

Appeal No. 19067 of Advisory Neighborhood Commission 4C and Concerned Citizens of Allison and Buchanan Streets, pursuant to 11 DCMR §§ 3100 and 3101, from a May 27, 2015 decision of the Department of Consumer and Regulatory Affairs to issue Building Permit #B1505734¹ and revised Building Permits #B1600488 and #B1603100 for the property located at 1117 Allison Street, NW (Square 2918, Lot 59).

HEARING DATE: December 1, 2015

DECISION DATE: January 19, 2016

DECISION AND ORDER

Advisory Neighborhood Commission (“ANC”) 4C (“Appellant”) submitted this appeal on June 12, 2015, which challenged a decision by the Department of Consumer and Regulatory Affairs (“DCRA”) to issue Building Permit #B1505734 for the conversion of a one-family row dwelling to a three-unit apartment house in the R-4 District. On October 26, 2015, DCRA issued Building Permit #B1600488 as a revision to Building Permit #B1505734. On December 24, 2015, DCRA issued Building Permit #B1603100 as a revision to Building Permit #B1600488. Appellant also challenges the revised permits. Following a public hearing, the Board voted at its public meeting on January 19, 2016 to grant the appeal for the reasons stated below.

PRELIMINARY AND PROCEDURAL MATTERS

Procedural History

1. ANC 4C timely filed this appeal with the Board of Zoning Adjustment (“Board”) on June 12, 2015.²
2. A hearing was scheduled for September 22, 2015; however, pursuant to Appellant’s motion requesting a new hearing date submitted on August 24, 2015, the Board rescheduled the hearing to September 29, 2015.³
3. On September 15, 2015 Appellant timely submitted its pre-hearing statement.⁴
4. On September 15, 2015, Concerned Citizens of Allison and Buchanan Streets, an unincorporated association (the “Association” or “Intervenor”), consisting of 19 neighbors within 200 feet of the Subject Property, filed a motion to intervene and for party status. In connection with its motion to intervene, the Association submitted a statement in support of the appeal that also adopted the pre-hearing statements filed by Appellant.⁵

¹ DCRA initially issued Building Permit #1505734 on May 18, 2015 and then reissued the permit on May 27, 2015.

² Reference is made to the official exhibit log of Appeal No. 19067. BZA Exhibits 1-2, 4-5.

³ BZA Exhibits 14, 17.

⁴ BZA Exhibit 19.

⁵ BZA Exhibit 18.

5. On September 23, 2015, Appellant submitted an amended pre-hearing statement.⁶
6. On September 23, 2015, DCRA filed a motion seeking to continue the hearing in order to request and receive revised plans from the Property Owner. Appellant opposed the motion stating its belief that DCRA would allow the Property Owner to change the plans to comply with the regulations and lot occupancy.⁷
7. On October 22, 2015, Appellant submitted a supplemental pre-hearing statement, addressing revised plans from the Property Owner. The following day, October 23, 2015, Appellant filed a motion seeking leave to late file its pre-hearing statement.⁸
8. On October 23, 2015, DCRA filed its pre-hearing statement with exhibits.⁹
9. On October 26, 2015, the Property Owner responded to Appellant's supplemental pre-hearing statement.¹⁰
10. On October 26, 2015, Appellant moved to exclude the revised plans dated October 2015 and submitted as Exhibits A-B to DCRA's pre-hearing submission. DCRA responded with a motion in opposition the same day.¹¹
11. The Board denied Appellant's motion to preclude the revised plans from being included in the record. After hearing testimony and arguments from all interested parties, DCRA moved for leave to file an official record of the plans that were reviewed and approved in connection with the approval of the original May permit. DCRA filed those plans on December 3, 2015,¹² and they were identical in substance to the May plans Appellant submitted to the record as BZA Exhibits 29-32 and 34.

Intervenor

The Board granted the Association's motion to intervene as a party. Multiple members of the Association provided written testimony for the record. These are presented as BZA Exhibits 26, 27, 28, 39, 40 and 50.

Additional Evidence

As part of the record, Appellant submitted an expert report dated October 21, 2015 from Patrick Williams, a Registered Architect in the District of Columbia, to support Appellant's

⁶ BZA Exhibits 23, 24.

⁷ BZA Exhibits 25, 38.

⁸ BZA Exhibits 45, 46.

⁹ BZA Exhibit 51A-D.

¹⁰ BZA Exhibit 56.

¹¹ BZA Exhibits 57, 58.

¹² BZA Exhibits 65A-B.

findings and conclusions.¹³ In addition, Ward 4 Councilmember Todd provided a letter of support for Appellant and Intervenor, which is presented as BZA Exhibit 61. In addition to Appellant's oral arguments presented at the hearing, Taalib-Din Uqdah, Secretary of ANC 4C, testified orally and provided written testimony in support of the appeal.¹⁴

FINDINGS OF FACTS

The Property

1. The property that is the subject of this appeal is located at 1117 Allison Street NW, Washington, DC 20011. It is in an R-4 district in the Sixteenth Street Heights neighborhood of Ward 4. The lot is rectangular in shape, 20 feet wide and 156.30 feet deep with a total lot area of 3126 SF.¹⁵
2. The lot is improved with a two-story row dwelling constructed in 1915 ("Subject Property"). The footprint of the Subject Property is 920 SF, and it occupies approximately 29% of the lot.¹⁶ The Subject Property is in the middle of a contiguous row of homes and is located on the north side of Allison Street NW. Its present use is a one-family dwelling.
3. The Subject Property shares a party wall with row dwellings on the adjacent lots to the east and to the west. The rear lot line abuts a 15-foot wide alley. The other side of the alley abuts the rear lot lines of other lots improved with row dwellings. These row dwellings front the southern side of Buchanan Street NW.
4. The depth of the existing front porch is 8 feet, not the 6 feet depicted in the plans, and the area is 160 SF.

