

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 19081 of ANC 1C, as amended,¹ pursuant to 11 DCMR §§ 3100 and 3101², from a May 13, 2015 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permits No. B1412288, B1601746, and B1602713 to allow the conversion of a one-family dwelling into a four-unit apartment house in the R-5-B District at premises 1828 Ontario Place N.W. (Square 2583, Lot 438).

HEARING DATES: November 17, 2015, December 22, 2015³
DECISION DATE: December 22, 2015

DISMISSAL ORDER

PRELIMINARY MATTERS

On July 12, 2015, ANC 1C (the “Appellant”) filed this appeal with the Board of Zoning Adjustment (the “Board”). The Appellant appealed the issuance of Building Permit No. B1412288 (the “Original Permit”) by the Department of Consumer and Regulatory Affairs (“DCRA”) to 1828 Ontario Place LLC (the “Property Owner”). The permit authorized the conversion of a one-family dwelling into a four-unit apartment house, including the construction of a retaining wall and two-story addition to the existing structure at the premises 1828 Ontario Place, N.W. (Square 2583, Lot 438) (the “Subject Property”).

¹ When originally filed, the subject of the appeal was Building Permit No. B1412288. The appeal was amended to include the two subsequent revisions to the Original Permit, Building Permits No. B1601746 and B1602713, which were issued during the course of the appeal proceedings.

² This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraphs, are to provisions that were in effect on the date this Application was heard and decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text (“the 2016 Regulations”).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 decision or the validity of this order.

³ The appeal was originally scheduled for October 20, 2015, and postponed to November 17, 2015 at the Appellant’s request. At the public hearing session on November 17, 2015, the Appellant made an oral motion to postpone the hearing in order to consider recent revisions of the permit at issue. The Board granted the motion and postponed the hearing to December 22, 2015.

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ANC 1C alleged that the approval of the Original Permit was issued in violation of the off-street parking requirements of 11 DCMR § 2101 and the parking space dimension requirements of § 2115.1, as it allowed an existing parking space that does not meet the dimension requirements to serve as one of two required parking spaces. (Exhibit 3.) On November 12, 2015, the Original Permit was revised as Building Permit No. B1601746 (“First Revised Permit”), which included revised parking plans that corrected the dimensions of the existing substandard parking space. (Exhibit 35.) At the Appellant’s request, the Board postponed the hearing on November 17, 2015 to allow the Appellant additional time to examine the First Revised Permit and raise any zoning issues introduced by the permit revisions.

Accordingly, the Appellant incorporated the First Revised Permit into its appeal and filed a Revised Prehearing Statement raising structural issues and arguing that these issues would prevent the Property Owner from executing the approved, revised parking plan. (Exhibit 38.) Subsequently, the permit was again revised on December 11, 2015 as Building Permit No. B1602713 (“Second Revised Permit”) to address these alleged structural deficiencies by including bracing beams and a report from a structural engineer. (Exhibit 41B.)

The Property Owner filed a motion to dismiss the appeal for lack of jurisdiction and for mootness. (Exhibit 41.) DCRA joined the Property Owner’s motion to dismiss on the same grounds. (Exhibit 43.) On December 22, 2015, the Board granted the motion to dismiss, on the basis that the zoning issues initially raised by the Appellant were made moot by the subsequent permit revisions and that the remaining issues raised by the Appellant at this stage of the proceedings are outside of the Board’s jurisdiction.

Notice of Appeal and Notice of Hearing. By memorandum dated July 28, 2015, the Office of Zoning (“OZ”) provided notice of the appeal to the Zoning Administrator (“ZA”) at DCRA, the D.C. Office of Planning, Advisory Neighborhood Commission (“ANC”) 1C, the ANC within which the Subject Property is located and the Appellant in this case, ANC Single Member District 1C04, the Councilmember for Ward One, and the owner of the Subject Property. On July 29, 2015, OZ mailed a Notice of Public Hearing to the Councilmember for Ward One, ANC 1C, DCRA, and the owner of the Subject Property.

Party Status. Consistent with 11 DCMR § 3199.1, the parties in this proceeding are ANC 1C, (“Appellant”), DCRA, and 1828 Ontario Place LLC (the “Property Owner”). ANC 1C authorized Michael Rafferty and Stacie Desai to represent the ANC in a report dated October 16, 2015. (Exhibit 29.) Michael Rafferty also filed a request for intervenor status on October 30, 2015. (Exhibits 32 and 33.) At the hearing on December 22, 2015, Mr. Rafferty clarified that he was authorized by ANC 1C as a representative, but also wished to be considered an individual appellant in this case. The Board granted that request, and dismissed his separate request for intervenor status.

