

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Appeal of ANC 3C, et al.

Appeal No. 19155

Hearing Date: January 12, 2016

OWNER'S MOTION TO DISMISS APPEAL

**I.
INTRODUCTION**

Adams-Porter LLC (hereinafter, the "Owner") is the owner of the property at 2926 Porter Street, NW, Square 2068, Lot 95 (the "Property"), which is the subject of this appeal. The Property measures 19,040 sq. ft. in land area, and is located in an R-2 zone. The Property is improved with a 23-unit condominium apartment house, with 13 accessory parking spaces. The apartment house was built in 1923, well before the adoption of the current zoning regulations, and is one of a number of pre-1958 apartment houses in the R-2 zone, in the immediate neighborhood, with accessory parking to the side and/or rear, accessed by an adjacent public alley. Three other examples include 3018 Porter, 3025 Porter, and 3032 Rodman Street, N.W. See Exhibit A. The Property also abuts the parking area for the Walgreen Drug Store on Connecticut Avenue, N.W. Many of the residential properties in the immediate vicinity have accessory parking in the rear, accessed by the public alley system. See Exhibit B.

Appellants are challenging the issuance of Building Permit No. B1511364, which authorized 10 of the accessory parking spaces on an open area of the Property, to the side and rear of the apartment house, as shown on the plat attached as Exhibit C hereto. To support their appeal, Appellants ignore the plain language and long-standing interpretations of the Zoning

Regulations regarding accessory parking. Both this Board and the Zoning Commission have long held that zoning interpretations must be based upon the “plain language” of the Zoning Regulations. See, e.g., Appeal No. 14384 of the North Cleveland Park Citizens’ Association at p. 4, para. 13 (October 10, 1986)(Appeal denied; Zoning Administrator’s decision upheld); PUD Order No. 03-05C, p. 2 (January 12, 2004).

II.

SUMMARY OF ARGUMENT

The Board should dismiss this appeal for failure to state a claim upon which relief can be granted, for the following reasons:

1. There is only one nonconforming use on the Property, and that is the apartment house use. The parking spaces are accessory to that use, and are permitted as a matter of right. The addition of 10 accessory parking spaces is not an expansion of the nonconforming apartment house use.
2. 11 DCMR, Section 2101.1 of the Zoning Regulations sets forth the minimum amount of required accessory parking. Sections 2101.2 and 2101.3 allow a property owner to provide more than the minimum amount of required accessory parking, even if no parking is required for a particular use.
3. The Zoning Regulations do not impose a maximum limitation on the number of accessory parking spaces for any use in the R-2 zone.

III.

THE APPELLANTS’ ALLEGATIONS OF ERROR ARE UNFOUNDED

A. The Appellants’ Allegations Of Error

Simply stated, Appellants allege on pages 2 through 4 of their “Detailed Statement of Zoning Errors”, BZA Ex. 2 (hereinafter, “Appellant’s Statement”) and pages 3 through 6 of their “Prehearing Submission”, BZA Ex. 15, (hereinafter “Prehearing Submission”) that the 10 additional accessory parking spaces¹ should not have been permitted for the following three reasons:

1. The Appellants erroneously claim that because the existing pre-1958 apartment house use of the Property is a nonconforming use, then based upon 11 DCMR, Sections 2000.2, 2000.3, and 2000.6, changing the use of the Property from a nonconforming apartment house with three parking spaces to a nonconforming apartment house with 13 parking spaces represents a prohibited enlargement /expansion/extension, and a prohibited change from one nonconforming use to another, that should not have been approved by DCRA.²

2. The Appellants erroneously claim that because accessory parking for an apartment house in the R-2 zone is not specifically mentioned in 11 DCMR, Section 2101.1, the 10 additional accessory parking spaces are not permitted.³ They also erroneously claim that matter-of-right accessory parking in the R-2 zone is limited by 11 DCMR, Sections 301.1(b) and 202.7 to one parking space plus two car-sharing spaces, but only for a one-family detached dwelling.⁴

3. The Appellants erroneously claim that the Office of the Zoning Administrator was incorrect in its reliance upon 11 DCMR, Section 2101.3, which allows “the establishment of

¹ Appellants interchangeably describe the 10 accessory parking spaces as a “parking lot”, “parking spaces”, and “parking”. The 10 parking spaces which are the subject of this appeal are accessory to the apartment house use, and therefore do not meet the definition of a parking lot—“a tract of land used for the temporary parking of motor vehicles when the use is not accessory to any other use”.

