

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18103 of ANC 8E, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs in the issuance of Building Permit No. B1002975, for interior renovation of an apartment building located at 1300 Congress Street, S.E., in the R-5-A District (Square 5915, Lot 12).

HEARING DATE: September 28, 2010

DECISION DATE: November 2, 2010

DECISION AND ORDER

This appeal was filed on May 25, 2010 with the Board of Zoning Adjustment (the “Board”). The appeal challenged the decision of the Department of Consumer and Regulatory Affairs (“DCRA”) to issue a building permit that authorized Peaceoholics, a non-profit corporation, to renovate an existing 13-unit apartment building. Because Peaceoholics sought only to do interior renovation work at the building, and no change of use was proposed, DCRA did not refer the permit application for zoning review by the Zoning Administrator (the “ZA”). The Appellant disputes that no change in use was sought, and claims that Peaceoholics intended to convert the building from an apartment building to a community-based residential facility (“CBRF”). The Appellant claims further that DCRA erred when it issued the permit because allegedly a CBRF use is not allowed in the zone as a matter of right. After allowing the parties an opportunity to be heard, the Board found that the permit had been properly issued and that the appeal should be denied. A full discussion of the facts and law supporting this conclusion follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning (“OZ”) scheduled a hearing on September 28, 2010. In accordance with 11 DCMR § 3112.13 and 3112.14, OZ mailed notice of the hearing to the Appellant, Advisory Neighborhood Commission (“ANC”) 8E (the ANC in which the subject property is located), the property owner, and DCRA.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18103

EXHIBIT NO. 29

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Parties

The Appellant in this case is ANC 8E (the “ANC” or the “Appellant”). ANC Commissioner Sandra Seegars spoke for the ANC during the proceedings.

DCRA appeared during the proceedings and was represented by Assistant Attorney General Jay Surabian.

As the owner of the subject property, Peaceoholics is automatically a party under 11 DCMR § 3199.1 and will hereafter be referred to as the “Owner” or “Peaceoholics.”

The Board granted a request to intervene in opposition to the appeal (Exhibits 15 and 17) by Brian Townes, Tonette Sivells, and Shayla Edgerton, individuals who reside and/or own property in close proximity to 1300 Congress Street (collectively the “Intervenors”). The Intervenors participated in all aspects of the public hearing and were represented by Andrea Ferster, Esq.

Intervenors’ Motion to Hold Appeal in Abeyance

The Intervenors filed a written motion on the day of the public hearing, requesting that the Board hold the appeal in abeyance until a certificate of occupancy (“C of O”) was issued by DCRA. (Exhibit 19.) The motion stated that no zoning review had occurred at the building permit stage; and therefore, no determination had been made as to whether the subject property would be used as an apartment building or a CBRF. The ANC did not join in the Intervenors’ motion, and the Owner stated that he did not have sufficient time to review the motion. DCRA argued in opposition to the motion, stating that although the ZA had not reviewed the application, DCRA’s permit staff had determined that there was no change in use. DCRA stated that the determination by the permit staff is reviewable by the Board. DCRA also stated that the Board should hear the appeal because it would be unfair to Peaceaholics to hold the appeal in abeyance. Agreeing with DCRA, the Board denied the Intervenors’ motion and proceeded with the hearing.

The Scope of the Appeal

After argument by the parties, the Board denied DCRA’s request to limit the scope of the hearing and receive only that evidence that was available to the agency when the permit was approved. The Board ruled that it would not limit the scope of the hearing as DCRA requested, but would conduct a full evidentiary hearing relating to the permit approval. The Board also ruled that it would not consider evidence relating to post-permit activities at the property.

FINDINGS OF FACT

The Property

1. The subject property is a 13-unit apartment building located at 1300 Congress Street, S.E.,

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in the R-5-A Zone District.

2. The property had been used as an apartment building, at least since November 27, 1989, when a C of O was issued which authorized the use of the property as an apartment building. (Exhibit 18, Tab D.)
3. The owner of the property is a non-profit corporation known as Peaceoholics, Inc. ("Peaceoholics" or the "Owner").

