

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 19047 of Michael Cushman pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs (“DCRA”) in the issuance of Certificate of Occupancy 1501450 allowing seven “private parking garages” and four “open parking spaces” for a “total of 11 parking spaces” located in the R-4 District at premises 20 14th Street, N.E. (Square 1035, Lot 810).

HEARING DATE: July 21, 2015

DECISION DATES: July 21, 2015, September 15, 2015, and September 22, 2015

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the “Board”) on May 6, 2015, challenging DCRA’s decision to issue a certificate of occupancy (“C of O”) on March 10, 2015, allowing seven parking garages and four open parking spaces. The property owner to whom the permit was issued, Ramin Taheri, (the “Owner”) moved to dismiss the appeal. The Board conducted a public hearing, at which time it heard from the Owner, from DCRA, and from the Appellant. The Board found that, as related to the appeal of the seven parking garages, the appeal was untimely filed; however, as related to the appeal of the four open parking spaces, the appeal was timely. As a result, that portion of the appeal survived the motion to dismiss and was considered on its merits. The Board ultimately voted to sustain DCRA’s decision and deny the appeal. A full discussion of the facts and law that support this conclusion follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on July 21, 2015. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, Advisory Neighborhood Commission (“ANC”) 6A (the ANC in which the subject property is located), the Owner, and DCRA.

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Parties

The Appellant in this case is Michael Cushman who resides at 1364 East Capitol Street, N.E., in close proximity to the subject property.

The property is owned by Ramin Taheri, who is an automatic party to the appeal pursuant to 11 DCMR § 3199.1(a)(3).

DCRA appeared during the proceedings and was represented by Assistant General Counsel Maximilian Tondro, Esq.

ANC 6A, as the affected ANC, was automatically a party in this Appeal. However, the Board did not receive a letter from the ANC, either in support of or in opposition to the appeal. Nor did the ANC participate in the public hearing.

The Board received a letter in support of the appeal from the Capitol Hill Restoration Society (Exhibit 39) and from three nearby neighbors (Exhibits 36 and 45).

Motion to Dismiss

The Owner filed a motion to dismiss prior to the hearing scheduled on July 21, 2015. (Exhibit 35.) In addition to considering the written submissions, the Board heard argument from each of the parties. As will be explained below, the Board decided that the portion of the appeal relating to the seven enclosed parking garages was untimely filed, but the portion of the appeal relating to the four parking spaces was timely filed. As a result, the Board addressed the latter challenge on its merits.

Decision Meeting

At a decision meeting following the hearing on July 21, 2015, the Board deliberated on the appeal challenging the C of O for the four parking spaces. At that time, the Chair moved to deny the appeal on three alternative theories: (1) the open parking spaces were accessory to the private parking garage; (2) the open parking spaces were a separate permitted matter-of-right use; and (3) the appeal was barred by the equitable principle of estoppel. However, the vote in support of the motion was 2-0-1, resulting in the failure of the motion for lack of a majority. (At that time, the Board had two vacant seats.)¹ The case was continued to September 15, 2015, and again to September 22, 2015. At that time, two additional members had joined the Board. Again, the Chair moved to deny the remaining portion of the appeal, but limited his motion to the first two theories previously offered. A majority of the Board agreed with the second of these theories *i.e.* that the open parking spaces were a separate matter-of-right use on the property and the Chair's motion was approved 4-1-0.

¹ Pursuant to § 3125.2 of the Regulations, "[t]he concurring vote of at least a majority of the members of the Board is necessary for any decision."

FINDINGS OF FACT

The Property

1. The subject property is located at 20 14th Street, N.E. (Square 1035, Lot 810).
2. The property is an “alley lot” and is located in the Capitol Hill Historic District and the R-4 zone district.
3. An alley lot is defined as “a lot facing or abutting an alley and at no point facing or abutting a street.” (See, 11 DCMR §199.1 (Definitions: Lot, alley).)
4. The Owner purchased the property on or about March 17, 2014. At that time there were seven existing garage stalls within a single structure at the front of the property.
5. The rear portion of the property consisted of, among other things, garbage and debris, broken concrete, and portions of a broken chain-link fence. (Exhibit 35.)

