

Appeal No. 18439 of Valor 1350 Maryland, LLC, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made May 4, 2012, to issue a building permit (No. B1107494) allowing the repair and renovation of a gasoline station in the HS-A/C-2-A District at premises 1400 Maryland Avenue, N.E. (Square 1049, Lots 21 and 803).

HEARING DATE: November 27, 2012

DECISION DATE: January 15, 2013

ORDER DENYING APPEAL

This appeal was submitted on July 3, 2012 by Valor 1350 Maryland, LLC (the "Appellant"), the owner and developer of an eighty-four unit condominium building at 1348-1350 Maryland Avenue, N.E. (Square 1027, Lot 849) immediately across 14th Street, N.E. from 1400 Maryland Avenue, N.E. (Square 1049, Lots 21 and 803) (the "Property"). The appeal challenges the issuance, on May 4, 2012, of a building permit allowing the repair and renovation of a gasoline station due to alleged errors in administering the Zoning Regulations.

The Board of Zoning Adjustment ("BZA" or "Board") heard the appeal on November 27, 2012. On January 15, 2013, the Board deliberated and voted _____ to deny the appeal as without merit.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing

By memoranda dated July 5, 2012, the Office of Zoning provided notice of the appeal to the Zoning Administrator; the Office of Planning; the Advisory Neighborhood Commission ("ANC") 6A; the ANC 6A Commissioner responsible for the affected Single Member District; City Councilmember for Ward 6; 1400 Maryland Avenue Ltd. Empire Leasing, Inc., the owner of the Property, and Capitol Petroleum Group, on behalf of DAG Realty, LLC (the "Ground Lessee"). The Board scheduled a public hearing on the appeal for November 27, 2012. Pursuant to 11 DCMR § 3112.14, the Board mailed notice of the public hearing to the Appellant; the Zoning Administrator; ANC 6A; 1400 Maryland Avenue Ltd. Empire Leasing, Inc.; and Capitol Petroleum Group.

Party Status

The Appellant in this case is Valor 1350 Maryland, LLC, the owner and developer of an eighty-four unit condominium building at 1348-1350 Maryland Avenue, N.E. (Square 1027, Lot 849), immediately across 14th Street, N.E., from the Property. The Appellant is represented by Jacques B. DePuy, Esquire, John Patrick Brown, Jr., Esquire, and Kate M. Olson, Esquire of the law firm of Greenstein Delorme & Luchs, P.C. The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") was represented by Jay Surabian, Assistant Attorney General, and Matthew LeGrant, Zoning Administrator for the District of Columbia. DAG Realty, LLC, the

Ground Lessee of the Property, is a party to the appeal pursuant to 11 DCMR §3199.9. The Ground Lessee is represented by Norman M. Glasgow, Jr., Esquire and Christine M. Shiker, Esquire of the law firm of Holland & Knight, LLP. ANC 6A is an automatic party in this case.

Appellant's Motion to Amend the Appeal

On November 13, 2012, the Appellant filed a Motion to Amend the Appeal and For a Continuance. The Appellant argued that the appeal should be amended to include an appeal of Building Permit No. B1209455 for "Grocery Store to be Added to Existing Vehicle Service Station Under Separate Building Permit No. B1107494."

Ground Lessee's Opposition to Appellant's Motion to Amend the Appeal

On November 20, 2012, the Ground Lessee filed an Opposition to Appellant's Motion to Amend the Appeal and For a Continuance. The Ground Lessee argued that the Appellant is out of time to raise issues which were decided in the permit issued on May 4, 2012, and which were not raised in the appeal when it was filed on the 60th day after the permit was issued. The Ground Lessee also stated that the construction of the gas station and building were appropriately authorized and vested under the C-3-A District and therefore the H Street Overlay District requirements are not applicable.

Appellant's Motion to Amend the Appeal Withdrawn

At the public hearing, the Appellant withdrew its Motion to Amend and for a Continuance and the Board accepted its withdrawal.

