

*Original*  
Before the Board of Zoning Adjustment, D.C.

PUBLIC HEARINGS-December 16, 1964 and  
January 13, 1965

Appeal No. 8022 Thomas D. McCloskey, appellant.

The Zoning Administrator of the District of Columbia, appellee.

On motion seconded and unanimously carried the following order was entered on February 9, 1965:

ORDERED:

That the appeal of Thomas D. McCloskey from the decisions of the Zoning Administrator dated September 30, November 2 and November 27, 1964 be denied and that such decisions of the Zoning Administrator be and they are hereby affirmed.

FINDINGS OF FACT:

From the evidence adduced at the hearing and from an examination of the records in this appeal and in appeals Nos. 6693, 6870 and 6871 which are incorporated herein by reference, the Board finds the following facts:

(1) The property involved in this appeal is located in a Special Purpose (SP) District, in which there is permitted the construction of new office buildings for, among other things, non-profit organizations such as Georgetown University, if authorized by the Board of Zoning Adjustment (4101.4 and 4101.42 Zoning Regulations).

(2) On January 30, 1962, the President and Directors of Georgetown College entered into a written contract with Thomas D. McCloskey wherein the University agreed to transfer to McCloskey a parcel of real property with the then existing improvements designed as 1715-19 Massachusetts Avenue, N.W. At that time the improvements on the property consisted of some old row houses which had been remodeled for offices and which were used to house activities of Georgetown University. The contract required that McCloskey demolish the existing buildings and construct a new office building on the site. Prior approval of the University for the plans and specifications was required.

The contract also required that the purchaser apply for and obtain all "building, zoning and any other permits and licenses required by the District of Columbia prior to commencement of construction of the new building." A condition precedent to the contract was the delivery to the University of the necessary zoning approval. The contract reserved to the University an option to reacquire the premises during the tenth year or any subsequent year after completion of the building in consideration of the payment of a sum equivalent to "any unre-captured investment of the buyer." Also provided for in the contract was a sublease over to McCloskey & Company for a term of ten years for all but two floors of net rentable space in the premises.

(3) In March, 1962 an appeal was filed on behalf of Georgetown University, then record owner of the property, with the Board of Zoning Adjustment (Appeal No. 6693), which appeal was granted on March 27, 1962. The order provided in part that the "appeal of the President and Directors of Georgetown College to erect a Special Purpose office building (housing non-profit organizations) known as the Georgetown University Research Center . . . be granted." As a part of that appeal, representations were made to the Board that the University proposed to locate ultimately within the building, research projects or programs closely related to the University's activities.

(4) The contract described in Finding No. 2, above, was in full force and effect at the time of the hearing of appeal No. 6693 but was not brought to the attention of the Board.

(5) During the course of the hearings on appeal, No. 6693 an exhibit was submitted on behalf of the appellant in the form of a written statement by Reverend T. Byron Collins, S. J., Business Vice-President, Georgetown University, which stated, in pertinent part, as follows:

"It is the University's long-range plan that the entire building will ultimately be devoted to University research projects or research projects closely related to the University's activities. In the meantime, the University proposes to locate within the building other kindred non-profit organizations engaged in educational and research activities. Some of these organizations may be religious organizations." (See Exhibit No. 9, BZA Appeal No. 6693.)

(6) On July 24, 1962, further appeals were granted which provided for an increase in building size. (BZA Appeals Nos. 6870 and 6871). During the course of hearings on these appeals, which were conducted on July 18, 1962, the following representations were made on behalf of Georgetown by its counsel in response to inquiries by members of the Board: (Tr. 196-197.)

"Q. Chairman Scrivener: How much of the building will be occupied by the University?

"A. Mr. Auerback: What is the answer to that question, Mr. Wilkes:

"A. Mr. Glasgow: In the original proceeding it will be --- they will occupy immediately three-fourths (later, Mr. Glasgow stated that this is an error in transcription, and should read "three floors") of the building for their present requirements and then the balance of the building would be other Catholic educational type activities that will be called in, but the University itself ---

"Q. Mr. Davis: Is that still the case?

"A. Mr. Glasgow: Yes, it would not necessarily be strictly Catholic, but it would be related SP type uses that would fit within this educational type of research activity.

"Q. Mr. Clouser: It would not under any conditions be the Federal Government?

"A. Mr. Glasgow: It would not be the Federal Government, that is correct."

(7) By letter dated July 22, 1963 Mr. Norman M. Glasgow, counsel for Georgetown University, advised Mr. George Roper assistant to the Vice President of the University that "the United States of America cannot legally occupy space at 1719 Massachusetts Avenue, N.W."

