GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17902-A of Joseph Park, pursuant to 11 DCMR §§ 3100 and 3101, from an August 29, 2008 decision of the Zoning Administrator to revoke Certificate of Occupancy Permit No. 167331, for a liquor store (Oasis Liquors) in the R-4 District at premises 1179 3rd Street, N.E. (Square 773, Lot 277).

HEARING DATE: April 14, 2009
DECISION DATE: May 12, 2009

CORRECTED ORDER[1]

PRELIMINARY MATTERS

On October 24, 2008, Mr. Joseph Park ("Appellant") filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board"), challenging the revocation of Certificate of Occupancy Permit No. 167331 ("C of O"). The Appellant owns the property located at address 1179 3rd Street, N.E. ("subject property"), and has operated a nonconforming liquor store there since approximately 1986. Due to age, ill health and other factors, the Appellant decided to lease the liquor store operation and the Department of Consumer and Regulatory Affairs ("DCRA") issued C of O No. 167331 to his lessee, Mikyung Yoon, on May 30, 2008. After issuing the C of O, the Zoning Administrator ("ZA") determined that the nonconforming liquor store use had been discontinued for at least three years, and that therefore, the C of O issued to Mr. Yoon had to be revoked. The "Notice to Revoke Certificate of Occupancy No. 167331," dated August 29, 2008 was mailed to the Appellant automatically revoking the C of O 10 business days later.

The Appellant appealed the Notice of Revocation to the Board claiming that there had been no abandonment of the liquor store use, and that the revocation was in error.
The Board heard the appeal on April 14, 2009, but kept the record open for further information from the Appellant, and set a decision date of May 12, 2009. At the May 12th public meeting, the Board voted 3-0-2 to grant the appeal.

[1]On July 23, 2009, Advisory Neighborhood Commission 6C filed a request for reconsideration of the decision in Appeal No. 17902. At a Special Public Meeting on October 27, 2009, the Board of Zoning Adjustment denied the substance of the ANC's request for reconsideration, but agreed with the ANC's contention that two Findings of Fact, Nos. 16 and 25, needed to be corrected. This Corrected Order, designated as Order No. 17902-A, contains revised and corrected versions of Findings of Fact Nos. 16 and 25. (A separate order, designated as Order No. 17902-B, denies the substance of the ANC's request for reconsideration.)

FINDINGS OF FACT

The subject property and the nonconforming use

1. The subject property is located at address 1179 3rd Street, N.E., at the corner of 3rd and M Streets, N.E., in an R-4 zone district.

2. On the subject property is a one-story building built as a commercial building in 1938, which is now the end building of a line of attached row dwellings fronting on 3rd Street.

3. The subject building contains a liquor/convenience store, which is owned by, and has been operated by, the Appellant.

4. The Appellant's store has existed at this location since 1986 and has operated pursuant to a valid Certificate of Occupancy permit ("C of O"), No. B146037, which was issued to the Appellant on July 9, 1986.

5. At some point in, or after, 1986, the Appellant obtained a liquor license, permitting his store to sell liquor.

6. From 1986 until 1997, the subject property was located in a C-M-1 zone district. In 1997, the property was re-zoned to R-4, although the other three corners of the intersection of 3rd and M Streets, N.E., remained zoned C-M-1.

7. Due to the 1997 re-zoning, Appellant's store became a nonconforming use. 11 DCMR § 199.1, definition of "Use, nonconforming."

8. Discontinuance of a nonconforming use for a period of more than three years is construed as *prima facie* evidence of an intention not to resume active operation of the use. Any subsequent use must conform to the regulations of the district in which the use is located. 11 DCMR § 2005.1.

History leading to this appeal

9. At some point in 2003/2004, the Appellant began experiencing health problems, causing him to reduce the amount of time that his store was open.

10. Through September, 2006, the Appellant continued to operate his store only sporadically - one or two days a week, or less - as his health permitted.

11. The Appellant's Basic Business License, which permitted him to operate his store, last expired on July 31, 2003, and was not renewed.

12. The Alcoholic Beverage Regulation Administration of the District of Columbia ("ABRA")

sent the Appellant a letter dated November 9, 2005,[2] stating that its records indicated that the Appellant's store was "not operating," but that his liquor license had not been placed in "safekeeping." Exhibit No. 23.[3]

13. Appellant took no action in response to this letter until March 24, 2008, when he paid $2,600 to put his store's liquor license in "safekeeping" with the ABRA.