² Appellants’ Statement at page 2, paragraph 1; Prehearing Submission at page 6.

³ Appellants’ Statement at pages 2 and 3, paragraph 2; Prehearing Submission at pages 3 and 4.

⁴ Id.

parking spaces accessory to *buildings for which no required parking spaces are specified in Section 2101.1*.”⁵ Appellants erroneously claim that “Section 2101.3 only relates[s] to required parking spaces”⁶ They also erroneously claim that because 11 DCMR, Sections 301.1(b) and 202.7 do not mention parking for an apartment house in the R-2 zone as a permitted accessory use, the accessory parking that is the subject of this appeal is not permitted at all, without zoning relief from this Board.⁷

B. Why the Allegations Of Error Are Unfounded

The Appellants’ three claims all boil down to two central questions:

--Whether the 10 additional accessory parking spaces are permitted as a matter of right, or are instead considered to be a nonconforming use, and an enlargement/expansion/extension or change of the nonconforming apartment house use, under 11 DCMR, Sections 2000.2, 2000.3 and 2000.6; and

--Whether a property owner may, as a matter of right, provide more accessory parking on a lot than the minimum amount required by 11 DCMR, Section 2101.1, even if that section requires no parking for a given use.

1. The 10 additional accessory parking spaces are permitted as a matter of right and are not an enlargement/expansion /extension or change of the nonconforming apartment house use.

11 DCMR, 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*.” (emphasis added). 11 DCMR, Section 2000.6 states that “a nonconforming use of land or of land with structures

⁵ 11 DCMR, Section 2101.3, emphasis added.

⁶ Appellants’ Statement, page 3, paragraph 3, emphasis in original.

⁷ Id.

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*” (emphasis added).

Neither of these sections prohibit the matter of right addition of 10 accessory parking spaces to the Property:

a. Accessory parking for the apartment house is permitted as a matter of right in the R-2 zone. 11 DCMR, Section 300.2 states that “*Except as provided in Chapter 21* [the accessory parking chapter] through 25 of this title, in an R-2 District, no building or premises shall be used...that is arranged, intended or designed to be used except for one (1) or more of the uses listed in Sections 301 through 319” (emphasis added). Section 301.1(c) allows as a matter of right “other uses ... customarily incidental to the uses permitted in R-2 Districts”. Section 2000.4 allows the nonconforming apartment house use on the Property to be “continued, operated, occupied and maintained” as a matter of right. Section 300.2 and Section 301.1(c) therefore allow accessory parking for the nonconforming apartment house in the R-2 zone as a matter of right.

b. The addition of matter of right accessory parking to a property on which a nonconforming use is located does not constitute an expansion of the nonconforming use. Because accessory parking in the R-2 zone is permitted as a matter of right per 11 DCMR, Sections 300.2 and 301.1(c), it does not meet the definition of a nonconforming use in Section 199, nor is it a prohibited use in the R-2 zone. There is no provision anywhere in Chapter 20, or any other chapter or section of the Zoning Regulations, that states or suggests otherwise. Nor is there any statement anywhere in the Zoning Regulations that prohibits the addition of on-site matter of right accessory parking for nonconforming uses in the R-2 zone.

c. 11 DCMR, Section 2000.2 does not apply. The nonconformity on the Property (i.e., the apartment house use) has not been “enlarged, expanded or extended” by the addition of 10 matter of right accessory parking spaces. Similarly, the nonconforming apartment house use on the Property has not been “used as a basis for adding any other structures or uses prohibited elsewhere” in the R-2 zone.

d. 11 DCMR, Section 2000.6 does not apply. The Property has not been “extended in land area” to accommodate the 10 additional accessory parking spaces, nor has the land and the apartment house use of the land been changed to another non-permitted use in the R-2 zone.