The Building Permit

4. On or about January 26, 2010, Peaceoholics applied to DCRA for a building permit. The application form stated that the work proposed was the "interior renovation of [the] apartment building." In addition, the application form stated that the property was currently used as an apartment building, and that the "proposed use" was also an apartment building. (Exhibit 18, Tab C.)
5. Peaceoholics submitted plans for the proposed renovation work with its permit application. These plans were reduced to page size by DCRA and are part of the record before the Board. (Exhibit 24.)
6. The plans show that there will be four identical two-bedroom apartment units on the first, second, and third floors, and a one-bedroom unit located in the basement, a total of 13 apartment units. The plans depict that the basement will have a maintenance office, storage space, and other amenities for use by the residents. The plans also designate space for a "SHIP" office in the basement.¹
7. When the permit application was received, DCRA staff routed the application to the appropriate disciplines within DCRA for review.² Since neither the application nor the plans reflected any change in use or renovations that went beyond interior work, the permit staff determined that there were no zoning issues to review. Thus, the permit staff decided it was not necessary to refer the application to the ZA.
8. Following review by the appropriate disciplines within DCRA,³ a building permit was

¹ "SHIP" is an acronym for "Strategic Housing Intervention Program", a program of the District's Department of Housing and Community Development ("DHCD").

² The building permit application reflects the different disciplines that review each application. The form contains space for each reviewer to indicate his or her approval. (See, Permit Application, Exhibit 18, Tab C, p. 4.)

³ For instance, the application was reviewed by disciplines in mechanical engineering, electrical engineering, and plumbing.

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issued to Peaceoholics on or about April 1, 2010. The permit limited the proposed work to the “interior renovation of [the] apartment building” and indicated that the work would encompass “only interior non structural work”. (Exhibit 3 and Exhibit 18, Tab B.)

The Appeal

9. The ANC filed this appeal on May 25, 2010, challenging DCRA’s decision to issue the building permit. The ANC and the Intervenors (collectively the “Appellants”) allege that DCRA erred because Peaceoholics intended to use the property as a CBRF, and not as an apartment building. As an existing apartment building, the use is allowable as a matter-of-right.⁴ The Appellants allege further that, as a proposed CBRF, the project would have been subject to special exception review and would not be allowed as a matter-of-right.⁵

Evidence Adduced at the Hearing

10. The Board credits the ZA’s expert testimony that the plans submitted to DCRA were consistent with the Owner’s application for a permit to renovate an apartment building. The plans did not show any change in the apartment building use or any proposed work that exceeded interior renovation work.
11. The Owner’s representative testified that the Owner would not be operating a CBRF and that it never intended to operate a CBRF. He testified that Peaceoholics would provide apartments for underprivileged adults who were at least 18 years old, or apartments for families. The families might include youths. He also stated that there would be common areas at the building such as a fitness center and a computer lab, and there would be a SHIP office in the building and 24-hour residential monitors.
12. Peaceoholics entered into a contract with DHCD to finance the renovations at the property (the “contract”). (Exhibit 14.) It requires that Peaceoholics use the property as low-income rental housing for 40 years but does not, on its face, require Peaceoholics to use the property

⁴ Since Peaceoholics’ use of the property as an apartment building is neither an expansion of or a change in the prior use, its renovation of the property is not subject to the provisions of § 353 requiring special exception review, which applies only to “new residential developments”. (See, 11 DCMR § 353.1.)

⁵ The project would not necessarily be subject to special exception review even if it were a CBRF. CBRFs are generally permitted, with varying restrictions as to size and/or operation, either as a matter-of-right use or as a special exception, in residential, commercial and waterfront zone districts. In the R-5-A Zone, where the subject property is located, even CBRFs that require special exception approval are allowed as a matter-of-right if the ZA has determined that the facility is intended to be operated as housing for persons with handicaps. (See, 11 DCMR §§ 350.4(a) and 330.5(i).)

as a CBRF.⁶ The contract was submitted to this Board by the Intervenor. It was not provided to DCRA during the permit review process and was not part of DCRA's building permit file. (Hearing Transcript of September 28, 2010, ("T."), p. 229, 238-9, 260-2.)

13. Peaceholics participates in the SHIP program, a housing program for at-risk youths in the District. The Appellants submitted detailed, somewhat duplicative information about the SHIP program. (Exhibit 14, Exhibit 16, and Exhibit 17, Tab 3.) None of these documents (the "SHIP program documents") were provided to DCRA during the permit review process and were not part of DCRA's building permit file. (T., p. 229, 238-9, 260-2.)

CONCLUSIONS OF LAW

The Board is authorized by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), to hear and decide appeals where it is alleged that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations (the "Regulations"). The Board's review of such decisions is not limited to the documents presented to the administrative decision-maker. Rather, as it did in this appeal, the Board conducts a full evidentiary hearing. Parties were permitted to present and cross examine witnesses and introduce evidence, and the Board has carefully considered the testimony and evidence that was presented.

