

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17591 of MLW, LLC pursuant to 11 DCMR § 3112, from the October 19, 2006 administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to revoke Certificate of Occupancy Permit No. CO 61776, dated September 9, 2003, that approved a five (5) unit apartment building. The subject property is located in the R-3 District at premises 3256 N Street, N.W. (Square 1218, Lot 104).

HEARING DATE: **May 1, 2007**

DECISION DATE: **May 1, 2007**

DECISION AND ORDER

INTRODUCTION

MLW, LLC (“Appellant”) filed this appeal with the Board of Zoning Adjustment (“BZA” or “Board”) on December 1, 2006, pursuant to 11 DCMR § 3112, challenging the October 19, 2006 administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs (“DCRA”), to revoke Certificate of Occupancy Permit (“CO”) 61776, dated September 9, 2003, approving a five-unit apartment building. The Zoning Administrator revoked the CO pursuant to 11 DCMR § 2005.1 on grounds that the use was non-conforming and had been discontinued for more than three years.

Appellant alleged that the Zoning Administrator erred in revoking the CO because the use of the subject property as a five-unit apartment building was not a nonconforming use for the following reasons: First, use of the property as a five-unit apartment building was approved by the Board in BZA Order No. 6885 (1962) without time limitation or other conditions. Second, use of the property does not fall within the definition of nonconforming use as set forth in 11 DCMR § 199. Therefore, the approved use as a five-unit apartment building is not subject to the discontinuance provisions of 11 DCMR § 2005.1. Appellant also argued that there was no discontinuance of the use for more than three years and that DCRA is estopped and barred by the doctrine of laches from revoking CO 61776.

A public hearing on the appeal was duly noticed and held on May 1, 2007. On the day of the hearing, counsel for DCRA submitted a Praecipe to the Board that indicated that DCRA had notified MLW in writing that the revocation of CO 61776 would be withdrawn; this Withdrawal of Notice of Revocation would affirm the validity of the CO; and, the Withdrawal would be delivered to Appellant’s counsel by that afternoon. *See*, Exhibit 14. DCRA sought postponement of the hearing on the basis that the issues would become moot. Appellant opposed postponement. Finding that the issues were not moot and that DCRA had

not provided good cause for the requested delay, the Board denied the request for postponement and proceeded with the hearing.

Upon hearing from the parties to the matter, the Board rendered its decision, voting to grant the Appellant's Motion for Summary Judgment and, thereby, to grant the appeal.

An explanation of the facts and law that support that conclusion follows.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Notice of Appeal, as well as a Motion for Summary Judgment and/or an Expedited Hearing, was filed on December 1, 2006 by MLW, LLC. The Office of Zoning scheduled a public hearing for May 1, 2007. In accordance with 11 DCMR § 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 2E03, and DCRA. The Office of Zoning advertised the hearing notice in the D.C. Register at *54 D.C. Reg. 1873* (March 2, 2007).

Motion for Summary Judgment

On December 1, 2006, the Appellant simultaneously filed this Appeal and a Motion for Summary Judgment and/or an Expedited Hearing. *See*, Exhibit 1, Tab 28. The Motion was heard on May 1, 2007. The Board, upon determining that there was no genuine issue as to any material fact, granted the Motion for Summary Judgment and thereby granted the appeal as a matter of law on the grounds that the five-unit apartment building that was approved by BZA Order 6885 is not a nonconforming use and therefore is not subject to discontinuance under § 2005.1 The Board expressly did not reach the issues of estoppel or laches, as such a determination was not necessary to granting the relief in this case. *See*, Tr. at 113.

Standard for Motion for Summary Judgment

Summary judgment is appropriate if there is “no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Super. Ct. Civ. R. 56 (2005); *see also*, *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1001-02 (D.C. 1994). Only disputes over facts, viewed in the light most favorable to the non-moving party, which might legitimately affect the outcome of a trial, are “material” under Rule 56. *See*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250; 106 S Ct. 2505 (1986) Disputed material facts are those that might affect the outcome of the suit under governing law. *Clayton v. Owens-Corning Fiberglass Corp.*, 662 A.2d 1374, 1381 (D.C. 1995)

The United States Supreme Court has articulated a policy favoring the summary judgment procedure. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, *supra*; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). In *Celotex*, the U.S. Supreme Court stated:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of [Court Rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.

Celotex, 477 U.S. at 327.