Approved Permits

May Permit

5. On May 27, 2015, DCRA issued building permit #B1505734 ("May Permit") to convert the subject one-family row dwelling into a three-unit apartment house consisting of a basement, first floor and second floor (hereafter referred to as "the Project").¹⁷ According to the plans that were submitted and approved, this will be accomplished, in part, by constructing a rear two-story addition measuring either 41 feet 6 inches in length or 45.5 feet in length. The approved building plans depict these two different

¹³ BZA Exhibits 47 (Resume), 67 (Expert Report). This report also is included as Exhibit 12 to Appellant's Supplemental Statement in Support of Appeal (BZA Exhibit 45).

¹⁴ BZA Exhibit 63.

¹⁵ BZA Exhibit 65B, Sheet C1 (May Approved Plans).

¹⁶ *Id* and BZA Exhibit 65A, Sheet A1 (May Approved Plans).

¹⁷ BZA Exhibit 3.

measurements for the rear addition.¹⁸ The new rear addition will span the entire width of the lot.¹⁹

6. Lot coverage of 1876 SF is allowed with a maximum percentage of lot occupancy of 60%. According to the plans that were submitted and approved, the proposed lot coverage for the Project is 1933 SF, which equals 61.8% lot occupancy (1933 SF ÷ 3126 SF).²⁰ Appellant's expert calculated two additional possibilities for lot occupancy from the plans that were submitted and approved – 62.7% and 59.8%.²¹
7. According to the plans that were submitted and approved, the existing basement will be excavated to raise the ceiling height and to extend the basement an additional 41 feet 6 inches long or 45 feet 5 inches long into the rear yard.²²
8. According to the plans that were submitted and approved, each unit will have rear decks/porches either 9 feet or 10 feet in depth and 14 feet wide and will have rear stairs for egress.²³ The rear decks/porches and stairs will be over and above the rear addition. In total the rear addition, rear decks/porches and rear stairs will add approximately 60 feet in length to the Subject Property. There is an unenclosed covered area about 6 feet wide and 30 feet long abutting the western lot line.²⁴ Two parking spaces will be provided at the rear of the lot.²⁵

October Permit

9. After Appellant submitted its Supplemental Pre-Hearing Statement to the Board on September 23, 2015 alleging that the May Permit exceeded the maximum percentage of lot occupancy, DCRA filed a motion for continuance to obtain revised building plans from the Owner of the Subject Property.²⁶
10. On October 26, 2015, DCRA issued a revised building permit, #B1600488 (“October Permit”), for the Project.²⁷
11. The October Permit plans were changed to remove the existing front porch.²⁸ Removal of the front porch decreased the lot coverage to 1768 SF and lot occupancy to 57%.²⁹

¹⁸ As discussed in more detail below, the approved plans are internally inconsistent.

¹⁹ BZA Exhibits 65A, Sheet A4, and 65B, Sheet C1 (May Approved Plans).

²⁰ BZA Exhibits 65A, Sheet A1, and 65B, Sheet C1 (May Approved Plans).

²¹ BZA Exhibit 67 (Expert Report).

²² BZA Exhibits 65A, Sheet A4, and 65B, Sheet C1 (May Approved Plans).

²³ As will be discussed in more detail below, the approved plans show inconsistent depths for the rear deck/porch.

²⁴ BZA Exhibit 65A, Sheet A4 (May Approved Plans).

²⁵ BZA Exhibit 65B, Sheet C1 (May Approved Plans).

²⁶ BZA Exhibits 24 and 25.

²⁷ BZA Exhibits 51A-B and 62.

²⁸ BZA Exhibits 51A, Sheet A3, and 51B, Sheets C1 and C1-Copy (October Approved Plans).

²⁹ *Id.*

12. The length of the rear addition increased in the October Permit to 44 feet 11 inches, which is a change from the May Permit.³⁰

December Permit

13. On December 24, 2015, DCRA issued building permit #B1603100 (“December Permit”) as a revision to the October Permit. Among other changes, the December Permit now retains the existing front porch, which the October Permit removed, and decreases the depth of the rear decks/porches to 7 feet. The lot coverage of the Project in the December Permit is 1902 SF or 61%.³¹

CONCLUSIONS OF LAW

Summary of Appellant’s and Intervenor’s Case

The issue before the Board is whether the May Permit was validly issued, *i.e.*, whether the plans fully conformed to the Zoning Regulations. Appellant argues that the May Permit did not fully conform to the Zoning Regulations because the approved plans contained multiple errors, inconsistencies and ambiguities, the most significant being that the Project exceeded the maximum percentage of lot occupancy allowed. As a result, Appellant contends that the plans the Zoning Administrator approved at that time did not fully conform with the Zoning Regulations, causing the May Permit to be issued in error and void *ab initio*. Consequently, Appellant argues that the October permit application, and all subsequent amendments thereto, are subject to the R-4 Zoning Regulations that are now in effect. These regulations do not permit conversions as a matter of right. Instead, the Property Owner must obtain special exception approval by this Board before DCRA is authorized to issue the permit.