Appellant's Case

The appeal, filed on July 3, 2012, challenged the issuance of Building Permit No. B1107494 and argued that it was issued in violation of the applicable Zoning Regulations, 11 DCMR §§ 3130, 3202.2, 3203.3 and 3205.1 and BZA Order No. 17825. Specifically, the Appellant argued that (1) the Property was not a single subdivided separate record lot, in violation of 11 DCMR § 3202.3; (2) the permit application and the plans submitted were incomplete, inaccurate and misleading; (3) the plans did not provide for the installation of an unbroken raised median strip in the center of Maryland Avenue in violation of BZA Order No. 17825; (4) the grocery store was not part of the Building Permit issued and the separate permit for the grocery store was filed after the time frame provided for filing building permit applications pursuant to the BZA Order had expired; and (5) the now applicable HS-A/C-2-A District does not allow the grocery store as presented in the BZA application. At the public hearing, the Appellant stated that the sole issue worth discussing was that the Property was not in a separate record lot.

Ground Lessee's Arguments for Denial of the Appeal

In its Opposition to Appellant's Motion to Amend the Appeal and For a Continuance, dated November 20, 2012, the Ground Lessee responded to each of Appellant's arguments relating to the approval of the May 4, 2012, permit as follows: (1) a subdivision application has been filed with the D.C. Surveyor to combine Lots 803 and 21 into a single record lot and there is no regulatory impediment to recording the plat; (2) the plans for the permit are complete and accurate on their face; (3) the median has been constructed in the center of the right-of-way of Maryland Avenue as required by BZA Order 17825; (4) the original plans for a building permit included a grocery store¹ in the building on the Property; and (4) a grocery store is a use permitted as a matter-of-right in a C-1 District (§ 701.4) and C-2 District (§§ 721.1 and 721.3) and there is nothing in the Neighborhood Commercial Overlay District regulations (§ 1302) nor in the H Street Overlay District Regulations (§§ 1320 -1323) which disallows a grocery store as permitted by the underlying zone.

Position of ANC 6A

ANC 6A filed a separate appeal on July 2, 2012 (BZA Appeal No. 18438), but subsequently withdrew that appeal on October 12, 2012.

On November 13, 2012, ANC 6A filed a letter stating that at its regularly scheduled and properly noticed meeting held on November 8, 2012, ANC 6A voted 6-0-0 to support the subject appeal of Building Permit No. B1107494 as well as the Appellant's motion to amend their original appeal to include Building Permit No. B11209455 and the request for a continuance. ANC 6A further stated that it shares Appellant's concerns that Building Permit No. B1209455 was improperly issued for a C-3-A zone when the correct zoning is HS-A/C-2-A. ANC 6A did not participate in the public hearing.

District of Columbia's Pre-Hearing Statement

On November 26, 2012, DCRA submitted its Pre-Hearing Statement in opposition to the appeal. In response to the Appellant's arguments, DCRA stated that the appeal should be denied because Building Permit No. B110749 was not issued in error. Specifically, DCRA stated that: (1) gas station use is permitted under BZA Order No. 17825; (2) grocery store use is allowed as a matter of right under 11 DCMR § 701.4, which is incorporated into the HS-A Overlay by 11 DCMR §§ 1302.2 and 1320.3; (3) alterations to the existing building under Building Permit No. B1107494 were authorized by the Board in BZA Order No. 17825 and are not subject to subsequent amendments of the Zoning Regulations, including the new H Street Overlay Design Standards;

¹ The term "convenience store" in BZA Order No. 17825 is not an established use under the Zoning Regulations. The Board has previously determined that, for the purposes of the Zoning Regulations, a convenience store is synonymous with a grocery store, which is an established use. See BZA Order No. 18146 at p. 4. All subsequent references to that use in this Order will be to a grocery store.

and (4) no error exists in administering the Zoning Regulations. Furthermore, DCRA stated that the median strip required by the Board under Condition No. 11 in BZA Order No. 17825 has been installed. DCRA further stated that an application to combine Lots 803 and 21 into a single record lot has been submitted to the District of Columbia Office of the Surveyor.

At the hearing, Mr. Surabian represented that due to the length in processing a subdivision application and to avoid unnecessary delay, DCRA has a policy of allowing permit applicants to obtain building permits while the subdivision application is pending, provided that the subdivision is complete before the final inspection is made. Mr. Surabian further represented that there is no regulatory impediment to the property owners completing the process and establishing a new record lot in place of the existing lots.