ANC Report. By letter dated July 11, 2015, ANC 1C indicated that it had considered a resolution to file the appeal at a duly noticed public meeting, with a quorum present, and approved the

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resolution by a vote of 8-0. (Exhibit 8.) In the resolution, the ANC challenged the issuance of Building Permit No. B1412288, alleging that conversion of a one-family dwelling to a four-unit apartment house must first demonstrate the presence of two, nine-foot by 19-foot parking spaces. ANC 1C also submitted a Prehearing Statement in advance of the hearing on November 17, 2015, providing additional detail and evidence to support its claim that the approved parking plan violates 11 DCMR §§ 2101.1 & 2115.1. (Exhibit 34.) After the subsequent revision to the permit on November 12, 2015, ANC 1C filed a Revised Prehearing Statement arguing that the First Revised Permit was issued in error and raising structural issues that would prevent the Property Owner from implementing the revised parking plan as approved. (Exhibit 38.)

FINDINGS OF FACT

1. The property is located at 1828 Ontario Place N.W. (Square 2583, Lot 438) (the “Subject Property”). The Subject Property is currently improved with a one-family dwelling.
2. The Subject Property is located in the R-5-B Zone District.
3. The Property Owner applied for a building permit for conversion of the one-family dwelling into a four-unit apartment building on September 22, 2014. That application for Building Permit No. B1412288 (the “Original Permit”) received zoning approval on May 13, 2015, and it was issued on July 20, 2015. (Exhibit 22.)
4. The approved plans associated with the Original Permit included two parking spaces: one standard, nine-foot by 19-foot space and one substandard eight-foot by 16-foot space within an existing detached garage structure.
5. The comments by the DCRA zoning reviewer note that the substandard space was “approved by ZA Matt LeGrant based upon existing conditions in existing garage.” (Exhibits 3 and 24.) The reviewer’s notes also indicate that approval was based on supplemental information provided in a traffic and parking report provided by the Property Owner as a part of the permit application.
6. ANC 1C (the “Appellant”) filed an appeal of the Original Permit to the Board on July 12, 2015. With regard to the Zoning Regulations, the Appellant’s claims of error in the Original Permit are centered on violations of 11 DCMR §§ 2101.1 and 2115.1.
7. Subsection 2115.1 provides that the dimensions for required parking spaces shall be nine feet by 19 feet; the Appellant argues that the existing, substandard parking space within the detached garage structure violates this requirement.
8. Subsection 2101.1 requires that a four-unit apartment house in the R-5-B District provide two off-street parking spaces; the Appellant argues that, because the existing, substandard space

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cannot be counted towards this parking requirement, the Property Owner provides only one of the required parking spaces and fails to meet this provision.

9. In a report dated October 16, 2015, ANC 1C authorized Stacie Desai and Michael Rafferty to represent the Appellant at the public hearing. (Exhibit 29.)
10. At the ZA's request and in response to the issues raised by the Appellant, the Property Owner submitted a revised building permit application to correct the dimensions of the existing, substandard parking space from eight-feet by 16-feet, as provided in the Original Permit application, to nine-feet by 18-feet, corresponding to the newly-received information on the interior space in the existing garage structure.
11. Building Permit No. B1601746 ("First Revised Permit") was issued on November 12, 2015, as a revision of the Original Permit. The parking plan in the First Revised Permit contains two parking spaces: one standard, nine-foot by 19-foot space and one substandard nine-foot by 18-foot space within an existing detached garage structure. (Exhibit 35.)
12. DCRA approved the substandard, nine-foot by 18-foot parking space based on the Property Owner's assertion that the existing, detached garage structure predated the adoption of the Zoning Regulations in 1958. Accordingly, the parking space would be grandfathered as an existing nonconformity and, along with the additional parking space provided on the Property, would meet the requirement in § 2101.1 to provide two off-street parking spaces. (Exhibit 36.)
13. At the November 17, 2015 hearing, the Board granted the Appellant's oral motion to postpone the hearing in order for the Appellant to further review the First Revised Permit and to raise, in writing, any zoning issues created by the approved revisions. (BZA Transcript for the Public Hearing of November 17, 2015 at 184-190.)
14. In the Appellant's Revised Prehearing Statement, filed on December 8, 2015, ANC 1C alleged that the issuance of the First Revised Permit was in error because the parking space dimensions in the approved parking plan requires removal of a portion of the party wall shared by the detached garage structure on the Subject Property and a garage structure on the adjacent property. The Appellant argues that this removal process will cause structural harm to the existing garages. (Exhibit 38, sub-exhibit D.) Based on these alleged structural issues, the Appellant argued that the approved, revised parking plan would be impossible to execute and that correcting the structural issues would result in a plan that violates the Zoning Regulations. (Exhibit 38.)
15. Though the Appellant's Revised Prehearing Statement indicates that changes to the Property Owner's plans in response to the structural issues raised could potentially lead to violations of the Zoning Regulations, the Appellant did not argue that the approved, revised plans currently violate the Zoning Regulations.