14. Water service to the Appellant's store had been disconnected in April, 2005 as a result of an arrearage of over $3,000. Water service remained disconnected until it was restored in May, 2008.

15. A "Merchant Financial Activity Statement" from American Express for Appellant's store during the period of December 12, 2007 to January 11, 2008, shows one transaction with a sales amount of $5.95.

16. Through the year 2008, the Appellant filed with the D.C. government Unincorporated Business Franchise Tax Returns for his store.[4] The returns do not show a profit, but a business can be operating and not making a profit. Nor do the returns indicate that the business had been terminated, although they provide a box to check if termination has occurred.

17. Through the year 2008, the exterior of the subject property was not particularly well maintained, with, for example, "signs falling off the side of the building." Exhibit No. 15 (ANC Letter).

18. Beginning in approximately September, 2006, the Appellant received several offers from persons wishing to lease the business. *See,* Exhibit No. 20.

19. On April 30, 2008, the Appellant entered into a commercial lease with Mr. Mikyung Yoon. Exhibit No. 20.

20. Mikyung Yoon was to lease the Appellant's business and continue the liquor store use for one year beginning on May 1, 2008, with an option to renew for five years, and an option to purchase the property within the five-year period. Exhibit No. 20.

21. DCRA issued C of O No. 167331 to Mikyung Yoon on May 30, 2008 for a "retail beverages store" on the subject property. The C of O erroneously noted the zone district of the subject property as C-M-1. It had no expiration date.

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[2]The ABRA letter was sent to an address at which the Appellant had not resided since 1996.

[3]There is no explanation in the record of how or why the ABRA came to the conclusion that the Appellant's business was "not operating," other than an allusion in the ANC's letter to the effect that the ABRA had done a "spot check of the establishment." Exhibit No. 15.

[4]Tax returns for 2002 and 2003 are not in the record and their absence was not explained.

22. Around the time of entering the lease with Mikyung Yoon, the Appellant made renovations to the property, but DCRA issued a Stop Work Order ("SWO") and Notice of Infraction ("NOI") because no building permit authorizing such renovations had been obtained.

23. Thereafter, the Appellant paid the fine associated with the NOI and applied for a building permit.

24. DCRA issued the Appellant a building permit for the subject property on July 18, 2008 allowing him to "alter partition, repair walls 7 (sic) painting, repair ceiling, replace window glass, repair roof, fix drainage." Exhibit No.2, Third Attachment.

25. Although there was some discrepancy as to the precise amount spent, the Appellant invested money in repairs and renovations of the subject property in preparation for the operation of the liquor store business by Mikyung Yoon. *See,* Hrg. Trans. at 133 and Exhibit No. 28 (2007 tax return).

26. After investigating the circumstances surrounding the operation of the Appellant's business, DCRA concluded that it had been discontinued for more than three years, and, pursuant to 11 DCMR § 2005.1, on August 29, 2008, revoked C of O No. 167331 as erroneously issued.

27. The Appellant filed the instant appeal of revocation of C of O No. 167331 on October 24, 2008.

CONCLUSIONS OF LAW

This appeal centers on one Zoning Regulation, 11 DCMR § 2005.1, which states:

> 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.

The test in the District of Columbia continues to be (1) the intent to abandon, and (2) some overt act or failure to act which carries the implication of abandonment. *GW University v. DC BZA, 429 A.2d 1342* (DC 1981). In sum, for discontinuance to be shown under § 2005.1, the law requires more than mere lapse of time or "discontinued use". The law also requires this "intent to abandon" and some act/failure to act that implies abandonment.
This regulation sets up a rebuttable presumption: proven discontinuance of operation of a nonconforming use for more than three years results in an assumption that the owner of such use has no intention to resume such use. This assumption, or legal presumption, is, however,

rebuttable, *i.e.*, can be contradicted, if the owner of the nonconforming use can make the appropriate showing that he did not intend not to resume the use. Therefore, the first thing that must be shown is that the nonconforming use has been discontinued for more than three years. If this is shown, the presumption arises. Notwithstanding the discontinuance for more than three years, however, the owner of the use next has the opportunity to demonstrate that they never intended not to resume the use. Such an intention must be proved to the Board by demonstrable, external facts. Such proof may involve actions or other evidence of intent taken at any time during or after the three year period identified by the ZA. It therefore behooves DCRA to take enforcement action sooner rather than later, since on any prior action evincing an intent to continue the business, no matter when taken, starts a new three year period.

