAW AND OPINION:**

In the instant appeal, the Board must decide if the Zoning Administrator's decision to revoke a certificate of occupancy was proper.

The Board concludes that the appellant has the burden of demonstrating his intent to continue the deli/carryout use in spite of the three year lapse in time. The Board is not convinced of this intent by the evidence submitted in this appeal. Instead, the Board concludes that the appellant failed to manifest his intention to resume the carryout use. The Board bases this conclusion on the appellant's application for a flower shop certificate of occupancy; the lack of due diligence in preparing the property to open and the passage of three years during which time the property was vacant. The Board draws no conclusion about whether the examination of the permit records conducted by the Zoning Administrator was an adequate basis to determine that the certificate of occupancy should be revoked. However, the Board does conclude that the revocation was not in error.

Therefore, the Board hereby **DENIES** the appeal and **UPHOLDS** the **DECISION** of the Zoning Administrator.

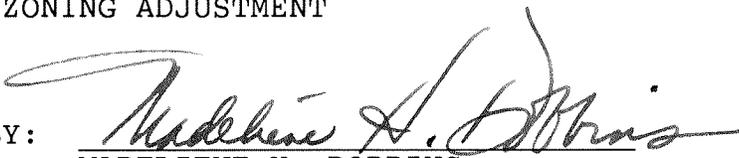
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VOTE: 3-2 (Craig Ellis, Maybelle Taylor Bennett and George M. Evans to deny and uphold; Laura M. Richards and Angel F. Clarens opposed to the motion).

THIS ORDER WAS ISSUED AS A PROPOSED ORDER PURSUANT TO THE PROVISIONS OF D.C. CODE SECTION 1-1509(d). THE PROPOSED ORDER WAS SENT TO ALL PARTIES ON APRIL 22, 1997. THE FILING DEADLINE FOR EXCEPTIONS AND ARGUMENTS WAS MAY 27, 1997. NO PARTY TO THIS APPLICATION FILED EXCEPTIONS OR ARGUMENTS RELATING TO THE PROPOSED ORDER, THEREFORE, THE BOARD OF ZONING ADJUSTMENT ADOPTS AND ISSUES THIS ORDER AS ITS FINAL ORDER IN THIS CASE.

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

ATTESTED BY:

  
MADELIENE H. DOBBINS  
Director

FINAL DATE OF ORDER: \_\_\_\_\_

JUN 9 1997

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."

15893ord/TWR/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15893

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on JUN 9 1997 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each person who appeared and participated in the public hearing concerning this matter, and who is listed below:

Michael E. Brand, Esquire  
Paul Crumrine  
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Mr. Haywood Liles  
958 Mount Olivet Road, N.E.  
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Mr. Jack Stover  
809 Massachusetts Avenue, N.E.  
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Helen M. Kramer, Chairperson  
Advisory Neighborhood Commission - 2F  
1325 13th Street, N.W., #25  
Washington, D.C. 20005

A handwritten signature in cursive script, reading "Madeliene H. Dobbins".

MADELIENE H. DOBBINS  
Director

DATE: JUN 9 1997