

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 19047-A on the Motion for Reconsideration and Rehearing in the Appeal of Michael Cushman (Appeal No. 19047), pursuant to 11 DCMR §§ 3100 and 3101¹, 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

ORDER ISSUANCE DATE: April 29, 2016

RECONSIDERATION DATE: June 21, 2016

**ORDER DENYING MOTION FOR
REHEARING AND RECONSIDERATION**

On April 29, 2016, the Board of Zoning Adjustment (“the Board”) issued a final order concerning the appeal brought by Michael Cushman (“the Appellant”). The Appellant challenged DCRA’s decision to issue a Certificate of Occupancy (“C of O”) for an alley lot owned by Ramin Taheri (“the Owner”) allowing seven “private parking garages” and four “open parking spaces”. Specifically, the Board found that, as related to the appeal of the seven parking spaces, the appeal was untimely filed and was therefore dismissed. As related to the appeal of the four open parking spaces, the Board found that the appeal was timely, and therefore considered the challenge on its merits.

During the public hearing on the merits, the Appellant argued that the four open parking spaces constituted a “parking lot”, a use that was not allowed as a matter of right and a use that was permissible only with special exception approval by the Board. The Zoning Administrator (“ZA”)

¹ This and all other references to the appeal in Order No. 19047 are to provisions that were in effect the date the appeal was heard and decided by the Board of Zoning Adjustment (the 1958 Regulations), but which were repealed as of September 6, 2016 and replaced by new text (the 2016 Regulations). The repeal of the 1958 Regulations has no effect on the validity of the Board’s original decision or the validity of Order No. 19047.

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testified at the hearing, stating that the parking spaces would not be considered a “parking lot” because, under the Regulations, a “parking lot” is open to all persons willing to pay a temporary fee. (Ex. 47, Order, p.4, Finding of Fact 14.) The ZA also testified that he considered the open parking spaces to be a second principal use on the lot – separate from the parking garage use – and a use that was allowed as a matter of right. The Board agreed with the ZA, and ultimately voted to sustain DCRA’s decision and deny that portion of the appeal relating to the open parking spaces. The Board issued its final written order on April 29, 2016.

The Motion for Rehearing and Reconsideration

On May 9, 2016, the Appellant-Movant² filed a timely Motion for Rehearing and Reconsideration (the “Motion”) of the Board’s order. (See 11 DCMR § 3126, part of the Board’s Rules of Practice and Procedure in place at the time the Motion was filed.) (Ex. 49.) Pursuant to 11 DCMR § 3126.5, also in place when the Motion was filed, any “Response” from a party must be filed within seven days after the Motion was served and filed. The Owner, who was an automatic party to the appeal and who participated in the appeal, filed a timely Response opposing the Motion. (Ex. 50.) While DCRA was a party to the appeal and participated fully during the proceedings, DCRA made no submissions concerning the Motion.

Motion for Rehearing

Subsection 3126.6 provides that a rehearing may not be granted unless “new evidence is submitted that could not reasonably have been presented at the original hearing.” The Owner contends that no such evidence was presented by the Movant, and the Board agrees with this contention. The Movant claims that he was not able to “determine what rationale was used to [deny] the appeal” until the Board’s written Order was issued. However, the legal reasoning employed by the Board does not constitute “new evidence” within the meaning of § 3126.6.

The Movant specifically refers to a previous Board decision, *Application No. 17906 of Se Y. Jeong* (2009), which the former Board Chairman referenced during the Board’s deliberations of the appeal, and which the Movant claims was incorrectly cited as precedent. It is true that the Chairman mentioned *Jeong* when reasoning that there could be two principal uses at one property. It is also true that in the *Jeong* case, unlike the instant case, the Board found there were *not* two principal uses at one property. However, the Movant’s points are not pertinent for three reasons. First, the mention of a past Board decision during oral deliberations does not constitute newly discovered evidence, or any evidence at all. Second, the Chairman’s reference to the *Jeong* case was not erroneous, as claimed by the Movant, but was instructive. The *Jeong* case explained that a particular use was “*either a part of a principal use or a stand-alone principal use, depending on its magnitude.*” (*Jeong*, at p.4.) Third, the fact that *Jeong* was mentioned during deliberations does not mean that the Board ultimately relied on the case as precedent. In fact, the case was not even mentioned in the Board’s written Order, and it is the written decision which is the final decision of the Board. (See, 11 DCMR § 3125.3.)

² The Appellant will be referred to herein as the Movant.

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Motion for Reconsideration

Subsection 3126.4 of the 1958 Regulations requires that a motion for reconsideration must “state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion and the relief sought”. The Movant asserts the Board erred by relying on the ZA’s testimony and analysis. However, the Board found the ZA’s analysis to be reasonable.

The Board found that the private parking garages on an alley lot were matter-of-right uses, citing 11 DCMR §§ 201.1(o) and 330.5(a). The Board also found that the Zoning Regulations were silent as to whether open parking spaces on an alley lot are a matter of right use. The ZA testified that there was no material difference between a private parking space that is covered and a private parking space that is not covered. The ZA also noted that both a private garage and a private open parking space differed from a parking *lot*³, where parking was arranged on an hourly or daily basis. (Hearing Transcript “Tr.”, July 21, 2015, p.81.) The Board extrapolated from the ZA’s analysis and found that private open parking spaces on an alley lot which, as here, were being leased on at least a monthly basis, were properly considered a distinct principal matter of right use.

The Movant fails to identify how the Board’s interpretation is unreasonable or erroneous. Instead, he restates many of the arguments made during the appeal. While the Appellant remains opposed to the issuance of the C of O, he has not presented new grounds which require reconsideration of the Board’s decision.

For the reasons stated above, it is **ORDERED** that the Motion for Rehearing and Reconsideration is **DENIED**.

VOTE: 3-1-1 (Marnique Y. Heath, Jeffrey L. Hinkle, and Frederick L. Hill in support of the Motion to DENY Rehearing and Reconsideration; Robert E. Miller opposed to the Motion to Deny; Anita Butani D’Souza not 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:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: September 18, 2017

³ Under 11 DCMR §199, a “parking lot” was defined as “a tract of land used for the *temporary* parking of motor vehicles when the use is not accessory to any other use. (Emphasis supplied.)

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PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.