

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18439 of Valor 1350 Maryland LLC, pursuant to 11 DCMR §§ 3100 and 3101, from a May 4, 2012 decision by the Department of Consumer and Regulatory Affairs, to issue a building permit (#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).¹

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 (“Appellant”) to challenge a decision of the Department of Consumer and Regulatory Affairs (“DCRA”), to issue a building permit for the renovation, alteration, and repair of an existing vehicle fuel service station at 1400 Maryland Avenue, N.E. (Square 1049, Lots 21 and 803), allegedly in violation of several provisions of the Zoning Regulations and an order of the Board of Zoning Adjustment (“Board” or “BZA”) in Application No. 17825. Following a public hearing, the Board voted on January 15, 2013 to deny the appeal.

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 (“ZA”) at DCRA, with copies to 1400 Maryland Avenue Ltd. Empire Leasing, Inc., and to Capitol Petroleum Group (according to the Appellant, the owner and lessee of the property that is the subject of the appeal, respectively); the Office of Planning; the Councilmember for Ward 6; Advisory Neighborhood Commission (“ANC”) 6A, the ANC in which the subject property is located; and Single Member District/ANC 6A02. Pursuant to 11 DCMR § 3112.14, on September 13, 2012 the Office of

¹ This caption, which was used in the public notice of this appeal, reflects the current zoning of the subject property. The property was zoned C-3-A at the time an application was submitted for the building permit at issue but has since been rezoned. See Zoning Commission Order No. 10-19, Z.C. Case No. 10-19, effective December 9, 2011 (58 DCR 10348).

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Zoning mailed letters providing notice of the hearing to the Appellant; the ZA, with copies to 1400 Maryland Avenue Ltd. Empire Leasing, Inc. and to Capitol Petroleum Group; and ANC 6A. Notice was also published in the *D.C. Register* on September 21, 2012 (59 DCR 10996).

Party Status. Parties in this proceeding are the Appellant, DCRA, ANC 6A, and DAG Realty, LLC, the ground lessee of the subject property.

Appellant's Case. The Appellant challenged "the May 4, 2012 determination by DCRA to issue Building Permit No. B1107494" for the renovation of an existing vehicle fuel service station at 1400 Maryland Avenue, N.E. The Appellant argued that issuance of the building permit violated various provisions of the Zoning Regulations as well as the Board's order in Application No. 17825.² According to the Appellant, use of the subject property as a gasoline service station was abandoned no later than 1995; the last certificate of occupancy authorizing a gasoline service station was issued in 1978 and the property had been used for a variety of other purposes since then.

By motion submitted November 13, 2012, the Appellant sought to amend the appeal "to include a directly related, but just issued new building permit" and to postpone the public hearing.³ The Appellant contended that the second building permit, known as the "grocery store permit," also violated certain provisions of the Zoning Regulations as well as the Board's order in Application No. 17825. However, at the public hearing, the Appellant withdrew its motion to amend the appeal and stated that the only remaining issue was the absence of a single record lot, since a subdivision of Lots 21 and 803 had not yet occurred, in violation of a zoning requirement that a building permit may not be issued unless each structure will be on a separate lot of record. The Appellant argued that the building permit should be revoked on that basis, and that any subsequent actions by the ground lessee to cure the defect were irrelevant.

The Department of Consumer and Regulatory Affairs. DCRA opposed the appeal on the ground that the Appellant had not identified a zoning error with respect to the building permit issued for the subject property.⁴ DCRA asserted that the various allegations in the appeal were all without merit. DCRA also stated that an application to combine Lots 803 and 21 into a single record lot had been submitted to the Office of the Surveyor, and indicated that, "due to the length in time in processing a subdivision application and to avoid unnecessary delay, DCRA allows permit 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." (Exhibit 18.)

² This order, issued January 26, 2010, granted, subject to conditions, an application for special exception approval of a gasoline service station and convenience store at the subject property.

³ The requested amendment concerned Building Permit No. B1209455, issued to 1400 Maryland Avenue Ltd. on November 1, 2012 for "Grocery Store to be Added to Existing Vehicle Service Station Under Separate Building Permit No. B1107494. Originally the 1 Story Store was Part of the Previous Application, and Was Removed to Become This Permit." The permit was issued for Lot 803 in Square 1049, zoned C-3-A. The permit type was "alteration and repair," and the existing and proposed uses were both shown as "Gas Station with minimart."

⁴ For similar reasons, DCRA also opposed the Appellant's motion to amend the appeal and for a continuance.

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Ground Lessee. The ground lessee, DAG Realty LLC, opposed the Appellant's motion to amend the appeal and for a continuance.

ANC Report. By letter dated November 13, 2012, ANC 6A indicated that, at a properly noticed meeting on November 8, 2012, with a quorum present, the ANC voted 6-0-0 to support the Appellant's appeal of Building Permit #B1107494 as well as its motion to amend the appeal to include Building Permit #1209455 and for a continuance. The letter also stated that the ANC shared the Appellant's concern that the latter building permit "was improperly issued for a C-3-A zone when the correct zoning is HS-A/C-2-A."