The District of Columbia Court of Appeals has also noted that summary judgment is a valuable tool, and that public policy favors disposing of issues summarily, where possible. *Hercules & Co., Ltd. v. Beltway Carpet Services, Inc.*, 592 A.2d 1069, 1075 (D.C. 1991); *Vessels v. District of Columbia*, 531 A.2d 1016, 1019 (D.C. 1987). In administrative proceedings, summary judgment is also a well-accepted practice. *District of Columbia Department of Consumer and Regulatory Affairs v. Vu*, CR-C-06-100009 (OAH, October 16, 2006.)

The Positions of the Parties

The Appellant maintained that there were no material facts in dispute and that, as a matter of law, the use of the subject property as a five-unit apartment building was not a non-conforming use under the definition set forth in 11 DCMR §2005.1; and based on BZA Order No. 6885, dated August 21, 1962, it became and continued to be a conforming use. Consequently, the regulations pertaining to discontinuance of a nonconforming use did not apply to the property and the Zoning Administrator erred in seeking to revoke CO 61776.

At the hearing, DCRA conceded that the regulations pertaining to discontinuance at § 2005.1 did not apply to the property, but argued that the Board could and should resolve the matter without reaching the question of whether the use of the property was conforming.

Material Facts Not in Dispute

1. The property that is the subject of this appeal is located at 3256 N Street, N.W. in the R-3 zone district of the Georgetown Historic District.

2. MLW, LLC is the owner of the subject property. *See*, Exhibit 1, Tabs 3 and 6.

3. In the early 1960's, the prior owners of the subject property, Mr. and Mrs. Aubrey W. Williams, filed an appeal¹ with the Board, seeking to change a nonconforming use from a rooming house to an apartment house. On August 21, 1962, the Board issued BZA Order No. 6885, authorizing the use of the subject property as a five-unit apartment building. While the BZA limited the apartment building to five units, it did not impose a time limitation or other conditions on the use. *See*, Exhibit 1, Tab 2.

4. Mr. Jerome Wagshal ("Mr. Wagshal") acquired the subject property in the early 1970's. On November 3, 1978, DCRA issued CO No. B111434 for the subject property (the "1978 CO"). The 1978 CO authorized the property to be occupied as a five-unit apartment house, the same as the prior Certificate of Occupancy for the subject property. *See*, Exhibit 1, Tab 4. On August 22, 2002, the Estate of Jerome Wagshal executed a deed to the subject property in favor of Ms. Mary Wagshal ("Ms. Wagshal"). *See*, Exhibit 1, Tab 5. On September 6, 2002, Ms. Wagshal transferred ownership of the subject property to MLW, LLC. *See*, Exhibit 1, Tab 6.

5. On September 9, 2003, DCRA issued the current Certificate of Occupancy No. 61776 to MLW, LLC based on a change of ownership and authorizing continued use of the subject property as a five-unit apartment building. *See*, Exhibit 1, Tab 7.

6. On March 16, 2005, DCRA issued Building Permit No. B470714 (the "March 2005 Permit") authorizing the exterior work on the subject property. *See*, Exhibit 1, Tab 10.

7. On June 21, 2005, DCRA issued a permit, Building Permit No. B474036 (the "June 2005 Permit"), authorizing interior work on the Subject Property. *See*, Exhibit 1, Tab 11.

8. Having received the necessary permits and approvals, MLW began construction at the property on November 3, 2005. (*See* Exhibit 1, Tabs 3 and 13.)

9. On December 7, 2005, DCRA issued a Stop Work Order (the "First SWO") at the subject property alleging a violation of 11 DCMR § 2002 (nonconforming uses within structures). *See*, Exhibit 1, Tab 14.

10. On January 23, 2006, DCRA lifted the First SWO and MLW resumed construction at the subject property. *See*, Exhibit 1, Tab 20.

¹ In 1962, a BZA appeal was the functional and legal equivalent of a modern "use variance" and/or a "special exception" granted by the Board. *See*, 11 DCMR §§ 3103 and 3104 and Tr. at 84.

11. On March 28, 2006, DCRA issued a Second Stop Work Order (the “Second SWO”), alleging a violation of 11 DCMR § 2005.1 (discontinuance of nonconforming use). *See*, Exhibit 1, Tab 22.

12. The second SWO was accompanied by a letter from the Zoning Administrator dated March 22, 2006, acknowledging that the use of the subject property as a five-unit apartment was authorized by order of the BZA in Appeal No. 6885. The letter required the Appellant to “provide proof of rental of all 5 units for past 10 years” and contained a handwritten note that read “Stop Work Order place [sic] by Mr. Bill Crews, authorization of the Director, DCRA will be lifted upon verification of requested documentation.” *See*, Exhibit 1, Tab 23.