FINDINGS OF FACT

Background and History

1. The Property is zoned HS-A/C-2-A and is located at 1400 Maryland Avenue at the corner of Maryland Avenue and 14th Street, N.E., Square 1049, Lots 803 and 21. The Property was originally zoned C-3-A but was rezoned to HS-A/C-2-A by Zoning Commission Order No. 10-19, effective on December 9, 2011.
2. On January 26, 2010, in BZA Order No. 17825, the Board granted a special exception allowing for the establishment of a gasoline service station at the Property. The plans submitted to the Board as part of that case show that the applicant intended to alter the existing, one story building on the Property and to use it to house the cashier/attendant for a gas station and a grocery store. The alterations to the existing building including demolishing the front portion of the building to reduce the size of the building by 385 square feet.
3. On or about May 31, 2011, the application for Building Permit No. B1107494 was filed. Initially, the plans for that permit included the interior layout of the grocery store, but those plans were revised to change the use of that space to storage. The plans clearly show the building located at the north side of the Property, behind the pump islands and canopy and indicated that the building was to be used to house the cashier for the gas station and for storage.
4. On May 4, 2012, Building Permit No. B1107494 was issued, allowing for interior and exterior work to allow a gasoline service station at the Property pursuant to BZA Order No. 17825.
5. On May 24, 2012, an application for a building permit was filed with DCRA. The proposed scope of work for that permit was to involve interior alteration to include the

grocery store use into the existing building. Building Permit No. B1209455 was ultimately issued on November 1, 2012.

6. DCRA approved building permits for gasoline service station use and demolition of a portion of the existing building and alteration of it for subsequent use within the time frames permitted under BZA Order No. 17825. The application for the building permit to establish a gas station and demolition and alteration of the existing building was filed within two years of the issuance of the BZA order and thus did not expire under 11 DCMR § 3130.
7. On July 3, 2012, the Appellants filed the present appeal. ANC 6A filed a separate appeal on July 12, 2012 (BZA Appeal No. 18438), but subsequently withdrew that appeal on October 12, 2012.

Subdivision Application

8. On June 13, 2011, a subdivision application was filed with DCRA Office of the Surveyor to combine Lots 803 and 21 into a single record lot. However, the subdivision application was misplaced at DCRA Office of the Surveyor. Thereafter, the subdivision plat was redrawn by that office and the necessary signatures on the subdivision plat were obtained.
9. There is no regulatory impediment to recording the subdivision plat, and the subdivision plat contains all of the signatures required of the property owner.
10. Due to the length in time in processing a subdivision application and to avoid unnecessary delay, DCRA has a longstanding interpretation of the regulations allowing applicants to obtain building permits and begin construction while the subdivision is pending, provided that the subdivision is complete before the final inspection is made.

Building Plans

11. The plans submitted with the application for the Building Permit No. 1107494 are complete and accurate. The Building Permit application was complete and meets the requirements of 11 DCMR § 3203.

Conditions of BZA Order

12. BZA Order No. 17825 requires, in Condition No. 11, that "[t]he Applicant shall install, upon DDOT's request and pursuant to its standards, an unbroken, raised median in the center of Maryland Avenue for the length of the property's Maryland Avenue frontage."

13. As required, the median has been constructed in the center of the right-of-way of Maryland Avenue.

Grocery Store Use

14. The grocery store on the Property is permitted as an accessory use to the gas station and it would also be permitted as a principal use in the HS-A Overlay. A grocery store is allowed as a matter of right under 11 DCMR § 701.4, which is incorporated into the HS-A Overlay by 11 DCMR §§ 1302.2 and 1320.3. Notwithstanding the Appellant's assertion, there is nothing in the Neighborhood Commercial Overlay District regulations (§ 1302) nor in the H Street Overlay District regulations (§§ 1320 -1323) which disallows a grocery store as permitted by the underlying zone.
15. The original plans for a building permit included a grocery store in the building on the Property. Those plans were revised and the approved permit set shows the building but no grocery store use in the building. BZA Order No. 17825, dated January 26, 2010, was styled as a request "to establish a gasoline service station with grocery store under §§ 743, 706, and 2302." The BZA Order states "[s]ince a convenience store is a matter of right use in the C-3 District, the subject of this application and the sole focus of the Board's decision is the gasoline service station use." Furthermore, the plans that are in the record and which are cited in BZA Order No. 17825 (Exhibits 60 and 60A) clearly show the grocery store use even though Board approval was not necessary. The building which has been constructed on the site and which is being fit out in accordance with the November 1, 2012 permit is in the same location as shown on the referenced exhibits.