As to whether the use had been discontinued for three years, the Board finds that the operation of the liquor store, although greatly reduced, did not ever cease for a period of more than three years. Although the Appellant concedes that he operated the liquor store only one or two days a week from approximately 2003 to September, 2006, this does not amount to "discontinuance," which the Board interprets to mean a "cessation, shutdown, [or] closure." *Webster's Third New International Dictionary,* definition of "discontinuance." *See,* 11 DCMR § 199.2(g). The Board concludes that Mr. Park did not intend to abandon the liquor store use, nor was there evidence of an overt act or failure to act that carried the implication of abandonment.

The Appellant also indicated that due to his ill health, he had failed to do what was necessary to keep all the aspects of his business viable. For example, he did not renew his Basic Business License, which expired on July 31, 2003, allowed the water service to be turned off for most of this time, and allowed the property to go into disrepair. However, none of these facts refute Appellant's contention that he did operate the business, albeit sporadically. All that is indicated is that he did so without a license or water and in a deteriorating physical environment. While ABRA and the Zoning Administrator may have surmised from these factors that a discontinuance may have occurred, the Board has the advantage of having heard from Mr. Park and, having done so, concludes that no discontinuance of the business occurred.

In March of 2008, approximately a month before entering the lease with Mr. Yoon, Appellant made the payment to ABRA necessary to safeguard his liquor license. The April 30, 2008 lease permitted Mr. Yoon, to continue operating the business for one year with the option to renew the lease for five years, and the further option to purchase the property. Following the execution of the lease, Appellant took the actions necessary to resume water service, spent over $30,000 to renovate and repair the subject property, and paid the necessary fines for beginning renovations without a permit.

Both separately and collectively, these actions rebut any presumption that Mr. Park had "no intention to resume active operation" of the nonconforming liquor store use, but instead manifest an intention to continue the business.
The Board therefore concludes that there was no three-year period of discontinuance of the nonconforming liquor store use at the subject property. The Board further concludes that even if there had been a discontinuance of this length, the actions of the Appellant to preserve and

enhance the use rebutted the presumption of abandonment. Therefore, C of O No. 167331, issued to Mikyung Yoon for the same nonconforming use, and issued only because of a change in the operator of the use, was erroneously revoked.

The Board is required to give "great weight" to issues and concerns raised by the affected ANC. D.C. Official Code § 1-309.10(d). Great weight means acknowledgement of the issues and concerns of the ANC and an explanation of why the Board did or did not find its views persuasive. ANC 6C recommended denial of the appeal, stating that "nothing in the application provides any evidence to rebut the presumption spelled out in 11 DCMR § 2005.1." Exhibit No.15, at 2. As explained above, the Board disagrees with this conclusion. The Board acknowledges the ANC's contention that the "property certainly appeared to be abandoned," (*Id.*) and there was other testimony to this point, but, as noted, the property's unkempt appearance is not enough to establish either a three-year period of discontinuance or an intention not to resume the use. The ANC also states that if the business were continuously operated, it was done illegally because of the lack of a Basic Business License and the cut-off of water service, but these are not issues within the jurisdiction of this Board.

For all the reasons stated above, the Board concludes that the Appellant met its burden of demonstrating that DCRA erred in revoking C of O No. 167331. Therefore, it is hereby **ORDERED** that this appeal be **GRANTED.**

VOTE TO GRANT APPEAL:	**3-0-2**	(Marc D. Loud, Shane L. Dettman and Anthony J. Hood to Grant. Two Mayoral appointees (vacant) not participating, not voting.)
VOTE TO ISSUE CORRECTED ORDER:	**3-0-2**	(Marc D. Loud, Shane L. Dettman and Anthony J. Hood to Approve. Two Mayoral appointees (vacant) not participating, not voting.)

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT
A majority of Board members has approved the issuance of this Order.

ATTESTED BY: Jamison L. Weinbaum
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: **JULY 10, 2009**

FINAL DATE OF CORRECTED ORDER: MAR 09 2010

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND 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.