

BOARD OF ZONING ADJUSTMENT FOR THE DISTRICT OF COLUMBIA

Appeal by Advisory Neighborhood Commission 3C)
and 2926 Neighborhood and Safety Coalition of the)
Zoning Administrator's Decision Permitting the) **BZA No. 19155**
Installation of a New 10-Car Parking Area on the)
Premises of 2926 Porter Street, NW)
(Square 2068, Lot 95))

APPELLANTS' PREHEARING SUBMISSION

Introduction

This appeal was filed on October 2, 2015, in response to a decision by the Zoning Administrator to permit the installation of a new 10-car parking area on the premises of 2926 Porter Street, NW (Square 2068, Lot 95) (the "Property"), per a permit dated August 13, 2015 issued to the owner/developer of the Property and a subsequently issued certificate of occupancy. A map of the immediate vicinity of the Property is included as Appendix 1. Permit #B1511364 and certificate of occupancy #CO1503112 are included in Appendix 2 (and such permit and certificate of occupancy are together referred to herein as the "Permit").

The issue in this appeal is whether the Zoning Administrator exceeded his authority and erred in approving the Permit and establishment of a new 10-car parking area for an apartment building located in an R-2 single-family dwelling district, particularly in light of multiple nonconformities already existing at the Property. The Appellants contend that the Permit should have been denied by the Zoning Administrator and that the installation of a new parking area at the Property requires one or more use variances, area variances and/or special exceptions granted by the Board. Although the Appellants believe that neither a variance nor a special exception is merited, and the Appellants would oppose them if they were sought, the underlying arguments against such variances or special exceptions are not necessary for the resolution of this appeal in Appellants' favor, because no variance or special exception process has been initiated by the owner/developer to date.

For the reasons explained below, the position taken by the Zoning Administrator in authorizing the Permit conflicts with the plain language, purpose, intent and structure of the Zoning Regulations (11 DCMR). Section references contained herein refer to sections of the Zoning Regulations, unless otherwise noted.

Appellants may call the following witnesses at the hearing in front of the Board currently scheduled for January 12, 2016:

Glen Zwicker, Representative of Appellant 2926 Neighborhood and Safety Coalition
Nancy MacWood, Commissioner of Appellant ANC 3C

Statement of Facts

The Property was constructed in 1923 and purchased in 2012 by Adams-Porter, LLC or an affiliate (“the Developer”). The Property has undergone extensive interior and exterior redevelopment since purchase by the Developer. Although the Property is located in an R-2 single-family dwelling residential district, it is currently operating as a 23-unit multi-family apartment building. The Property is surrounded on all four sides by single-family dwellings and located within the Cleveland Park Historic District.

The south and southwest sides of the Property abut an alley. Prior to the redevelopment, the land on these south and southwest sides of the Property was a sunken yard several feet below the level of the alley, consisting solely of green space containing grass, sizable trees and shrubs, all behind a fence separating the Property from the alley. As part of its redevelopment, the Developer removed 100% of the prior green space, removed the fence, and raised the level of the land on the south and southwest sides of the building by several feet in order to create 10 new parking spaces on a newly-poured gravel surface. The addition of this new 10-car parking area is the basis for the Appellants’ appeal to the Board. Appendix 3 shows the area before and after the installation of the parking spaces.

It is noted that, prior to the redevelopment, there existed three parking spaces on the east side of the Property emptying into a separate and distinct alleyway. The Appellants have never opposed the continuation of the three eastern parking spaces at the Property, and this appeal is limited to the newly established 10-car parking area on the south and southwest sides of the Property.

Prior to the beginning of the redevelopment, more than twenty neighbors in the immediate vicinity of the Property and the ANC 3C learned of the Developer’s desire to raze/regrade the green space comprising the yard and replace it with a new 10-car parking lot. Upon learning of this, the neighborhood and ANC voiced their unanimous objections due to conflicts with the Zoning Regulations and concerns surrounding safety, traffic, light/noise, snow and garbage removal, ingress/egress, and other reasons. The ANC unanimously passed a resolution on April 21, 2014 objecting to the new 10-car parking and then reiterated its objection unanimously on September 21, 2015 in connection with the filing of this appeal (see Appendix 4). The Developer disregarded the neighbors’ and ANC’s objections and failed to respond to all inquiries which could have potentially resulted in a mutually agreeable solution.