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16. The structural issues raised by the Appellant pertain to the alleged violations of the Building Code, 12A DCMR.
17. On December 11, 2015, Building Permit No. B1602713 (“Second Revised Permit”) was issued as a “revision to building permit B1412288 and B1601746 to remove one brick wythe from each side of garage party wall, install pressure treated ledger board at top of garage wall with two by ten pressure treated framing at 24 inches on center.” (Exhibit 41B.) The Second Revised Permit application included stamped structural plans and a report from a structural engineer confirming that the “structural integrity of the wall will remain sound.” (Exhibit 41B.)
18. A representative of the Appellant testified at the Board’s public hearing on December 22, 2015, that both the First Revised Permit and the Second Revised Permit are also the subject of proceedings before the Office of Administrative Hearings. (BZA Transcript for the Public Hearing of December 22, 2015 at 42-43.)

CONCLUSIONS OF LAW

The Board is authorized by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.), 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. Therefore, the Board has no authority to hear an appeal that is not based upon an interpretation of a zoning regulation. (*See Appeal No. 18239 of ANC 6A* (2011).) Further, the Board is restricted from considering moot questions. (11 DCMR § 3100.7.) Before the Board, a case is considered moot “when the legal issues present are no longer ‘live’ or when the parties lack a legally cognizable interest in the outcome.” (*N St. Follies, Ltd. P’ship v. D.C. Bd. of Zoning Adjustment*, 949 A.2d 548, 588 (D.C. 2008) (citing *Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006).)

With regard to Building Permit No. B1412288 (“Original Permit”), the Appellant argued that the parking plan was approved in violation of the off-street parking requirements of 11 DCMR § 2101.1 and the parking space dimension requirements of 11 DCMR § 2115.1. The Board finds that the zoning issues originally raised by the Appellant were made moot with the issuance of Building Permit No. B1601746 (“First Revised Permit”), which included a revised parking plan. The corrections made to the measurements in the approved plan address the issues raised by the Appellant in the initial appeal and therefore those issues are no longer “live” before the Board. Accordingly, those moot questions cannot be considered by the Board. (11 DCMR § 3100.7.)

Although the original zoning issues were rendered moot by the issuance of the First Revised Permit, the Board provided the Appellant the opportunity to amend the appeal and raise any new zoning issues arising specifically from the revisions made to the Original Permit. After reviewing the First Revised Permit, the Appellant did not dispute that the revision cured the off-street violations it asserted, and therefore the appeal has become moot on that ground.

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However, the Appellant raised the issue that the approved, revised parking plan would require removal of a portion of the party wall in the detached garage structure, though this removal was not shown or approved in the First Revised Permit plans. The Appellant argued that the removal of portions of the party wall would cause structural harm to the existing garages. Further, the Appellant claimed that correcting the structural issues would result in a plan that would violate the Zoning Regulations.

In advance of the Board's public hearing on December 22, 2015, Building Permit No. B1602713 ("Second Revised Permit") was issued as a further revision to the plans, in order to reflect the removal of one brick wythe from each side of the party wall of the garage structure and the installation of ledger board and framing within the structure. In addition, the Second Revised Permit included stamped structural plans and a report from a structural engineer. During the hearing on December 22, 2015, the Appellant did not concede that the Second Revised Permit sufficiently addressed the structural issues raised regarding the First Revised Permit, but indicated that both the First Revised Permit and Second Revised Permits are the subject of proceedings with the Office of Administrative Hearings as to that issue.

The Board need not determine whether the structural issues raised by the Appellant are addressed by the Second Revised Permit, as the Appellant does not allege violations of the Zoning Regulations, but rather issues pertaining to Building Code requirements. The Board is authorized to hear and decide an appeal 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. (D.C. Official Code § 6-641.07(g)(2) (2012 Repl.) Therefore, the Board dismisses the remaining issues raised in the appeal for lack of jurisdiction.

As to the possibility that future zoning violations might occur, that assertion is at this point purely speculative and not ripe for adjudication.

As the Board has determined that the issues raised by the Appellants are moot, outside the Board's jurisdiction, or unripe, the Board grants DCRA and the Property Owner's motions to dismiss the appeal.

It is hereby **ORDERED** that this appeal be **DISMISSED**.

VOTE: **3-0-2** (Marnique Y. Heath, Marcie Cohen⁴, and Jeffrey L. Hinkle to Dismiss;
Frederick L. Hill not present, not voting; 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.

⁴ Commissioner Cohen did not participate in the November 17, 2015 hearing of the appeal, but indicated at the December 22, 2015 hearing that she read the record in order to participate.

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ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: September 19, 2017

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.