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 1400 Maryland Avenue, N.E. (Square 1049, Lots 21 and 803).
2. By order issued January 26, 2010 in Application No. 17825, the Board approved an application by 1400 Maryland Avenue, Ltd. Empire Leasing for a special exception to establish a gasoline service station and convenience store at the subject property, subject to 12 conditions. The order indicates that, because a convenience store is a matter-of-right use in the C-3 District, the sole focus of the Board's decision was the gasoline service station use.
3. Lot 803 is an Assessment and Taxation Lot, not a record lot established by the Office of the Surveyor. The ground lessee submitted an application for a subdivision of Lots 21 and 803 on June 13, 2011. The processing of an application for a subdivision of this sort generally requires two to three months. In this case, the initial application was misplaced, but after submitting another application, the ground lessee obtained a plat that has been signed by the property owners. That plat was recently submitted to DCRA.
4. Building Permit No. B1107494 was issued to 1400 Maryland Avenue Ltd. on May 4, 2012 for the "Renovation Alteration and Repair for Existing Vehicle Fuel Service Station with BZA Order #17825 Special Exception Granted on 01/26/2010 Pursuant to 2 Exhibits No 60 & 66A with 12 Conditions." The permit was issued for Lot 803 in Square 1049, zoned C-3-A.
5. Subsection § 3202.3 of the Zoning Regulations states, in relevant part, that "a building permit shall not be issued for the proposed ... construction ... of any principal structure, or for any addition to any principal structure, unless the land for the proposed ... construction ... has been divided so that each structure will be on a separate lot of record...."
6. The Appellant is the owner of a lot across 14th Street from the subject property (Lot 849 in Square 1027), where the Appellant plans to develop an 84-unit condominium building.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to “hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal” made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.)) (*See also* 11 DCMR § 3100.2.) Appeals to the Board of Zoning Adjustment “may be taken by any person aggrieved, or organization authorized to represent that person,...affected by any decision of an administrative officer...granting or withholding a certificate of occupancy...based in whole or part upon any zoning regulations or map” adopted pursuant to the Zoning Act. (D.C. Official Code § 6-641.07(f) (2008 Repl.)) (*See also* 11 DCMR § 3200.2.) In an appeal, the Board may “reverse or affirm, wholly or partly; or may modify the order, requirement, decision, determination, or refusal appealed from; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken.” (11 DCMR § 3100.4.)

In this case, the Appellant argues that a building permit that was not issued to a record lot should be revoked on that basis, regardless of subsequent measures undertaken to complete a subdivision of the affected parcels into a single lot of record. DCRA does not agree, citing an “accommodation” made by DCRA, in recognition of the time needed to process subdivision applications, to issue building permits before a subdivision has been recorded, provided that the subdivision is completed before a final inspection and a certificate of occupancy is issued. The ground lessee agreed with DCRA, and provided documents showing its efforts to complete the subdivision of the two lots at the subject property.

The Board recognizes the long-standing practice of DCRA to issue building permits, although not certificates of occupancy, before a subdivision has been completed to create a lot of record, notwithstanding the provision in § 3202.3 of the Zoning Regulations stating that a building permit shall not be issued for the construction of any principal structure, or for any addition to any principal structure, unless the land for the proposed construction has been divided so that each structure will be on a separate lot of record. In this case, since the subdivision process has been almost entirely completed, and because the delay does not appear attributable to the subdivision applicant, the Board finds no reason that the building permit at issue in this appeal should be revoked; the permit would merely be reissued as soon as the subdivision process had been finally completed. The Board concludes that any error by DCRA with respect to issuance of Building Permit No. B1107494 before the subdivision of the subject property into a single lot of record was harmless.

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, ANC 6A voted to support the Appellant’s appeal of Building Permit No. B1107494 as well as its motion

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to amend the appeal to include the second building permit and its request for a continuance. As discussed above, the Appellant withdrew its motion to amend the appeal, leaving one sole issue on appeal. Because ANC 6A did not indicate any issues or concerns specific to that issue, there was no statement of issues or concerns to which the Board can give great weight in this proceeding.

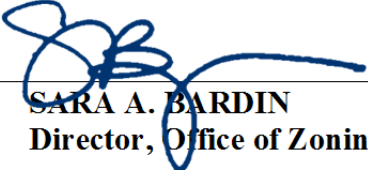
Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to the claim of error in the issuance of Building Permit No. B1107494 for construction at 1400 Maryland Avenue, N.E. (Square 1049, Lots 21 and 803). Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**.

VOTE: 4-0-1 (Lloyd J. Jordan, Marcie I. Cohen, Jeffrey L. Hinkle, and Nicole C. Sorg
(by absentee vote), voting to deny 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: June 19, 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.