At the conclusion of the redevelopment project in 2015, after razing the prior green space, removing the fence, regrading the land and installing the new 10-car gravel parking lot on the Property, the Developer submitted plans and a permit request to the Department of Consumer and Regulatory Affairs (“DCRA”) for the new 10-car parking. This permit request was dated August 12, 2015 and the Permit was issued by the DCRA per the instructions of the Zoning Administrator immediately thereafter.

Discussion

The Zoning Administrator exceeded his authority and erred by allowing the new 10-car parking as a matter of right. Given the facts at hand, the Zoning Regulations applicable to R-2 districts limit the number of parking spaces permitted at the Property to no more than the three existing eastern parking spaces and/or two potential car-sharing spaces. The installation of the new 10-car parking is a prohibited extension, enlargement, expansion, and change of already nonconforming uses of land at the Property. Lastly, the Zoning Regulations are required to be interpreted taking into account the impact of a new use of a premises as it relates to safety, density, other impacts, and the nature of the district in which such new use of the premises occurs.

For these reasons, the Zoning Administrator should have denied the Permit and informed the Developer that variances and/or special exceptions must be applied for and granted by the Board for the installation of the new 10-car parking. Although the Appellants believe that neither a variance nor a special exception is merited and would oppose them if sought in the future, the arguments against such variance or special exception are not necessary for the resolution of this appeal in Appellants' favor, because no variance or special exception process has been initiated by the Developer.

The Zoning Regulations Limit Parking In R-2 Districts.

The Property is a multi-family apartment building constructed in 1923 and located in the R-2 district for single-family residential dwellings. The Zoning Regulations do not require any parking at the Property because it was constructed prior to 1958. Section 2100 and Section 2101.1 specify the number of required parking spaces for different buildings in different districts, but only for buildings erected after 1958. Even if the current requirements for parking spaces were imposed on the Property, the maximum number of required spaces would be one, because the schedule of requirements in Section 2101.1 does not list any requirements for an apartment building in an R-2 district and lists a requirement of one parking space for a single-family dwelling in an R-2 district. As noted above, the Property has historically enjoyed three parking spaces on the eastern side of the building. Therefore, these three eastern spaces are more than any required amount of parking for the Property.

The Zoning Regulations specify the principal and accessory uses of buildings and land that are permitted as a matter of right in R-2 districts. Sections 300.2 and 300.3 together list the principal uses allowed as a matter of right in R-2 districts, and the relevant principal uses may be summarized as follows: (a) one-family dwellings, as noted in Sections 300.3(c) and 201.1(k); (b) any use permitted in R-1 districts pursuant to Section 201, as noted in Section 300.3(a); and (c) the uses listed in Sections 301-319. Nothing in any of these aforementioned Sections 300, 201 or 301-319 can be construed to permit either multi-family apartment houses or parking areas as a matter-of-right principal use in an R-2 district.

Although parking is not a permitted principal use in an R-2 district, the Zoning Regulations do provide a rule set for determining if, and how much, parking may be permitted as an accessory use at a premises in an R-2 district. Section 301.1(a) allows in an R-2 district any accessory use that is permitted in an R-1 district under Section 202. The only specific reference to parking in

the applicable list of accessory uses appears in Section 202.7, and such Section 202.7 states that a one-family detached dwelling is allowed one resident parking space or up to two car-sharing spaces, in addition to any required parking. The Zoning Regulations therefore do not contemplate or permit accessory parking as a matter of right at a multi-family apartment building in an R-2 single-family residential district in excess of the amount of accessory parking that would otherwise be permitted at a single-family dwelling in an R-2 district. It would be nonsensical and contrary to the language, purpose and intent of the Zoning Regulations to permit a greater amount of accessory parking for an apartment building (which is not a permitted use within an R-2 district) compared to single-family dwellings, which are actually intended to exist within R-2 districts. There is no justification within the Zoning Regulations for applying a less restrictive standard to the Property, which generally does not meet the characteristics of the R-2 district, compared to all of the single-family dwellings which do meet the characteristics of the R-2 district. The rules applicable to non-conforming properties are discussed in further detail below in “Expansion of Nonconformities at the Property Is Not Allowed As A Matter of Right”.

Contrary to the Zoning Regulations referenced above, the Zoning Administrator has argued in email correspondence from his office (see Appendix 5) that (unlimited) accessory parking at a multi-family apartment building in the R-2 single-family dwelling district is permitted as a matter of right. As noted above, none of the Sections of the Zoning Regulations actually addressing principal and accessory uses of a premises in an R-2 district would permit this interpretation. The matter of right uses are explicitly identified, and unlimited accessory parking for an apartment building in an R-2 single-family residential district is not one of them.