The Building Permit

6. Beginning in April 2014, the Owner began the process of obtaining a building permit to renovate the existing garages and to clear and pave the rear portion of the property.
7. The Owner obtained Building Permit No. B1400387 on or about May 16, 2014, authorizing the repair of “existing 7-accessory residential garage on alley lot.” The building permit also authorized the Owner to, among other things, “[l]ay permeable pavers in [the] area behind the garage.” (Exhibit 13.)
8. In the box labelled “proposed use” the building permit stated “other (specify).” Nothing was specified.
9. The Owner made the repairs to the garage pursuant to the building permit and repaved the rear area.
10. After becoming aware of the issuance of the building permit, the Appellant indicated that he “wrote to Kathleen Beeton, Deputy Zoning Administrator and outlined the problems with the building permit.” (Exhibit 17.) The Appellant is likely referring to an email dated June 12, 2014. (Exhibit 2.)
11. In response, the Appellant received an email dated June 16, 2014 from Rohan Reid, who identified himself as the Zoning Enforcement Officer of DCRA. (Exhibit 3.)
12. Mr. Reid advised the Appellant that as to the seven parking spaces, the Appellant was “correct” that “the language of ‘accessory garages’ stated in the specific zoning approval of the building permit was done in error. It should instead read ‘parking garages on an alley lot’.” (Exhibit 3.)

13. As to the Appellant's assertion that the rear of the property was to be used for open parking spaces, Mr. Reid assured the Appellant that the surveyor's plat and building plans "do not show or reference parking on the open space and was not approved for parking lot use on the open space. A parking lot use in the R-4 zone would require relief from the Board of Zoning Adjustment. If at any time you become aware that the open space is being used as a parking lot, please feel free to contact me so that our office can begin enforcement procedures." (Exhibit 3.)

The C of O

14. Following the completion of the repair work and other construction work, and the required DCRA inspections, the Owner applied to DCRA for a C of O. The Owner explained to the Zoning Administrator ("ZA") that he intended to use the rear portion of the property as "privately-leased parking spaces". (Exhibit 35.) In response, the ZA advised the Owner that, such spaces would not be considered a parking lot because a parking lot is "open to all persons willing to pay a temporary fee." *Id.*
15. The Owner obtained C of O No. 1501450 on or about March 10, 2015 for "private parking garages - 7; and open parking spaces - 4; total of 11 parking spaces [not a public parking lot]." (Exhibit 14.)
16. The Owner subsequently secured long-term lease agreements for the four open parking spaces authorized in the C of O. (Exhibit 35.)

The Instant Appeal

17. The Appellant filed this appeal on May 16, 2015, nearly a year after the building permit was issued and approximately 56 days after the C of O was issued.
18. The Appellant challenged DCRA's decision to issue the C of O, claiming that the seven enclosed parking uses and the four open parking spaces constitutes an unlawful "parking lot" that is allowed on an alley lot only after special exception approval by the Board pursuant to 11 DCMR § 333. (Exhibit 1.)
19. The Owner moved to dismiss the appeal on the grounds that it was untimely filed.

CONCLUSIONS OF LAW

The Motion to Dismiss

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Paragraph (a) provides that an appeal must be filed within 60 days from the date the person filing the appeal first had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier.

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Although the Board has concluded that this rule is not jurisdictional, *see Appeal No. 18031-C of West End Citizens Association (2014), affirmed on other grounds, W. End Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 112 A.3d 900, 903 (D.C. 2015), if untimeliness is raised during an appeal, the Board must dismiss the case if the 60-day timeframe is not met, unless the time is extended due to “exceptional circumstances.” As will be explained, the appeal was untimely filed with respect to the seven parking garages, and no circumstances exist to allow its late filing.

Ordinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure and its use conform to the Zoning Regulations. *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (2008), *citing, Schonberger v. District of Columbia Bd. of Zoning Adjustment*, 940 A.2d 159 (2008). The Appellant does not deny that he was aware of the garages and that he knew the building permit had been issued. Indeed, the Appellant states that on June 12, 2014 (less than 30 days after the permit was issued), he wrote to the Deputy Zoning Administrator and “outlined the problems with the building permit,” Exhibit 17, and on June 18th was advised by DCRA’s enforcement officer that seven “parking garages on an alley lot” were being allowed. (Exhibit 3.) Yet, the Appellant waited nearly a year before appealing the building permit to claim that a parking lot was being permitted instead and offered no explanation as to why the appeal could not have been timely made. Therefore, the Board finds that the portion of the appeal relating to the garages is dismissed as untimely.