CONCLUSIONS OF LAW

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g) (2001), to hear and decide appeals where it is alleged by the Appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2 and 3200.2. The notice requirements of 11 DCMR § 3112 for the public hearing on this appeal have been met. In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from § 3100.4.

The Appellant having withdrawn its Motion to Amend the Appeal, the Board's decision as set forth in this Order relates to Building Permit No. B1107494. For the reasons set forth below, the Board concludes that Building Permit No. B1107494 for "Renovation Alteration and Repair For Existing Vehicle Fuel Services Station" was issued in accordance with all applicable Zoning Regulations and BZA Order No. 17825.

I. There is No Regulatory Impediment to the Subdivision Application

The Appellant alleges that the Property is not a separate record lot, but is comprised of two lots (Lots 81 and 803) and therefore the Building Permit was issued in direct violation of 11 DCMR § 3203.3. At the hearing, DCRA represented that a subdivision application was filed with DCRA Office of the Surveyor to combine lots 803 and 21 into a single record lot on June 13, 2011. DCRA further represented that the subdivision plat contains all of the signatures required of the property owner and that there is no regulatory impediment to recording the plat.

Due to the length in time in processing a subdivision application and to avoid unnecessary delay, DCRA has a longstanding interpretation of the regulation that allows applicants to obtain building permits and begin construction while the subdivision is pending, provided that the subdivision is complete before the inspection is made. DCRA has consistently applied this practice to permit applicants for over thirty years. A decision by the Zoning Administrator to deny a building permit in this case would represent an arbitrary and capricious departure from well-established precedent.

The Board concludes that the Building Permit is valid because, as consistent with the longstanding interpretation of the regulation, the subdivision application has been filed and there is no regulatory impediment to recording the plat, only the passage of time and the completion of routine ministerial acts. There is no basis for overturning the Building Permit, as the required action is ministerial in nature, and therefore, at most, the approval of the permit application by the Zoning Administrator constitutes a harmless error. The Board has previously upheld decisions of the Zoning Administrator if an error is determined to be harmless. *See Appeal No. 17902-B of Joseph Park* (Mar. 9, 2010) (denying motion for reconsideration of BZA order and holding that discrepancy between Appellant's tax returns and the findings of fact in BZA order was harmless error); *Appeal No. 16716-B of Nebraska Avenue Neighborhood Association* (Feb. 15, 2002) (affirming portion of the BZA order which found harmless error in the failure of the Zoning Administrator to refer the roof plans to the D.C. Office of Planning). The District of Columbia Court of Appeals has also upheld the decisions of the BZA when it determines that an error was harmless. *See, e.g., Foggy Bottom Ass'n v. DC Bd. of Zoning Adjustment*, 791 A.2d 64, 71-73 (D.C. 2002) (affirming BZA order and holding that BZA's granting of an application for a special exception prior to the Department of Health's consideration of whether an environmental impact statement was required was harmless error); *Concerned Citizens of Brentwood v. District of Columbia Board of Zoning Adjustment*, 634 A.2d 1234, 1240 (D.C. 1993) (affirming BZA order and holding that the BZA's refusal to allow citizens at hearing to intervene was arbitrary and capricious but that error was harmless).

Furthermore, for the Board to overturn the longstanding interpretation of DCRA on a retroactive basis in this case would be an exception to the way the regulations have been consistently applied. It would also work a hardship on the Applicant as it reasonably relied upon the

District's issuance of the building permit, which among other things permits the construction of the cashier's area for the gasoline service station, which is now constructed and in place.