With no basis in the directly applicable Zoning Regulations, the Zoning Administrator instead chose to rely on a provision of the Zoning Regulations which is in fact irrelevant (Section 2101.3). Section 2101.3, cited by the Zoning Administrator’s office as the basis for the determination to issue the Permit, appears within Section 2101 which generally addresses required parking. Section 2101 is the “Schedule of Requirements for Parking Spaces” and sets forth how much parking is required at a particular location. As stated above, no parking is required at the Property and none of the Appellants, the Developer or the Zoning Administrator have disputed that contention. Within the broader context of addressing required parking, Section 2101.3 merely states that Section 2101 itself does not prohibit accessory parking. Section 2101 clearly does not state that unlimited accessory parking is permitted as a matter of right for every building in every district regardless of all other relevant Zoning Regulations. Given that the new 10-car parking area at the Property is in fact prohibited by other applicable provisions of the Zoning Regulations as described herein, and does not otherwise comply with the Zoning Regulations, Section 2101.3 becomes irrelevant and not dispositive to the question at hand. By issuing the Permit in reliance on Section 2101.3, the Zoning Administrator has improperly and unilaterally expanded the plain meaning and intent of Section 2101.3, overriding all other applicable sections of the Zoning Regulations. Out of thin air the Zoning Administrator has created an unlimited matter of right accessory use for apartment buildings which are located in single-family districts.

If the Zoning Administrator’s legal reasoning and logic were to be upheld by the Board, then the precedent established by that decision would be as follows: all owners of properties in a residential district (whether the properties conform to the parameters of the district or not),

would be entitled as a matter of right to change grading and pave/gravel over all land in 100% of the side yards and rear yards of their properties and use that land for parking an unlimited number of vehicles without any regard whatsoever to any other provision of the Zoning Regulations beyond the two chapters referenced in Section 2101.3 (chapters 21 and 23). Under this tainted logic, when accessory parking is being considered by the Zoning Administrator or the Board in the future, all other potentially applicable Zoning Regulations must be ignored, including but not limited to: Chapter 1 (which includes interpretation and application rules, among others), Chapters 2, 3 and 4 (which address residential district uses, height, area and density regulations), Chapters 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 28 and 29 (which address requirements in other specified districts), Chapter 20 (which addresses nonconforming uses and structures, and which is directly relevant to the Property as described below), Chapter 31 (which sets out the rules of the Board itself) and Chapter 34 (addressing the green area ratio regulations), among others.

Expansion of Nonconformities at the Property Is Not Allowed As A Matter of Right.

Another important and specific basis for denying the Permit and requiring that the Developer seek variances and/or special exceptions relates to the existing nonconformities at the Property. Three distinct nonconformities existing at the Property include:

1. Nonconforming Use Of/Within Structure as Apartment Building: The structure at the Property is used as a 23-unit multi-family apartment building, but it is located within the R-2 district which does not provide for the use of a structure as a multi-family apartment building (Section 300).
2. Nonconforming Use of Land for Parking Three Cars on Eastern Side of Building: As discussed above in “The Zoning Regulations Limit Parking in R-2 Districts”, the three existing parking spaces on the eastern side of the Property already exceed the maximum number of parking spaces that would be permitted at the Property under current Zoning Regulations. As a result, the use of the land at the Property for such three eastern parking spaces is a nonconforming use of such land.
3. Nonconforming Use of Land Due to Insufficient Rear Yard Depth: Buildings in an R-2 district are required to have a rear yard depth of at least 20 feet (Section 404.1). The rear yard at the Property is angled, and the rear yard depth ranges from approximately 10 feet at its shallowest to approximately 15 feet in the large majority of the rear yard, only achieving the required 20-foot depth in a very small portion of the easternmost section of the rear yard. Thus, the use of the land in the rear yard of the Property is nonconforming to the requirements of the use of land in an R-2 district (i.e., the land that should otherwise be used for a rear yard has been and continues to be used for the nonconforming use of an apartment building structure).

The Zoning Regulations are explicit regarding the treatment of nonconformities. Section 2000.2 states that “It is the intent of this title that nonconformities may not be enlarged upon, expanded, or extended, nor may they be used as a basis for adding other structures or uses prohibited elsewhere in the same district”. Section 2000.3 adds that “It is necessary and consistent with the

establishment of the separate districts under this title that all uses and structures incompatible with permitted uses or structures shall be regulated strictly and permitted only under rigid controls.” Section 2000.6 further states that “A nonconforming use of land or of land with structures incidental to the use of the land shall neither be extended in land area nor changed to any use except a use permitted in the district in which the property is located.”