Summary of DCRA’s Case

DCRA asserts that the Zoning Administrator correctly issued the May Permit and that it complies with lot occupancy and the Zoning Regulations. DCRA contends that the Zoning Administrator requested revised plans to clarify the plans and to correct “scrivener’s and minor clerical errors” contained in the plans it approved in March and again in May. DCRA maintains that the revised plans for the October Permit do not contain material changes from the original plans, and in the alternative, that only the amendments to the original plans are subject to the new R-4 regulations.

May Permit Did Not Fully Conform to the Zoning Regulations

The Zoning Regulations state that, “[e]xcept as provided in § 3202.5, 3202.7, or 3202.8, a building permit shall not be issued for the proposed erection, construction, conversion, or

³⁰ BZA Exhibits 51A, Sheet A4, and 51B, Sheets C1 and C1-Copy (October Approved Plans).

³¹ BZA Exhibit 68.

alteration of any structure unless the plans of and for the erection, construction, conversion, or alteration *fully conform* to the provisions of this title.”³² (emphasis added).

The exceptions found in §§ 3202.5, 3202.7 and 3202.8 do not apply in this appeal to the requirement that the plans fully conform to the Zoning Regulations. First, § 3202.5 applies when “an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction.” This appeal does not involve a zone district classification. Second, § 3202.7 applies when a building permit has lapsed, which is not the case here. Third, § 3202.8 is inapplicable because it does not apply to conversions.

The May Permit plans did not fully conform to lot occupancy and pervious surface requirements, and the plat, Sheet C1, contained dimensional errors. The multiple inconsistencies, errors and ambiguities in the May Permit plans call into question the reliability of the plans and proves that the plans did not fully conform to the Zoning Regulations.

To determine compliance with zoning, the building code requires the plans to show “[t]he shape and location in plan of all existing and proposed structures, fully dimensioned, including orientation and distances to lot lines so as to define without ambiguity the dimensions and location of said structures.”³³ The May Permit plans included at least the following errors, ambiguities and inconsistencies, discussed in more detail below, which made a determination of full compliance with the Zoning Regulations impossible.

- Several possibilities for lot occupancy exceeding the maximum percentage allowed
- Conflicting dimensions for the length of the addition
- Conflicting dimensions for the depth of the rear porch
- Plans showing front porch and front deck
- Plat with dimensional errors for the rear lot

There were three possible calculations for lot occupancy in the May Permit plans

The May Permit plans that were submitted and approved, did not comply with the percentage of lot occupancy requirements because the plans exceeded the maximum percentage of lot occupancy allowed. Under the Zoning Regulations, a conversion of a building or structure to an apartment house in R-4 shall not occupy its lot in excess of 60 percent.³⁴ In the report prepared by Appellant’s expert, a registered architect in the District of Columbia, the expert found that the plans approved for the May Permit contained “significant ambiguities and dimensional errors” regarding the dimensions of the proposed apartment building and the percentage of lot occupancy.³⁵

³² 11 DCMR § 3202.1.

³³ 12-A DCMR § 106.1.12(3).

³⁴ 11 DCMR § 403.2.

³⁵ BZA Exhibit 67, pp. 3-5 (Expert Report).

There are three possible calculations of lot occupancy in the approved plans. Two exceed 60%, the maximum allowed.³⁶

The first possible calculation for lot occupancy is 61.8%. The zoning data summary provided by the Property Owner on Sheets A1 and C1 indicates that the maximum lot coverage allowed for the Project is 1876 SF.³⁷ This is 60% of the total lot area of 3126 SF. Indicated immediately next to the maximum allowed lot coverage is the proposed lot coverage of 1933 SF, which clearly exceeds the maximum of 1876 SF.³⁸ It is evident from the zoning data summary that the Property Owner recognized that the Project exceeded the maximum percentage of lot occupancy.

The second possible calculation for lot occupancy is 59.8%. This calculation is based on the dimensions from the proposed first floor plan on Sheet A4.³⁹ As will be discussed in more detail below, the plans, including Sheet A4, contain dimensional inconsistencies for the addition.

The third possible calculation for lot occupancy is 62.7%. Appellant's expert calculated this result by using the dimensions of the proposed apartment building on Sheet C1.⁴⁰ In addition to lot occupancy of 62.7%, Sheet C1 also shows lot occupancy of 61.8%, which was calculated from the same zoning data summary provided on Sheet A1 and discussed above.

The Zoning Administrator failed to determine compliance with lot occupancy

The Zoning Administrator failed to ensure that the plans for the May Permit conformed to the maximum percentage of lot occupancy allowed under the Zoning Regulations. The permit application was filed on March 26, 2015, and the Zoning Administrator approved the zoning review one day later on March 27, 2015.⁴¹ Because of the obvious errors and inconsistencies in the plans, it is questionable whether the Zoning Administrator thoroughly reviewed the plans for conformance.⁴² Although DCRA maintained that the Project did not exceed the maximum percentage of lot occupancy, the Zoning Administrator did not provide what he determined to be the percentage of lot occupancy for the May Permit.

As discussed above, the zoning data on Sheets A1 and C1 show lot occupancy of 61.8%. DCRA asserted that the zoning data provided was a courtesy and not required. This is a misstatement of the law. To determine compliance with zoning, the building code requires:

³⁶ DCRA and the Property Owner indicated that the Zoning Administrator did not grant minor flexibility from the lot occupancy requirements. Thus, lot occupancy is limited to a maximum of 60%.