The threshold question is to identify the administrative decision that is challenged and the alleged zoning error. The appeal in this case relates to the issuance of the building permit. However, the alleged zoning error does not relate to any decision made by the ZA because, as explained in the Statement of Facts, the ZA did not review the permit application. In this case, the challenged determination is the determination by DCRA's permit staff. DCRA's staff determined that no zoning review was required because (a) there would be no change in use at the property, and (b) the proposed work would not exceed interior renovation work. The Appellants do not challenge the determination regarding the scope of the renovation work. They do challenge the determination that there would be no change in use at the property. Thus, this determination, that the apartment building use would not change, is the zoning error complained of.

The Appellants maintain that when the Owner applied for its building permit, it intended to convert the property from an apartment building into a CBRF. A CBRF is defined by the Zoning Regulations as "a residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living." (*See*, § 199.1 of the

⁶ The contract requires the Owner to comply with various laws and regulations in its operation of the property, including licensing regulations of the District's Child and Family Services Agency, if it operates "certain independent living programs" defined in the regulations. This contract provision does not necessarily mean that the property will be used as a CBRF.

Regulations.) Intervenors claim that DCRA had sufficient information to conclude that the Owner intended to operate a CBRF, or at least enough information to trigger further inquiry into the Owner's proposed operations. Alternatively, the Appellants allege that the Owner may have misled DCRA and hid the fact that it would be operating a CBRF, but based upon the additional information submitted by the Appellants at the public hearing, the Board must now conclude that the Owner intended to operate a CBRF. (*See*, Statement on Appeal, Exhibit 2, and Intervenors' Post-Hearing Brief, Exhibit 27.)

The Board disagrees and concludes that there was no zoning error when DCRA issued the building permit. No conclusive evidence was presented by the Appellants which would compel a finding that the Owner intended to operate a CBRF at the property.

Evidence before DCRA

The only probative evidence received by DCRA was the permit application and the plans, and neither gave any indication that a CBRF was planned. As stated in the Findings of Fact, the application expressly stated there would be no change in use – an apartment building existed at the property and was also proposed at the property. (Finding of Fact 4.) Likewise, the plans that were submitted show 13 renovated apartments at the property. (Findings of Fact 5 and 6.) The designation of a "SHIP office" in the plans does not, in and of itself, indicate that the property will be used as a CBRF. As the ZA testified, office space in an apartment building is not uncommon and the renovations depicted on the plans were consistent with the building being used as an apartment building; no other conclusive determination could be made. (T., p. 253.)

Additional Evidence before the Board

Nor can the Appellants prevail based upon the additional evidence which it submitted during the hearing. In addition to the permit application and plans that DCRA reviewed, the Appellants submitted other documents to support their position. The Appellants assert that the DHCD contract and the SHIP program documents (*see*, Findings of Fact 12 and 13) also establish an intention to operate a CBRF. The Board does not agree. The DHCD contract establishes that the property is to be used for low-income rental housing and establishes complex terms for the financing of the project. However, it does not establish that the property will be converted to a CBRF. (Finding of Fact 13.) Nor do the SHIP program documents provide clear or compelling evidence of a CBRF use. The SHIP documents indicate that Peaceoholics participates in the SHIP program for at-risk youths in the District. This fact, alone, cannot be construed to conclude that the Peaceoholics will operate a CBRF. The Owner testified that, except for children in families, the occupants would not necessarily be "youths" and would be at least 18 years old. (Finding of Fact 11.) There is nothing to suggest that these or any of the likely occupants will have a common need for treatment, rehabilitation, assistance, or supervision in their daily living that is to be provided at this residence.

The Appellants argue that, at the very least, there were "red flags", such as the name "Peaceoholics" and the depiction on the plans of the SHIP office, which should have triggered an additional inquiry by DCRA. (Exhibit 27.) Again, the Board disagrees. The Board concludes that, based upon the permit application and plans, it was reasonable for DCRA to rely upon the Owner's representations and conclude that no change in use was intended. As the ZA testified, the proposed construction was not inconsistent with an apartment building use. (Finding of Fact 11.)

As explained previously, neither the DHCD contract nor the SHIP program documents were available to DCRA during its review of the permit application. However, based upon the Board's *de novo* review of the evidence, which includes the additional information submitted by the Appellants at the public hearing, the Appellants did not establish that Peaceoholics intended to operate a CBRF.

The ANC

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code § 1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. This opinion fully addresses why the Board does not find the ANC's views to be persuasive.

For reasons discussed above, it is hereby **ORDERED** that the **APPEAL** is **DENIED**.

Vote taken on November 2, 2010.

VOTE: 3-0-2 (Meridith H. Moldenhauer, Greg M. Selfridge and Jeffrey L. Hinkle to Deny; Nicole C. Sorg not participating; No other Board member (vacant) participating)

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

A majority of the Board members approved the issuance of this order.

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

FINAL DATE OF ORDER: MAY 18 2011

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PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.