13. On April 12, 2006, DCRA lifted the Second SWO and MLW resumed construction at the Property. *See*, Exhibit 1, Tab 28.

14. On or about October 19, 2006, the Zoning Administrator sent a Notice of Revocation of CO 61776 to MLW. *See*, Exhibit 1, Tab 1. The Zoning Administrator alleged that on “information and belief, the Zoning Administrator has determined that the nonconforming use was discontinued for a period of three (3) or more years” and, as a result, under 11 DCMR § 2005.1, “the current use as a five (5) unit apartment building is not allowed by the Zoning Regulations.” *Id.*

Legal Analysis

Revocation of Appellant’s certificate of occupancy was based on the Zoning Administrator’s determination that the apartment building was a nonconforming use and therefore subject to the discontinuance of nonconforming use provision set forth in § 2005.1. As set forth below, and based on the undisputed facts in this case and the law governing nonconforming and conforming uses, the Zoning Administrator erred in this finding.

The term “nonconforming” use is specifically defined under the Zoning Regulations as follows:

[A]ny use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective, that does not conform to the use provisions for the district in which the use is located. A use lawfully in existence at the time of adoption or amendment of this title that would thereafter

require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use. That nonconforming use shall be considered a conforming use, subject to the further provisions of §§ 3104.2 and 3102.3.

11 DCMR § 199.1.

It is undisputed that use of this building as an apartment building was authorized by the Board in 1962 – after the Zoning Regulations that require special exception approval from the Board for this use were adopted in 1958. (*See* Undisputed Material Fact #3.) Accordingly, this use was not lawfully in existence prior to the adoption of the zoning regulations and, therefore, does not fall within the definition of nonconforming use.

Further, it is undisputed that the Board expressly authorized this use without time limitation or other conditions. *See*, Finding of Fact # 3. The Appellant argued that because the use was approved and authorized by the Board, it became a “conforming use” and use of the property runs with the land. Although the District’s courts have not addressed this precise question, courts in other parts of the country have upheld the concept that a use approved by a variance or special exception “becomes a conforming use and otherwise partakes to a large degree the character of a vested right running with the land.” *See, Anderson, American Law of Zoning*, §§ 6.1, 20.2 (4th Ed.) citing *Industrial Lessors, Inc. v. Garfield*, 119 NJ Super 181, 290 A.2d 737 (1972), *cert. den.*, 61 NJ 160, 293 A2d 390. The Board concurs with this reasoning.

Regardless of whether the use of the subject property as a five-unit apartment building as authorized by BZA Order No. 8665 is considered a conforming use, it is undisputed that the use is not a nonconforming use and it thereby is not subject to the discontinuance restrictions of § 2005.1. The discontinuance restrictions under § 2005.1 are by definition only applicable to a “nonconforming use.” Subsection 2005.1 provides:

Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for a period of more than three (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.

11 DCMR § 2005.1 (Emphasis added).

Grant of Motion for Summary Judgment

The Board finds that there was not a nonconforming use in this case. The undisputed facts show that use of this five-unit apartment building was not in existence prior to 1958 and, thereby, it does not fit the definition of a "nonconforming use" as set forth in the regulations. That section of the regulations specifically requires that the nonconformity be in existence at the time the title or an amendment became effective, which was not the case in this instance. *See*, 11 DCMR § 199.1.

Further, the Board finds use of the subject property as a five-unit apartment building was authorized in 1962 by BZA Order No. 6885. As a result, use of the subject property, as a five-unit apartment building pursuant to that order is a conforming use.

Finally, the Board finds as a matter of law that there was no discontinuance of a nonconforming use under § 2005.1 because the use of the subject property as a five-unit apartment building was not a nonconforming use.

Accordingly, DCRA erred when it issued the Notice of Revocation of the Certificate of Occupancy.

For the reasons discussed above, it is hereby **ORDERED** that:

The Motion for Summary Judgment and the appeal of the Notice of Revocation are **GRANTED**.

Vote taken on May 1, 2007

VOTE: 3-1-1 (Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann II to grant; Marc D. Loud to deny. No Zoning Commission member participating or voting)

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

Three Board members have approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning 

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FINAL DATE OF ORDER: OCTOBER 18, 2007

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17591

As Director of the Office of Zoning, I hereby certify and attest that on **OCTOBER 18, 2007**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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