³⁷ BZA Exhibits 65A, Sheet A1, 65B, Sheet C1 (May Approved Plans).

³⁸ *Id.*

³⁹ BZA Exhibit 67, pp. 3, 8 (Expert Report).

⁴⁰ *Id.*

⁴¹ BZA Exhibit 62 (Status of Building Permits).

⁴² In its pre-hearing statement at BZA Exhibit 45, Appellant included as exhibits several sheets (A1, A3, A4, C1) from an approved set of plans pertaining to a February permit DCRA had issued to convert the Subject Property. The May Permit revised the February Permit. Appellant submitted the plans for no other purpose than to demonstrate that the February plans also retained the existing front porch. The Board sustained DCRA's objection to exclude those plans.

A Zoning Data Summary of the project including, as applicable, at least the following data: lot width, area of the lot, *percentage of lot occupancy*, height of the structure and the location and elevation of the height measurement reference points... areas dedicated to each use, width of any proposed side yard, rear yard or court, number of standard and compact parking spaces....⁴³ (emphasis added).

The building code required the Property Owner to specify the percentage of lot occupancy for the Project on the zoning data summary, and the Property Owner provided it on Sheets A1 and C1. The zoning data summary objectively reflects lot occupancy exceeding the maximum allowed and is clear and convincing evidence that the Zoning Administrator knew or should have known that the plans did not fully conform.

DCRA also indicated that the plat the Zoning Administrator approved shows a front deck for the Project and that the existing front porch will be removed. DCRA added that Sheets A4 and A6 of the May Permit also show a front deck and not a front porch.

The plat the Zoning Administrator relied on and approved on March 27, 2015 was replaced with a new plat, Sheet C1. While the plat the Zoning Administrator approved on March 27, 2015, shows a “deck”, this plat is not part of the approved May Permit plans that DCRA submitted to the Board on December 3, 2015.⁴⁴ Sheet C1 is identical to the plat in the type of information it contains about the Project, and it is the only sheet in the approved plans that represents the plat. Sheet C1 has a District government date stamp of April 27, 2015⁴⁵ and shows a “front porch”, which must be included in the calculation of lot occupancy.⁴⁶ Furthermore, the Property Owner submitted and DCRA approved a similar version of Sheet C1, containing the same soil and erosion notes as Sheet C1 of the May Permit plans, for the October Permit approval.⁴⁷

Although the Zoning Administrator initially approved the zoning permit on March 27, 2015, one day after the permit application was filed, he completed a second zoning review and approval on May 22, 2015.⁴⁸ This second approval is after the date of April 27, 2015 stamped on Sheet C1. Although DCRA asserted that the Zoning Administrator did not review Sheet C1 because it was required for the review and approval of the District Department of the Environment, he knew or should have known that the information provided on Sheet C1 to determine compliance with the Zoning Regulations superseded the information on the plat he approved on March 27, 2015. The Zoning Administrator’s failure to review the plans sufficiently to ensure full conformance with the Zoning Regulations does not justify or excuse his approval of a permit that did not conform to the lot occupancy requirements.

⁴³ 12-A DCMR § 106.1.12(6).

⁴⁴ BZA Exhibit 65A-B.

⁴⁵ BZA Exhibit 65B, Sheet C1 (May Approved Plans).

⁴⁶ As will be discussed in more detail below, the dimensions of the front porch are inaccurate. The front porch is eight feet deep, not six feet as shown throughout the May and October plans, including on Sheet C1.

⁴⁷ BZA Exhibits 51B (October Approved Plans) and 65B (May Approved Plans).

⁴⁸ BZA Exhibit 62 (Status of Approved Permits).

Moreover, although Sheets A4 and A6 show a front “deck”, Sheet C1 shows a front “porch”, and Sheet A3 confirms that the existing front porch will remain.⁴⁹ This is another example of the errors, inconsistencies and ambiguities in the May plans.

The plat was inaccurate and had obvious errors.

The Property Owner provided an inaccurate plat with the May Permit application.⁵⁰ Sheet C1 shows that the dimension line drawn along the western lot boundary indicating the length of the proposed apartment building’s footprint is inaccurate. The length of the western lot boundary is 156.30 feet as indicated by the Surveyor. However, when the western boundary dimensions indicated on the plat are calculated with the 15 foot building restriction line setback, the total is 171.3 feet. It is apparent that the 63.8 feet dimension shown at the rear of the lot is not correct.⁵¹ The plat the Zoning Administrator reviewed showed the same errors.⁵²

The inaccurate plat resulted in flawed calculations for pervious surfaces. When a new principal structure is constructed or an addition is made to a principal structure that increases the existing lot occupancy at the time of application for the building permit by 10% or more, the structure must have a minimum percentage of pervious surfaces.⁵³ For a lot 2,000 SF or larger in the R-4 district, the minimum percentage of pervious surface is 20%. Because the calculations on the plat are incorrect, DCRA used flawed data to calculate compliance with the pervious surface requirement. It is unclear whether the plans conformed to the pervious surface requirement of 20% when the May Permit was issued.

DCRA asserted that the Zoning Administrator was able to review the plat despite the erroneous numbers because the plat is a scale drawing. This argument has no merit. If the Zoning Administrator relied on scale drawings with erroneous numbers and measurements, he will obtain erroneous results.