However, the Board finds that the building permit gave no notice as to whether any zoning decision had been made as to the four open parking spaces. As stated, the building permit merely alluded to “lay[ing] permeable pavers in [the] area behind [the] garage”. (Exhibit 13.) This language was insufficient to put the Appellant on notice as to whether DCRA had decided to permit four open parking spaces at the rear of the property. Further, the Appellant was assured by DCRA’s enforcement officer that no open parking spaces were shown on the plans and that the use of any such spaces would require a special exception.² (Finding of Fact 13.)

In contrast, the C of O clearly states that four open parking spaces were to be permitted on the property, but not as a parking lot. The Board therefore accepts the Appellant’s assertion that he first learned of a decision to allow the open parking spaces after the C of O was issued on March 10, 2015. Accordingly, the 60-day appeal period runs from that date, and the appeal filed on May 6, 2015, was timely filed as to the open parking spaces.

The Merits Regarding the Four Parking Spaces

DCRA argued two alternative theories as to why the four parking spaces are matter-of-right uses that do not require special exception approval: (1) the four parking spaces are an “accessory use” to the seven parking garages pursuant to § 331.1(b); or (2) the four parking spaces are an

² Nevertheless, the Owner claims that DCRA was aware of his plans to use the rear portion of the property for parking prior to issuing the building permit. Reconciling the Owner’s claim with the enforcement officer’s statement would only be necessary had the Board reached the merits of the estoppel argument. For the purposes of the timeliness issue addressed in this Order, the only relevant question is what the Appellant knew and when he knew it.

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independent principal matter-of-right use at the property. The Owner also argued that even if the four open parking spaces were not permitted, he had detrimentally relied on DCRA's issuance of the building permit and C of O, and that the appeal is therefore barred by the equitable principle of *estoppel*.

For the reasons that follow the Board agreed with the second theory.³ Subsection 3301.1 of the Zoning Regulations provides in part that “, no person shall use any structure, land, *or part of any structure or land* for any purpose until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title and the D.C. Construction Code, Title 12 DCMR (Emphasis added). It follows that a structure or land may have more than one principal use as long as one or more C of O for the uses is issued. In this, the C of O refers to two different uses, “private parking garages” and “open parking spaces”.

A private garage on an alley lot is a matter-of-right use in an R-4 zone because it is permitted in an R-1 zone. (11 DCMR §§ 201.1(o), 330.5(a).) The Zoning Regulations are silent as to whether open private parking spaces on an alley lot are a matter-of-right use. The only distinction between a private garage and a private open parking space is that the former is covered and the latter is not. To the Board, that is a distinction without a difference. In both circumstances the owner is engaging in a long term lease with a third party for the use of the space. The Zoning Administrator distinguished the situation from a parking lot, in which parking is arranged for on an hourly or daily basis. (See Finding of Fact No. 14 and Hearing Transcript of July 21, 2015, p. 81.) The Board therefore agrees with the Zoning Administrator that private open parking spaces on an alley lot, which are being leased on at least a monthly basis, are properly considered a distinct principal matter-of-right use. Since the open parking spaces on the subject property met those criteria, the Zoning Administrator did not err in issuing a certificate of occupancy authorizing “open parking spaces – 4.”

Vote taken on July 21, 2015 on the Motion to Dismiss:

By Consensus the Board GRANTED the Motion to Dismiss the portion of the Appeal concerning the seven closed parking spaces, and DENIED the Motion to Dismiss the portion of the Appeal concerning the four open parking spaces. (Lloyd J. Jordan, Marnique Y. Heath, Jeffrey L. Hinkle, Frederick L. Hill, and Robert E. Miller participating).

Vote taken on September 22, 2015 on the Merits:

VOTE: 4-1-0 (Lloyd J. Jordan, Marnique Y. Heath, Jeffrey L. Hinkle, and Frederick L. Hill to AFFIRM the ZA on the remaining portion of the Appeal; Robert E. Miller voting in opposition to the motion to affirm).

³ Since the Board sustained the Zoning Administrator on this ground, it was not necessary for it to consider the Owner's estoppel defense, which is therefore preserved in the event this order is challenged before the District of Columbia Court of Appeals and is reversed.

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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: April 29, 2016

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.