

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18321 of the Citizens Association of Georgetown, pursuant to 11 DCMR §§ 3100 and 3101, from a decision on August 26, 2011, by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue a building permit (B1010202) allowing construction of a rear addition to an existing building in the C-2-A District at premises 1525 Wisconsin Avenue, N.W. (Square 1271, Lot 0813).

HEARING DATES: March 6, 2012, May 15, 2012, and September 25, 2012
DECISION DATE: September 25, 2012

ORDER DISMISSING APPEAL

INTRODUCTION

This appeal was filed by the Citizens Association of Georgetown with the Board of Zoning Adjustment (the “Board”) on October 25, 2011, challenging the Department of Consumer and Regulatory Affairs’ (“DCRA”) issuance of a building permit approving a rear addition to an existing building at 1525 Wisconsin Avenue, N.W. That building permit has now been revoked by DCRA. For this reason, the Board voted to dismiss the appeal as moot. A full explanation of the factual and legal basis for the Board’s conclusion follows.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing

This Appeal was filed with the Board on October 25, 2011 by the Citizens Association of Georgetown (the “Appellant” or the “Association”). (Exhibit 1- Appeal, and Exhibit 3-Statement on Appeal.) The filings detailed several claims of zoning error, including alleged approval of non-conforming lot occupancy. Accordingly, the Office of Zoning scheduled a public hearing for March 6, 2012. Notice of the hearing was provided to the property owner, Sara Mokhtari, d.b.a. Dey Dreams LLC (Exhibit 16), the Appellant (Exhibit 15), the Advisory Neighborhood Commission (“ANC”) 2E (Exhibit 17), and DCRA (Exhibit 18).

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18321
EXHIBIT NO. 25

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Appearance and Representation

The Appellant authorized Outerbridge Horsey, AIA, to represent the Association during the proceedings. (Exhibit 4.) DCRA was represented by Jay Surabian, Esq., Office of the General Counsel, and Matthew LeGrant, the Zoning Administrator ("ZA"). Mr. Horsey appeared during the public hearing, as did the property owner (the "Owner" or "Ms. Mokhtari"), Mr. Surabian, and Mr. LeGrant. The ANC did not participate during the proceedings.

Continuance

On March 6, 2012, the Appellant submitted a written request for a continuance of the public hearing scheduled for that date. (Exhibit 19.) The submission also alleged that the permit approval encompassed additional zoning violations, including the proposed construction of a covered structure in the second floor open court. (Exhibit 19.) Although DCRA consented to the continuance, the Owner opposed the request. The Board continued the appeal until May 15, 2012, and instructed Mr. Horsey to seek an amendment to the appeal if he wished to add new grounds or claims of error.

DCRA's Motion to Dismiss

On May 10, 2012, DCRA filed a Motion to Dismiss, contending that the appeal was now moot. (Exhibit 20.) The basis for its motion was that the agency had "proceeded to take enforcement action to revoke the building permit at issue in this appeal." (Exhibit 20.) In fact, DCRA had served a "Notice of Revocation" of the building permit that would take effect on August 31, 2012 unless the Owner submitted revised plans satisfactory to DCRA and other reviewing agencies, including the Commission of Fine Arts ("CFA"), obtained a revised permit, and completed construction by that date. The Board received a filing from the Appellant in opposition to the Motion to Dismiss. (Exhibit 22.) On May 15, 2012, the Board heard argument from the parties and then voted to deny the Motion to Dismiss, finding that the dispute was still "live". The hearing was continued to September 25, 2012.

Untimely Submissions

At the start of the hearing on September 25, 2012, Appellant proffered a submission to the Board consisting of a brief Statement and two annotated drawings referred to in the Statement. Because the submission was not filed within 14 days prior to the hearing, the Appellant requested a waiver of the requirements of § 3112.10, which unambiguously sets this time limitation on the Appellant. The Board denied this request, finding that the Appellant had known about the hearing for many months and had no excuse for the late filing, or the failure to serve DCRA and the Owner.

FINDINGS OF FACT

The Building Permit

1. The subject property is located at 1525 Wisconsin Avenue, N.W., in the C-2-A Zone District, and in the Georgetown Historic District.
2. It consists of a three-story building and cellar. The first two floors are used for retail, and the upper floor is used residentially.
3. On or about September 16, 2010, the former property owner applied to DCRA for a building permit to construct, in relevant part, a two-story rear addition.
4. On August 26, 2011, Building Permit No. B1010202 was issued to Dey Dreams LLC (also hereafter, the "Owner"), and construction began.

The Appeal

5. On October 25, 2011, the Association filed an appeal challenging DCRA's issuance of the building permit. The Association contended, among other things, that the approval was contrary to the lot occupancy requirements and the court width requirements of the Zoning Regulations.

DCRA's Post-Permit Review and Enforcement Steps

6. After the appeal was filed, the ZA reviewed the matter again and determined that the submitted plans did not permit him to make a finding as to whether the proposed addition did or did not comply with the lot occupancy and floor area ratio ("FAR") requirements of the Zoning Regulations.
7. As to lot occupancy, the ZA found that one sheet in the plan set indicated that the second floor of the existing building would be used as retail space, but that a floor plan submitted with the same plan set indicated that the use of that space will be residential. The ZA therefore concluded that it was not possible to determine if the approved plans met or exceeded the allowable lot occupancy since different standards applied to retail and residential uses.
8. As to FAR, the ZA found that the scale of the plans was inconsistent with the dimensions given on the plan sheets. Since the dimensioned numbers and scale were inconsistent, the ZA concluded that it was impossible to accurately determine the size of the building and thus it was also impossible to calculate the floor area ratio.
9. DCRA then directed the Owner to submit revised plans that provided information necessary to determine compliance with those two requirements of the Zoning Regulations.