The plans show two different measurements for the depth of the rear porch

The rear decks/porches depicted on Sheets C1 and A4 show different dimensions. Sheet C1 shows a rear deck/porch of 10 feet deep, and Sheet A4 shows rear decks/porches of 9 feet deep.⁵⁴

The plans show two different dimensions for the addition

The approved plans for the May Permit show two different measurements for the addition. Sheet A4 indicates that the addition will be 41 feet, 6 inches long.⁵⁵ However, Sheet

⁴⁹ BZA Exhibits 65A-B (May Approved Plans).

⁵⁰ BZA Exhibit 65B, Sheet C1 (May Approved Plans).

⁵¹ BZA Exhibit 67 (Expert Report).

⁵² BZA Exhibit 51C.

⁵³ 11 DCMR § 412.1.

⁵⁴ BZA Exhibits 65A-B (May Approved Plans).

⁵⁵ BZA Exhibit 65A, Sheet A4 (May Approved Plans).

C1 and the plat DCRA approved on March 27, 2015 show a length of 45.5 feet for the addition.⁵⁶ The approved plans show two different sizes for the addition, and those sizes differ by 4 inches. This inconsistency is further evidence of the errors contained in the approved plans.

The dimensions of the front porch are inaccurate

The May Permit plans depict the front porch as 6 feet deep, however, it is 8 feet deep.⁵⁷ Mr. Uqdah testified that he measured the existing front porch on the Subject Property and that it measures at least 8 feet deep.⁵⁸ The depth conveyed for the porch in the approved plans is inaccurate.

DCRA indicated that the Zoning Administrator relied only on Sheets A1, A4, A6 and the plat he approved on March 27, 2015 to determine compliance with the Zoning Regulations.⁵⁹ Yet, other pages of the approved plans establish that the plans did not fully conform with the Zoning Regulations as required by § 3202.1. These statements are an admission from the Zoning Administrator that he did not review the plans sufficiently to determine conformance with the Zoning Regulations.

As stated above, to determine compliance with zoning, the building code requires the plans to show “[t]he shape and location in plan of all existing and proposed structures, fully dimensioned...so as to define without ambiguity the dimensions and location of said structures.”⁶⁰ The Property Owner failed to submit plans meeting this requirement because the plans contained multiple errors, inconsistencies and ambiguities, and the Zoning Administrator failed to ensure that the plans fully conformed.

Section 3202.1 states clearly that DCRA shall not issue a permit that does not fully conform with the regulations. The plans that were submitted and approved did not fully conform. Partial conformance is not sufficient. The subjective intent of the owner is irrelevant, as is the subjective interpretation of the Zoning Administrator; the regulations require an objective review of the plans. The building plans objectively show that lot occupancy is over 60%. Thus, DCRA issued the May Permit in error.

The Revised October Permit

Although DCRA contends that the May Permit was properly issued, the Zoning Administrator requested a three-week continuance of the hearing one week after Appellant filed its first Pre-Hearing Statement challenging the May Permit and asserting that the Project exceeded the maximum percentage of lot occupancy.⁶¹ According to DCRA, it requested the

⁵⁶ BZA Exhibits 51C, 65B, Sheet C1 (May Approved Plans).

⁵⁷ BZA Exhibits 65A, Sheets A3, A4 and A6, and 65B, Sheet C1 (May Approved Plans).

⁵⁸ BZA Exhibit 64 showing photographs of the correct porch measurement.

⁵⁹ BZA Exhibit 65 (DCRA’s Submission).

⁶⁰ 12-A DCMR § 106.1.12(3).

⁶¹ This was for the September 29, 2015 hearing.

continuance to give the Property Owner an opportunity to submit “more detailed plans” on the Project.⁶²

On October 26, 2015, DCRA issued the October Permit as a revision to the May Permit. The October Permit plans reduce the lot area of the Project to 1768.2 SF and the percentage of lot occupancy to 57%.⁶³

DCRA indicated that the Zoning Administrator requested revised building plans to correct “scrivener’s and minor clerical errors” contained in the May Permit. However, revised building plans would not be necessary if the May Permit had fully conformed with the Zoning Regulations. The request and desire for revised plans is tantamount to an admission by the Zoning Administrator that the plans for the May Permit did not fully conform and was issued in error. Furthermore, the reduction in lot occupancy in the October plans is clear and convincing evidence that the May plans did not conform to the maximum percentage of lot occupancy.

The Plans for the May Permit and October Permit are Different.

The plans that were approved for the October Permit are materially different from the plans approved for the May Permit. The differences between the plans for the May and October permits are discussed below.

Lot occupancy changed

As discussed above, the May Permit plans did not fully conform to the Zoning Regulations because the percentage of lot occupancy is greater than 60%. In the October Permit plans, the lot area of the Project decreased to 1768.2 SF, and the percentage of lot occupancy decreased to 57%.

The October Permit plans show that the front porch will be removed but the May Permit plans show it will remain.

The reduction in the square footage of the Project and in lot occupancy occurred because the Property Owner eliminated the front porch in the October Permit plans to reduce the percentage of lot occupancy to under 60%. The May Permit plans do not support DCRA and the Property Owner’s contention that the May Permit plans contemplated demolition of the front porch. Appellant contends that the timing of this change reveals it was made to correct the errors with the May plans that were brought to light by Appellant’s pre-hearing statement.