II. The Building Plans are Complete and Accurate

The Appellant alleges that the Building Permit application and plans submitted were incomplete, inaccurate and misleading and that the Building Permit does not approve the establishment of a new gasoline service station or grocery store. In BZA Order No. 17825, issued on January 26, 2010, was styled as a request "to establish a gasoline service station with convenience store under §§ 743, 706, and 2302." The Board granted a special exception allowing for the establishment of a gasoline service station at the Property. The Order states that "[s]ince a convenience store is a matter of right use in the C-3 District, the subject of this application and the sole focus of the Board's decision is the gasoline service station." Notwithstanding this statement, the plans that are in the record and which are cited in the Board's Order clearly show the grocery store even though board approval was not necessary. The Board concludes that the Building Permit application and plans submitted by the Applicant are complete and accurate. In addition, the District did not assert any issue as being unable to understand and evaluate the Applicant's plans for compliance with the regulations.

III. Full Compliance with Condition No. 11 of BZA Order

The Board concludes that Condition No. 11 of BZA Order No. 17825 has been satisfied. The Order requires, in Condition No. 11, that "[t]he Applicant shall install, upon DDOT's request and pursuant to its standards, an unbroken, raised median in the center of Maryland Avenue for the length of the property's Maryland Avenue frontage." The Appellant argues that the plans submitted show the existing median strip on Maryland Avenue without any documents to prove current or future compliance with the Condition. However, in full compliance with the Order, the median has been constructed in the center of the right-of-way of Maryland Avenue.

IV. Grocery Store Use was Included in Original Plans and is Permitted as a Matter of Right

The Board concludes that the original plans for a building permit included a grocery store in the building on the site. Appellant argues that the grocery store was not made a part of the building permit issued and that a separate building permit for the grocery store was filed after the BZA Order became invalid after two years. However, the original plans for a building permit did include a grocery store in the building on the site. Those plans were revised and the approved permit set shows the building but no grocery store use in the building. BZA Order No. 17825, dated January 26, 2010, was styled as a request "to establish a gasoline service station with convenience store under §§ 743, 706, and 2302." The BZA Order states "[s]ince a convenience store is a matter of right use in the C-3 District, the subject of this application and the sole focus of the Board's decision is the gasoline service station use." Furthermore, the plans that are in the record and which are cited in the Board's Order (Exhibits 60 and 60A) clearly show the grocery store use even though Board approval was not necessary. The building which has been

constructed on the site and which is being fit out in accordance with the November 1, 2012 permit is in the same location shown on the referenced exhibits.

The Board further concludes that the grocery store on the Property is permitted as an accessory use to the gas station and it would also be permitted as a principal use in the HS-A Overlay. A grocery store is allowed as a matter of right under 11 DCMR § 701.4, which is incorporated into the HS-A Overlay by 11 DCMR §§ 1302.2 and 1320.3. The expiration of the validity of the BZA order has no bearing on the issuance of the permit for the grocery store, since no BZA approval is required for the grocery store.

V. ANC's Concern Regarding the Proper Zoning for the Building Has Been Addressed

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(D)(2001)).) In this case, the ANC 6A filed a separate appeal on July 2, 2012 (BZA Appeal No. 18438), but subsequently withdrew that appeal on October 12, 2012.

In its letter dated November 13, 2012, ANC 6A stated that at its regularly scheduled and properly noticed meeting held on November 8, 2012, it voted 6-0-0 to support the appeal of Building Permit No. B1107494 as well as the Appellant's motion to amend its original appeal to include Building Permit No. B11209455 and the request for a continuance. As stated above, the Appellant's motion to amend has been withdrawn. Furthermore, ANC 6A letter states that it shares Appellant's concerns that Building Permit No. B1209455 was improperly issued for a C-3-A zone when the correct zoning is HS-A/C-2-A. ANC 6A did not participate in the public hearing.

As set forth above, the construction of the gas station and the building were originally zoned under the C-3-A District, but rezoned to HS-A/C-2-A by Zoning Commission Order No. 10-19, effective December 9, 2011. The Board concludes that the construction of the gas station and the building were appropriately authorized and vested under the C-3-A District and the H Street Overlay District design standards are not applicable to the building. The Board concludes that ANC's concerns were given great weight and have been properly addressed. For the reasons stated above, it is hereby **ORDERED** that the appeal is **DENIED**.

Vote taken on January 15, 2012.

Vote: _____ (Lloyd L. Jordan, Jeffery L. Hinkle, Nicole C. Sorg, Marcie I. Cohen, third mayoral appointment vacant)

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: _____

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.