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10. The Owner submitted revised plans to DCRA on January 19, 2012.
11. The ZA determined that the proposed design complied with the Zoning Regulations.
12. On February 21, 2012, the Office of Planning's Historic Preservation Office ("HPO") issued the Owner a letter informing her that the Historic Preservation Review Board had recommended against the issuance of a building permit based upon the revised design. The basis of that recommendation was that the CFA had also recommended against permit issuance.
13. The HPO letter indicated that the Owner had the option of revising its plans or requesting a hearing before the Mayor's Agent for Historic Preservation.
14. Pursuant to D.C. Official Code § 6-1202, upon the receipt of a CFA report the Mayor "shall take such actions as in his judgment are right and proper in the circumstances."
15. On May 2, 2012 DCRA gave notice of its intent to revoke Building Permit No. B 1010202.
16. The notice indicated that building permit would be deemed revoked on August 31, 2012 unless the Owner: (a) submitted revised plans for the construction of the rear addition that met the approval of DCRA and other reviewing agencies, including CFA; and (b) obtained a revised permit and completed construction of the work under the revised and approved plans by August 31, 2012.
17. The Owner did not submit revised plans in accordance with the first requirement, which was a necessary prerequisite to complying with the second requirement.
18. As a consequence, DCRA is deemed to have revoked Building Permit No. B1010202 on August 31, 2012.
19. In issuing the revocation, DCRA took the action sought by the Appellant. Because there was no longer any controversy between the Appellant and DCRA, the instant appeal is moot.

CONCLUSIONS OF LAW

Section 8 of the Zoning Act authorizes appeals to the Board "... by any person aggrieved, or organization authorized to represent that person, ... affected by any decision of an administrative officer granting or refusing a building permit ... based in whole or in part upon any Zoning Regulations ..." D.C. Official Code § 6-641.07(f) (2008). The Citizens Association challenged DCRA's issuance of a building permit on the ground that the zoning analysis undertaken by DCRA was in error and the building permit should not have issued.

From almost the start, DCRA asserted that the instant appeal was moot. While the Board did not initially agree, it ultimately found that the appeal was moot and should therefore be dismissed.

The Board's Rules of Practice prohibit it from considering "moot" questions. (11 DCMR § 3100.7.) Indeed, the Board has dismissed several appeals as moot; for example, *Appeal No. 18249 of Larry Heyman* (February 21, 2012) (portion of appeal based upon incorrect lot number rendered moot when DCRA issued a revised building permit with a corrected lot number); *Appeal No. 17085 of Louise and Larry Smith and Mary Ann Snow and James Marsh* (February 28, 2005) (appeal challenging construction on substandard lots rendered moot by owners' obtaining variances of lot size and lot width requirements); *Appeal No. 16984 of Advisory Neighborhood Commission 2A* (March 22, 2004) (appeal challenging portion of permit approving expansion became moot when renovation approved under revised permit which eliminated the expansion); and *Appeal No. 16752 of Advisory Neighborhood Commission 4A* (December 12, 2001) (appeal challenging certificate of occupancy became moot when new certificate of occupancy issued and original certificate of occupancy voided).

"A case is moot when the legal issues present are no longer 'live' or when the parties lack a legally cognizable interest in the outcome... The central question is ... whether the decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." *N Street Follies Limited Partnership v. DC Bd. of Zoning Adjustment*, 949 A.2d 584 (D.C. 2008) (other citations omitted). Applying these principles to this case, the Board finds that, although the issues were still "live" when the Board heard the case on May 15, 2012, they ceased to be so by September 25, 2012 when the Board found that the appeal was moot.

When the Board heard from the parties on May 15, the controversy was still "live" because DCRA had not yet revoked the permit, but only given notice of its intent to do so by August 31, 2012. The notice further indicated that revocation would not take place if the Owner submitted revised plans satisfactory to DCRA and other reviewing agencies, including CFA, obtained a revised permit, and completed construction in accordance with the revised plans by the August 31st date. None of this occurred. Therefore, by the time the case was heard on September 25, the revocation was deemed issued. Since the point of this appeal was to achieve that objective, there is no longer any "live" controversy between Appellant and DCRA as to whether the permit should be revoked.

To be sure, the Appellant also requested the Board to compel the Owner to seek a variance for lot occupancy relief. (Hearing Transcript of September 25, 2012, p. 182-183). However, as the Board has stated previously, neither the Zoning Act nor the Zoning Regulations grants the Board such an extraordinary power. In the absence of an application for a variance filed by a property owner, the Board may not decide or grant such relief. (11 DCMR §§ 3113.3 and 3113.4.) *Appeal No. 17465 of Advisory Neighborhood Commission 3D* (May 9, 2006).

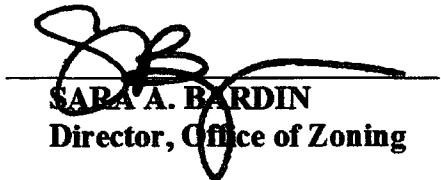
Accordingly, the Board hereby **ORDERS BZA Appeal No. 18321 DISMISSED as moot.**

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VOTE: **4-0-1** (Lloyd J. Jordan, Nicole C. Sorg, Jeffrey L. Hinkle, and
Anthony J. Hood voting to DISMISS the appeal; one Board seat
vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED: BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: May 2, 2013

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.