Appellant’s expert architect concluded there was a material change in the October Permit plans to remove the front porch. The expert report states:⁶⁴

⁶² BZA Exhibit #25 (DCRA’s Motion for Continuance).

⁶³ BZA Exhibits 51A, Sheet A1 and 51B, Sheets C1 and C1-Copy (October Approved Plans).

⁶⁴ BZA Exhibit 67, p. 4 (Expert Report).

In the revised Permit Set drawings (October 2015), Sheet A3 indicates that the front porch is to be demolished. However, on the previous Sheet A3 in the approved permit B1505734 (May 2015), the front porch was shown as existing to remain. Since, the previous Sheet A3 did not show the front porch as being removed but the new Sheet A3 does, *this is essentially a material change in the revised Permit Set drawings* (October 2015) (emphasis added).

Sheet A3 of the May Permit plans demonstrates that the existing front porch was to remain part of the new apartment building. Sheet A3 shows the existing conditions of the building and the structures that will be removed. The legend in the right corner shows that dotted lines were used for parts of the existing structure that will be demolished and solid lines for parts of the existing structure that will remain. For example, the interior partitions for the existing basement, first and second floor plans, the two-story rear porch, the exterior walls at the rear of the house, and the rear stairs used dotted lines to indicate that these areas will be demolished. Furthermore, there are notations on Sheet A3 that the exterior walls at the rear of the house will be demolished. In contrast, the legend shows solid lines for the front porch, which confirms the intent to keep the existing front porch, and includes no notations that the porch was to be demolished.⁶⁵ Sheet C1 also depicts a front porch spanning the entire width of the lot.⁶⁶

Although DCRA argued that the legend indicating the parts of the structure that will be removed is a partition legend and that the front porch has no partitions, the May plans depict the removal of the rear stairs and all interior stairs with dotted lines, and the stairs do not have partition walls. Thus, this argument is without merit.

DCRA also stated that the Zoning Administrator did not review Sheet A3; again however, that is irrelevant. Zoning compliance is an objective determination based on the plans submitted, and the Zoning Administrator is not permitted to subjectively disregard elements of the plans that do not conform with the regulations. To determine compliance with zoning, the building code requires the plans to show “[t]he shape and location in plan of all existing and proposed structures, fully dimensioned...”⁶⁷ Accordingly, the Zoning Administrator was required to review Sheet A3, showing the existing structure, to determine compliance.

Two sheets in the October plans illustrate that the plans were changed to remove the front porch. First, Sheet A3 (the Existing First Floor Plan) now contains a notation that the existing front porch will be removed.⁶⁸ Although the October plans indicate that changes from the May plans to the October plans are depicted with “bubbles” and there is now a written notation on Sheet A3 that the front porch will be removed, there are no bubbles indicating the removal of the existing front porch. Second, Sheet C1 of the October plans show a front deck that is half the width of the lot and an areaway that occupies the other half.⁶⁹ The partial “deck” and areaway

⁶⁵ BZA Exhibit 65A, Sheet A3 (May Approved Plans).

⁶⁶ BZA Exhibit 65B (May Approved Plans).

⁶⁷ 12-A DCMR § 106.1.12(3).

⁶⁸ BZA Exhibit 51A (October Approved Plans).

⁶⁹ BZA Exhibit 51B (October Approved Plans).

are different from the “deck” depicted on the plat the Zoning Administrator approved on March 27, 2015. Finally, the partial deck and areaway on Sheet C1 in the October plans are inconsistent with the “deck” shown on Sheets A4 and A6.⁷⁰ Sheets A4 and A6 show a “deck” spanning the entire width of the proposed building, providing further evidence that the October plans were changed to remove the front porch.

Moreover, the Building Data on Sheet A1 does not mention removal of the front porch, which supports that the approved plans did not include demolition of the front porch and that no permit was issued to demolish the front porch.⁷¹

At best, the plans are ambiguous regarding the front porch, but ambiguity means the plans did not fully conform. Even if the Board accepts that the Property Owner intended to remove the front porch, the plans did not support this. It is the plans, not the subjective intent of the Owner, which determines compliance with the Zoning Regulations.

The size of the addition changed

Sheet A4 of the May Permit plans indicates that the addition will be 41 feet 6 inches long. Both Sheets C1 and the plat the Zoning Administrator approved show the addition as 45.5 feet long, which conflict with Sheet A4.⁷² Thus, there is an internal inconsistency regarding the size of the addition even in the May Permit plans. The October Permit plans show a different dimension for the addition. Sheets A4 and C1 indicate that the addition will be 44 feet 11 inches long, which is a change in the dimensions of the addition from the May Permit plans.⁷³ Although there is a notation on the October plans that changes to the plans are depicted with “bubbles”, there is no bubble showing the change to the length of the addition. This also is a material change from the May plans.

DCRA indicated that the October Permit plans did not increase the size of the building. As demonstrated by Sheets A4 and C1 of the October Permit plans, the size of the addition increased by approximately 4 inches, a change that increases the overall size of the Project.

DCRA asserts that the changes in the October plans were made to correct scrivener’s errors. Yet, as the above discussion demonstrates, and as Appellant’s expert has concluded, the changes between the May and October plans are material, particularly as they relate to lot occupancy. The May plans indicate that lot occupancy is greater than 60%, which would prevent the permit from being issued. The October plans show lot occupancy less than 60% as a result of the changes, authorizing issuance of the permit. Consequently, the changes were not minor.