(8) The sublease provided for in the January 30, 1962 contract was

entered into on August 2, 1962, with the Pennsylvania Tower Building Corporation. The sublease reveals that T. D. McCloskey is vice-president of this corporation. The lease and sublease contained the following provision:

"The Tenant will use and occupy said premises for offices for employees of the Tenant and may sub-lease all or any part of said premises for any period during the term of this lease, provided that any sub-lessee will use the demised premises for office space only and not for any retail commercial or any other type of use not permitted under the applicable zoning laws of the District of Columbia for this building."

(9) On August 15, 1962, Thomas D. McCloskey, denominated in the application as "owner", applied for the necessary building permit to construct the building and set forth the use to be made of the building as: "Office Bldg. Spec. Purpose." The permit was granted and approved for zoning.

(10) Construction was commenced early in 1963 and in the early part of 1964 the building was substantially completed. During the year 1963, Randall Hagner & Co. was asked to act as rental agent for the building to secure occupants for the available office space in the building. Because of a change in general business conditions suitable tenants were not developed by this agent. Shannon & Luchs was then requested to undertake the job of renting the building and declined because that company had a contract with a nearby office building to act as rental and management agent, which contract precluded Shannon & Luchs from undertaking the rental of any building within a geographical area which included 1717 Massachusetts Avenue. Conversations to this end were also held with Walker & Dunlop in the early spring of 1964.

(11) On February 1, 1963 and June 3, 1963, the appellant, during the course of construction, submitted bids to the General Service Administration, United States Government to lease space in subject building. Copies of those bids are attached to the statement of the Zoning Administrator as exhibits "C" and "D", respectively, and are incorporated herein by reference.

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(12) On April 23, 1964, approximately 88,000 net usable square feet of space therein was leased to the United States of America by a corporation bearing the name "1717 Massachusetts Avenue, N.W., Inc." The corporation's 1964 annual report, filed in the Office of the Superintendent of Corporations, reveals that the President and Treasurer of the corporation is Thomas D. McCloskey. This lease specifies that the premises is to be used exclusively for "governmental purposes." At the date of the hearing of the present appeal all but approximately 3,600 square feet was being used by the Veterans Administration and by its sub-tenants.

(13) On September 8, 1964 the Corporation Counsel of the District of Columbia delivered his opinion on the question:

Whether or not the occupancy of 1717 Massachusetts Avenue, N.W., Washington, D. C., violates the Zoning laws and regulations of the District of Columbia.

His opinion was that such violations existed. That opinion, and his supplemental opinion of November 17, 1964 are incorporated by reference into these findings.

(14) By letters dated September 30, November 2 and November 27, 1964 the Zoning Administrator of the District of Columbia ruled that occupancy of the building by the United States Government was in violation of the Zoning Regulations and refused, for that reason, to approve the request which had been made for a certificate of occupancy. These three letters are incorporated by reference into these findings.

(15) On November 27, 1964 appeal was taken to this Board from the decisions of the Zoning Administrator as set forth in his three letters, the appeal being that of Thomas D. McCloskey:

"from decision of the Zoning Administrator given on Sept. 30th, Nov. 2nd and Nov. 27th, 1964 that a certificate of occupancy is required for use by the U. S. Government of private property;

that the U. S. Government is not a non-profit organization and does not qualify as an SP District user of private property; and that existing governmental occupancy is not of professional persons as defined in the regulations governing the SP District premises 1717 Mass. Avenue, N.W., lot 850, sq. 157."

(16) The printed form for "Solicitation For Negotiated Offers" issued by the General Services Administration contains the following provision:

"6. ZONING

Prior to award under this Solicitation, any one or all bidders may be required to furnish evidence that their property is zoned in conformance with the Government's intended use. Such evidence must be furnished within five (5) days from the date of the Government's written request. Failure to provide satisfactory evidence will automatically make the bid non-responsive. Moreover, if rezoning or a zoning variance is necessary for the proposed use of the property, the bidder must furnish evidence that such rezoning or variance would be authorized even if the Federal Government, as such, were not involved."

(17) Section 16 of the Act of June 20, 1938 reads as follows:

"Sec. 16. The provisions of this Act shall not apply to Federal public buildings: Provided, however, that in order to insure the orderly development of the National Capital, the location, height, bulk, number of stories and size of Federal public buildings, in the District of Columbia and the provision for open space in and around the same will be subject to the approval of the National Capital Planning Commission."

(18) Appellants' counsel agreed at the hearing (R.p. 145) that the building involved in this appeal is not a "Federal public building" as that term is used in Section 16 of the Act of June 20, 1938.