As applied to the nonconformities existing at the Property, the Zoning Regulations explicitly prohibit the installation of the new 10-car parking area as a matter of right. The installation of such new 10-car parking area would represent both: (a) a prohibited “enlargement”, “expansion” and “extension” of the already nonconforming use of the land of the Property, and (b) a prohibited “change” in use from one nonconforming use to another use that is not permitted. First, the existing nonconforming use of the Property’s land for parking three cars on the eastern side of the building would be enlarged/expanded/extended to instead be a use of the Property’s land for parking a total of 13 cars on the eastern, southern and southwestern sides of the Property.

Second, regarding the nonconforming yard as it relates to depth, the installation of 10 new parking spaces in such yard would be changing/enlarging/expanding/extending the nonconformity of the yard. Until now, the only nonconforming use of the yard where the new 10-car parking is proposed to be located has been the use of the yard to house the apartment building (which itself is a nonconforming use of a structure in an R-2 district). However, if the new 10-car parking is added, then the nonconforming yard would be used for two uses that are not permitted as a matter of right in an R-2 district (the original use of land for a nonconforming apartment building, and the proposed new use of land for parking in excess of the amount allowed in an R-2 district).

As a result of the several existing nonconforming uses of the Property and the clear language in the Zoning Regulations regarding nonconforming uses, a combination of variances and/or special exceptions are required for the installation of the new 10-car parking. The Zoning Administrator erred by disregarding all of the Zoning Regulations that relate to nonconformities in reaching the conclusion that the new 10-car parking is permitted as a matter of right.

Variance(s)/Special Exception(s) Are Required If New Parking Is To Be Allowed.

Although it is the Property owner’s responsibility to determine the specific variances and special exceptions that are required for the installation of the new 10-car parking area because such parking area is not permitted as a matter of right, and not the Appellants’ responsibility, the following represents a non-exhaustive list of some variances and special exceptions which might be required.

Variances: Section 300 (use variance in R-2), Section 301 (use variance in R-2), Sections 404/405 (area variances in R-2 for yards), Sections 2000/2003 (use variances regarding nonconforming uses), Section 3103 (general provisions).

Special Exceptions: Section 214 (accessory parking), Section 2116 (accessory parking), Section 3104 (general provisions).

If the Board grants this appeal in favor of the Appellants and the Developer decides to seek such variances and special exceptions, then the procedures outlined in the Zoning Regulations must be followed. For example, public notices, hearings, traffic and other studies, factual determinations, legal analysis, etc. will occur in an orderly manner as provided in the Zoning Regulations. Furthermore, arguments in support of and against such variances and special exceptions will be heard by the Board to consider them in light of the burdens and standards that must be met for the issuance of such variances and special exceptions. The inclusion of the foregoing references to variances and special exceptions are not an admission by the Appellants that any such references are actually applicable, and the Appellants believe that any future application for a variance or special exception to allow the new 10-car parking should not be granted in any event.

Critical Rules of Interpretation and Principles Must Be Applied.

The Appellants believe that the Zoning Regulations referenced above are explicit and unambiguous in support of this appeal. In addition, the Board should consider the more general rules and principles within the Zoning Regulations which are applicable, and the Appellants believe that such other general rules and principles described below also support a ruling in the Appellants' favor.

Section 101.2 states that "The regulations in this title and the Zoning Maps are designed with consideration of the: (a) Character of the respective districts; (b) Suitability of each district for the uses permitted in each district under this title; and (c) Encouragement of the stability of districts and of land values in those districts." Similarly, Section 300 adds that "The R-2 District consists of those areas that have been developed with one-family, semi-detached dwellings, and is designed to protect them from invasion by denser types of residential development." A new 10-car parking area at the Property would violate all three tenets listed in Section 101.2, and the explicit intent of the R-2 district set out in Section 300. The R-2 district is not intended for apartment buildings with massive amounts of parking occupying entire yards. To the contrary, the Property is surrounded by single-family homes which exist in conformity with the R-2 district guidelines and purposes related to parking and otherwise. With the new 10-car parking installed, raising the total parking at the Property to 13 spaces, the Property would be an anomaly in the area in which it exists. Despite its status as an apartment building within a single-family zone, the Property has until now existed for almost 100 years in relative stability with its neighbors. However, the proposed installation of the new 10-car parking represents a rejection of that stability and history contrary to the plain language, intent and spirit of the applicable Zoning Regulations.