DCRA Approved Another Revision to the Permit in December to Retain the Front Porch

⁷⁰ BZA Exhibit 51A (October Approved Plans), 65A (May Approved Plans).

⁷¹ BZA Exhibit 65A (May Approved Plans).

⁷² BZA Exhibits 51C, 65A-B (May Approved Plans).

⁷³ BZA Exhibit 51A, Sheet A4 (October Approved Plans).

On December 24, 2015, DCRA issued the December Permit as a revision to the October Permit. The December Permit plans now retain the existing front porch that the October plans removed.⁷⁴ This revision is further evidence that the Property Owner never intended to remove the front porch, and that the October revision was a subterfuge for the hearing to convince the Board that the permit conformed to the Zoning Regulations.

Further, the revisions in the December plans exceed the maximum percentage of lot occupancy allowed for a conversion in R-4. As discussed above, lot occupancy is limited to a maximum of 60%. The dimensions of the front porch, existing building, addition, rear porch and rear stairs total 1902 SF or 61% lot occupancy. As with the May Permit, the Zoning Administrator approved a permit that exceeded the maximum percentage of lot occupancy and that does not fully conform to the Zoning Regulations.

The Board's Decision in This Appeal Must be Based on the May Permit

The ANC filed this appeal to challenge the May Permit DCRA issued, which was necessarily based on the information submitted in the May Permit plans. Therefore, the Board's determination of whether those plans fully conform with the Zoning Regulations as required by § 3202.1 must be limited to an analysis of the actual plans submitted, as they existed at that time, and not after they have been revised to correct the errors revealed by Appellant's pre-hearing statement. If the Zoning Administrator required additional information to determine conformance with the Zoning Regulations, he was prohibited from approving the permit application in May. The October plans are irrelevant as a matter of law, and must be excluded.

Appellant has shown that the May plans contain multiple errors and are objectively inconsistent and ambiguous. This is further confirmed by Appellant's expert report, in which a licensed architect concluded that the plans contained "significant ambiguities and dimensional errors" such that they were reasonably capable of more than one interpretation.⁷⁵ At least two of those reasonable interpretations provide for lot occupancy in excess of what is permitted under the Zoning Regulations; therefore, the plans did not fully conform with the regulations and the permits should not have issued.

DCRA asserted that the lot occupancy did not change in the October Permit plans, and that Sheets A1 and C1 were only changed because they were erroneously transcribed and thus a scrivener's error. This argument is without merit. As Appellant has shown, and as Appellant's expert concluded, the changes between the May and October plans are material. The materiality of the changes between the May and October plans establish that the May plans were not in full compliance with the Zoning Regulations as Section 3202.1 requires. Because the May Permit plans exceeded the maximum percentage of lot occupancy and did not fully conform to the Zoning Regulations, the May Permit was issued in error, and is invalid.

⁷⁴ BZA Exhibit 68 (December Approved Plans).

⁷⁵ BZA Exhibit 67, p. 3 (Expert Report).

Zoning Regulations in Effect on the Date Permit is Amended Must Apply to the Amended and Revised Permits

The Zoning Regulations provide that “[a]ny amendment of the permit *shall comply* with the provisions of [the Zoning Regulations] in effect on the date the permit is amended.”⁷⁶ (emphasis added). Effective on June 26, 2015, the Zoning Commission changed the Zoning Regulations to eliminate conversions of residential buildings as a matter of right in R-4 Districts and allow them only through special exception approval by this Board.⁷⁷ Section 336.1 of the Zoning Regulation now provides:

Conversion of an existing residential building existing prior to May 12, 1958, to an apartment house shall be permitted as a special exception in the R-4 District if approved by the Board of Zoning Adjustment under § 3104, subject to §§ 336.2 through 336.11.⁷⁸

The new R-4 regulations became effective on June 26, 2015 for all permits not yet approved, with two exceptions for vesting under the repealed R-4 regulations. Neither exception to vesting applies to the revised permits.⁷⁹

In its Order on ZC-14-11, the new R-4 Zoning Regulations, the Zoning Commission stated:

Ordinarily, construction authorized by a building permit must be in accordance with the Zoning Regulations in place on the date the permit was issued. (11 DCMR § 3202.2.). [sic] That means that even if a building permit application has been filed, *that application becomes subject to any amendments to the text of the Zoning Regulations that are adopted while the permit application is being processed*. However, once the building permit is issued, construction rights are vested *unless a modification to the building permit is granted*.⁸⁰ (emphasis added).

This explanation of § 3202.4 from the Zoning Commission, the exclusive body in the District of Columbia empowered to enact zoning laws, makes it clear that where there has been an intervening change in the Zoning Regulations before a permit is issued, the entire application is subject to *all* new Zoning Regulations. This is clear language that the application of the new zoning law is not limited to the change in the permit, but must be applied to the *entire* building permit application. This declaration from the Zoning Commission is further supported by the next sentence stating that construction rights no longer are vested in the old law when a

⁷⁶ 11 DCMR § 3202.4(b).

⁷⁷ 11 DCMR § 336.1, 3104.1.

⁷⁸ 11 DCMR § 336.1.

⁷⁹ 11 DCMR §§ 3202.8, 3202.9. Section 3202.8 does not apply to new conversions. Section 3202.9 applies to conversions where DCRA accepted the permit application as complete prior to July 17, 2014, or there was a variance, special exception or concept design with an application or approval prior to June 26, 2015.