(19) As of October 27, 1964 the employees of the U. S. Government occupying the building were classified as follows:

First Floor	• Realty Appraisers and Construction Analysts.
Second Floor	- Representatives of non-profit organizations (e.g., American Legion, Veterans of Foreign Wars, Disabled American Veterans, American Red Cross, Amvets, Military Order of the Purple Heart, and National Academy of Science).

- Third Floor - Files.
- Fourth Floor - Attorneys, Physicians, Counseling Psychologists.
- Fifth Floor - Manager and Administrative Offices.
- Sixth Floor - Attorneys and Physicians.
- Seventh Floor - Files.
- Eighth Floor - Attorneys, Psychologists, Personnel, Specialists, and Accountants.

## OPINION:

## I

The first contention of appellants in the instant appeal is that no certificate of occupancy is required for use of private property by the U. S. Government. In support of this contention appellants urge that various sections of Title 40 of the United States Code exempt all Government occupancy from the Zoning statutes and regulations of the District of Columbia and that, in any event, the United States being the sovereign power with respect to the District of Columbia cannot be subjected to the zoning statutes and regulations.

It is very apparent to us that Title 40 has no bearing whatsoever on the obligation of the United States Government to obey, or not to obey, the zoning statutes and regulations of the District of Columbia. That title merely confers on the Administrator of General Services the power to purchase, acquire, construct and lease buildings and space for the use of the Government. No authority is cited to support the proposition advanced by appellant and, in fact, the inclusion by the General Services Administration of Zoning clause in its solicitations of offers of space (see Finding of Fact No. 15) refutes any contention by this private appellant that the United States, as represented by the Administrator of General Services, makes any contention that Title 40 exempts it from the zoning statutes and regulations. The United States has

made no such contention, nor has it intervened in this proceeding, even though notified.

The relation of the United States Government to the zoning statutes and regulations of the District of Columbia is exactly and fully covered by Section 16 of the Zoning Act of June 20, 1938 which is set forth in full in Findings of Fact No. 16:

"Sec. 16. The provisions of this Act shall not apply to Federal public buildings; Provided, however, that, in order to insure the orderly development of the National Capital, the location, height, bulk, number of stories, and size of Federal public buildings in the District of Columbia and the provision for open space in and around the same will be subject to the approval of the National Capital Planning Commission."

Therefore, the sole question presented as to this aspect of appellant's contentions is whether the building involved in this appeal is a "Federal public building." We are of the opinion that it clearly is not, and appellant has agreed with this. The building is not owned by the Federal government but is owned by a private individual with certain reversionary rights in Georgetown University. The Federal government does not occupy all of the available space in the building and does not control the remaining space, and the mere fact of partial or entire governmental occupancy of a privately owned building does not constitute that building a Federal public building. This building is therefore subject to the zoning regulations.

## II

Appellant also contends that the United States Government is a non-profit organization and may therefore occupy office space in an SP zone as a matter of right. Such an organization is defined as follows in the Zoning Regulations;

Organization, non-profit - an organization organized and operated exclusively for religious, charitable, literary, scientific, community, or educational purposes, or for the prevention of cruelty to children or animals, provided no part of its net income inures to the benefit of any private shareholder or individual.

To hold that this contention is correct and that general purpose office buildings may be constructed and leased wholly or in part to the Government in the SP zone, would not only do extreme violence to the concept of the SP zone and its function in the orderly planning of the city but would also in our opinion do violence to the concept of the National Government, as neither the entire government nor the Veterans Administration is a non-profit organization as that term is used in the zoning regulations. A mere reading of the definition of a non-profit organization in those regulations is dispositive of any argument that the Government of this nation is such an organization.

### III

Appellant also argues that in this particular case the Government is permitted to occupy the building for the reason that many of its employees housed in the building are professional people such as those specified in Section 4101.42. We cannot accept this argument as we believe that the clear intent of the section referred to is to exclude from the SP District typical business office uses such as those found in the C districts, in which the Federal Government is permitted as a matter of right. The Veterans Administration which occupies the building involved in this appeal is a relatively small arm of the Federal Government and as such is a typical office operation. The mere fact that some, or even all, of those employed and housed in the building, are lawyers or doctors or the like if those were the facts, which they are not, does not, in itself, constitute this government office to be that of professional persons as intended by the Zoning Regulations. It is our view that government employees engaged as such must be so classified and the mere fact that some may also qualify as professionals as enumerated by the Zoning Regulations is incidental to primary objectives of government. But

in any event we note that at least four floors of this building are being utilized by other than architects, dentists, doctors, engineers, lawyers or similar professional persons, these being the 1st, 3rd, 5th, 7th and part of the 4th and 8th.