2. **11 DCMR, Section 2101.3 allows accessory parking in excess of that required by Section 2101.1, even if Section 2101.1 does not require any parking.**

The Appellants claim that

“The Zoning Regulations do not require parking at apartment buildings located within the R-2 district (Section 2101.1). Absent a special exception or variance, up to one parking space and up to two car-sharing spaces are permitted (Sections 301, 202.7)”...The new additional 10-car parking lot⁸ exceeds any permitted or required parking for the Property.”⁹

And later in the Appellant’s Statement, they claim that

“Section 2101.3 is both irrelevant to the question at hand and not supportive of a new 10-car parking area at the Property. Section 2101 and such Section 2101.3 only relate to required parking...Within the broader context of addressing required parking, Section 2101.3 merely states that Section 2100 in itself does not prohibit parking unless it is prohibited by otherwise applicable provisions of the Zoning Regulations or otherwise fails to comply with the 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 above [e.g., Sections 301 and 202.7] and does not otherwise comply with the Zoning Regulations, Section 2101.3 is irrelevant and not dispositive in any manner”¹⁰ (emphasis in original).

⁸ See footnote #1.

⁹ Appellants’ Statement, page 2, paragraph 2; Prehearing Submission at pages 3 and 4.

¹⁰ Appellants’ Statement, page 3, paragraph 3.

In order to be able to reach these conclusions, the Appellants ignore the plain language of the following:

a. 11 DCMR, Sections 300.2 and 301.1 (c), which permit accessory parking as a matter of right in the R-2 zone, as discussed above.

b. 11 DCMR, Section 2101.3, which states that “Nothing contained in this section shall be construed to prohibit the establishment of parking spaces accessory to *buildings or structures for which no required parking spaces are specified in Section 2101.1...*” (emphasis added). There is nothing in Section 2101.3 which supports the Appellants’ contention that this section applies only to required parking. In fact, Section 2101.3 states the exact opposite.

c. 11 DCMR, Section 2101.2, which states that “Nothing contained in this section shall be construed to prohibit the establishment of accessory parking spaces in an amount that exceeds that required by Section 2101.1...”. In dismissing an appeal based on this section, the Board has ruled that “The Zoning Regulations ... do not mandate parking maxima.” Appeal No. 17746 of Reed Cooke Neighborhood Association at p. 3 (January 12, 2009)(Appeal dismissed). Because the accessory parking spaces are permitted as a matter of right by the Zoning Regulations, the Zoning Administrator has “committed no error” by approving them without the need for relief from this Board. See Appeal No. 17615 of William Harnett at p. 7 (May 2, 2008)(Appeal denied).

3. The Appellants’ Claims Of Adverse Effects Are Without Merit

The Appellants claim that if the Zoning Administrator’s decision is upheld, then an owner would be entitled to establish parking “over all land on the property and use that land for parking an unlimited number of vehicles without any regard to rules regarding location within property and setback from property lines,” etc.¹¹(emphasis added). There is no basis for such a claim. 11

¹¹ Appellants’ Statement, pages 3 and 4, paragraph 3. See also, Prehearing Statement at page 4.

DCMR, Section 2116 governs the location of parking spaces on a lot, and that section has been followed. This allegation is specious.

IV.
EXHIBITS

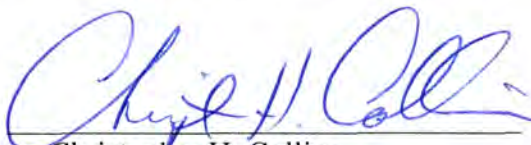
- A. Examples of on-site accessory parking for other nonconforming apartment houses in the neighborhood
- B. Examples of on-site accessory parking in the neighborhood
- C. Plat of the Property
- D. Outline of testimony of Douglas Yurechko, Adams-Porter LLC
- E. Affidavit and outline of testimony of Steven E. Sher, Urban Planner

V.
CONCLUSION

Where an Appellant fails to state a claim upon which relief can be granted, dismissal of the appeal is appropriate. See, e.g., Appeal No. 18851 of James Hill, et al (June 11, 2015) (Appeal dismissed). For the above reasons, Owner respectfully requests that the appeal be dismissed.

Respectfully submitted,

HOLLAND & KNIGHT, LLP

By: 
Christopher H. Collins

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Owner's Motion to Dismiss Appeal was filed electronically with the Office of Zoning and was sent by first-class mail and electronic mail, this

6th day of January, 2016, to the following:

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