⁸⁰ Zoning Commission Order, ZC 14-11, June 8, 2015.

modification to the building permit is granted. Once a modification to the permit is granted, the new law must apply to the entire permit.

Conversions of residential buildings no longer are permitted as a matter of right in R-4 Districts. The Zoning Commission changed the law to give affected neighbors a voice and an opportunity to be heard before a permit is issued. The Zoning Commission acted to address the multitude of concerns about conversions of rowhomes raised by R-4 residents and to protect rowhouse neighborhoods as set forth in the Comprehensive Plan.⁸¹

The new R-4 regulations apply to a permitted use in R-4 Districts and whether such use is allowed as a matter of right or only through special exception approval from this Board. The use for which the October Permit application pertains, conversion to an apartment house, cannot be separated out from the rest of the zoning approval. The use of the property cannot be ignored and cast aside as though it is unrelated to the permit for which zoning approval is sought.

The plain language in § 3202.4(b) requires that the amended permits comply with the law in effect on October 26, 2015. Although Appellant stated that the changes to the October plans are material, a finding of materiality is not required under § 3202.4(b). Any amendment to the permit requires compliance with the Zoning Regulations in effect, and the Zoning Commission made this clear in its 14-11 Order.

Moreover, § 3104.2 states that “[i]n the case of a use that was originally permitted and lawfully established as a matter of right and for which the Zoning Regulations now require special exception approval from the Board of Zoning Adjustment, any extension or enlargement of that use shall require special exception approval from the Board.” The May Permit initially was approved as a matter of right. The revised permit, which encompasses the use of the Subject Property as an apartment house, now requires special exception relief from this Board.

Neither DCRA nor the Property Owner has pointed to any provision in the Zoning Regulations that authorizes the Zoning Administrator to apply a repealed law to a revised permit application under the facts presented in this appeal. Appellant and Intervenor, however, have pointed to several authorities to support their arguments.

The Board recognizes that under the building code, DCRA has the authority to request revised building plans and issue revisions to a permit.⁸² Appellant is not challenging this authority, and the Board’s decision will not affect that authority in the building code.⁸³ Appellant’s argument applies only to the Zoning Regulations. Appellant contends that because DCRA issued a revision to correct errors to the original May Permit, the Zoning Administrator must apply the Zoning Regulations in effect on the date the permit was amended. That means

⁸¹*Id.*

⁸² 12-A DCMR § 105.3.8.

⁸³ “No provision of the Construction Codes shall be deemed to modify or amend any provision of the Zoning Regulations of the District of Columbia...nor shall any provision of those Zoning Regulations be deemed to modify or amend any provision of the Construction Codes.” 12-A DCMR § 105.3.8.

the law in effect must apply to the entire permit being issued. The law is clear on this point, and the Board agrees with Appellant.

DCRA and the Property Owner have asserted that only the amendment has to comply with the existing regulations. This reading of the Zoning Regulations has no merit for the reasons stated above. The Owner submitted a new permit application with a complete set of plans. The Zoning Administrator approved the zoning permit, and DCRA issued a revised permit that superseded the original May Permit. The May Permit issued under the now repealed R-4 regulations no longer exists.

The law in effect when the Zoning Administrator approved the revised zoning permit in October only allows conversions in R-4 Districts through special exception relief granted by this Board. The Zoning Administrator no longer has the authority to approve the use for which the permit was approved, a conversion of a residential building, in R-4 Districts. Accordingly, DCRA issued the revised October Permit in error because the Zoning Administrator applied the now repealed regulations to the October Permit application instead of the special exception provisions.⁸⁴ By approving the October Permit, the Zoning Administrator abused his authority and undermined the special exception authority reserved to this Board.

The special exception provisions require that:

Any addition shall not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, in particular:

- (a) The light and air available to neighboring properties shall not be unduly affected;
- (b) The privacy of use and enjoyment of neighboring properties shall not be unduly compromised; and
- (c) The conversion and any associated additions, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street or alley.⁸⁵

The Project as approved by the May and October permits will add approximately 60 feet to the rear of the Subject Property, more than doubling the existing footprint. The scale of this addition will affect the neighbors in close proximity. By approving the October Permit as a matter of right, Appellant and Intervenor, consisting of 19 neighbors, are deprived of the right to appear in front of BZA and demonstrate how the Project will affect the light, air, use and enjoyment of their homes. This is a concrete harm to Appellant and Intervenor. A special

⁸⁴ 11 DCMR §§ 336, 3104.1.

⁸⁵ 11 DCMR § 336.9.

exception hearing could result in a scaled down apartment building which would protect the rights afforded to the Appellant and Intervenor by the new R-4 regulations.

Furthermore, granting this appeal will not prevent the Property Owner from converting the Subject Property into an apartment house. The Property Owner may reapply for a permit under the existing Zoning Regulations, and Appellant, Intervenor and any other affected person will have the opportunity to be heard by this Board.

The Zoning Administrator must apply the Zoning Regulations currently in effect to any new or revised permit application filed by the Property Owner to convert the Subject Property. Accordingly, the appeal is **GRANTED**, and the May Permit and all subsequent permits are invalid.

Respectfully Submitted,



Lyn Abrams
Representative for ANC 4C



Andrew Wible
Representative for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2016, a copy of Appellant's and Intervenor's Findings of Facts and Conclusions of Law was provided by electronic mail to the following:

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