Section 101.1 adds that "In their interpretation and application, the provisions of this title shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to: (a) Provide adequate light and air; (b) Prevent undue concentration of population and the overcrowding of land; and (c) Provide distribution of population, business and industry, and use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and cultural opportunities; and that will tend to further economy and efficiency in the supply of public services." As evidenced by the extreme crowding of the area that would be created by the new 10-car parking, and the unanimous opposition to the new 10-car parking area

from surrounding neighbors and the ANC 3C on safety, nuisance and other grounds, the effects of the new 10-car parking would be deleterious to the entire neighborhood.

The Board is required to give “great weight” to issues and concerns raised by the affected ANC (D.C. Official Code § 1-309.10(d)). To satisfy the “great weight” requirement, District government entities must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The ANC 3C has been uniquely positioned to assess the impact of the factual and legal circumstances surrounding the Property and this appeal. The ANC 3C is an independent body consisting of diverse community membership outside the influence of the specific neighbors or developer associated with the Property and its immediate vicinity. After careful and unbiased analysis, the ANC 3C passed two separate unanimous resolutions, corresponded with the Zoning Administrator’s office, and submitted this appeal, all indicating the ANC 3C’s unanimous opposition to both the new 10-car parking area at the Property and the Zoning Administrator’s interpretation of the Zoning Regulations.

Lastly, the Property is less than one block from the Cleveland Park Red Line Metro Rail Station, less than one block from multiple major Metro Bus route stops, and less than two blocks from a large Capital Bikeshare station. For nearly 100 years, even prior to all of these forms of public transportation being available, the Property and its residents existed in harmony with the neighborhood without parking in the rear yard. The extraordinary scale of new parking being proposed with the addition of the new 10-car parking area has never been necessary or desired until the new owner of the Property sought to install it as part of a redevelopment.

Conclusion

The Zoning Administrator both erred in interpreting the Zoning Regulations used as the basis for approving the Permit for new 10-car parking, and failed to take into account other Zoning Regulations that are applicable to the facts of this case. The Appellants respectfully request that the Board conclude that the Zoning Administrator's decision to approve the Permit was in error, that the new 10-car parking area at the Property is not permitted as a matter of right, and that the owner of the Property must apply for variance(s) and/or special exception(s) in order to increase parking at the Property beyond the three pre-existing parking spaces on the eastern side of the Property.

Respectfully Submitted,

Appellants:

Advisory Neighborhood Commission 3C, and 2926 Neighborhood and Safety Coalition

Administrative Notes

1. Appellants' original October 2, 2015 filing associated with this appeal identified permit #B1511364 as the permit approved by the Zoning Administrator to allow for the new 10-car parking. After that permit was issued, certificate of occupancy #CO1503112 was subsequently issued and the Appellants are now aware that it also notes the new 10-car parking. At the time of Appellants' original filing of this appeal, Appellants were not aware and could not have been expected to be aware that the certificate of occupancy would also reference the new 10-car parking. Although Appellants duly filed a Freedom of Information Act request on August 20, 2015 requesting all documents related to the permit, the DCRA did not respond to such request completely until November 20, 2015. At such time, the Appellants became aware of the certificate of occupancy reference to the new 10-car parking, and for that reason the Appellants hereby add such certificate of occupancy to this appeal by virtue of this Prehearing Submission. This approach was confirmed with a representative from the Office of Zoning on December 8, 2015. The Board has frequently permitted Appellants to amend their appeals to include subsequently issued documents that are germane to the same project or order that was the subject of the original appeal, without requiring the filing of a new appeal or additional notice. (See, e.g., *Sisson v. DCBZA*, 805 A.2d 964 (DC 2002) and *Appeal of ANC 2E, BZA Appeal No. 17519* (2006)). As the issues with respect to the certificate of occupancy are identical to the challenge of the first-issued permit, the parties would experience no prejudice or unfair surprise by permitting the appeal to include both the permit and the certificate of occupancy.

2. The original appeal filed by the Appellants contained a typographical error when it referred to the three existing parking spaces at the Property as located on the "western" side of the building. As correctly noted in this Prehearing Submission, the three pre-existing parking spaces have always been located on the eastern side of the building.

Appendices (filed separately through IZIS system for technical efficiency):

1. Map of Property and Surrounding Area
2. Permit #B1511364 and Certificate of Occupancy #CO1503112
3. Photos of Property Before and After Installation of New 10-Car Parking Area
4. Resolution of ANC3C No. 2015-031 reiterating opposition to additional parking at Property and joining in this appeal
5. Email dated August 19, 2015 from DCRA explaining position of Zoning Administrator following issuance of Permit #B1511364