

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001

Appeal of Advisory Neighborhood Commission 3C, *et al*

BZA Appeal 19155

DCRA’S PRE-HEARING STATEMENT
AND MOTION TO DENY APPELLANTS’ REQUEST TO ADD
CERTIFICATE OF OCCUPANCY TO APPEAL AS UNTIMELY FILED

Appellants allege that the Zoning Administrator (the “**ZA**”) erred in approving Building Permit B1511364, issued on August 13, 2015 (the “**Permit**”), to “stripe 10 additional parking spaces in the existing rear yard” in addition to the pre-existing 3 parking spaces on an apartment building (the “**Project**”) at 2926 Porter Street, N.W. (the “**Property**”), in the R-2 Zone District, because the 10 parking spaces did not constitute an accessory use permitted under the Zoning Regulations. Appellants also allege that the ZA erred in approving Certificate of Occupancy CO1503112 (the “**CofO**”), issued on August 20, 2015, that included the 10 parking spaces in addition to the pre-existing 3 parking spaces.

Respondent, the District of Columbia Department of Consumer and Regulatory Affairs (“**DCRA**”), asserts that the ZA properly reviewed and approved the Permit as in compliance with the Zoning Regulations. DCRA notes that the Board of Zoning Adjustment (the “**Board**”) has stated that “the Zoning Regulations ... do not mandate parking maxima”¹ and asserts that the ten parking spaces authorized under the Permit are accessory uses permissible on the Property. DCRA also asserts that Appellants’ request to incorporate the CofO into this appeal is untimely and should be denied as outside the jurisdiction of the Board.

Therefore, DCRA joins the Owner’s Motion to Dismiss and respectfully requests the Board affirm the ZA’s approval of the Permit as compliant with the Zoning Regulations and deny this Appeal.

¹ BZA Appeal 17746, *Appeal of Reed Cooke Neighborhood Association*, at 3.

**DCRA’S PRELIMINARY MOTION TO DENY APPELLANTS’ REQUEST
TO ADD THE CERTIFICATE OF OCCUPANCY TO APPEAL AS
UNTIMELY FILED**

DCRA objects to Appellant’s attempt to circumvent the timely filing requirement of Subsection 3112.2 by seeking to incorporate the CofO into this appeal. The Board has consistently ruled that where the administrative decision appealed to the Board is that of the ZA, the starting point for the appeal period is the date that the ZA’s decision is publicly announced, and the Board has accepted that the publication on the DCRA PIVS and Permit Status Tracking websites qualifies as public announcement sufficient to trigger the appeal period.²

The CofO was listed on the DCRA PIVS website –clearly stating the inclusion of the 10 parking spaces on that webpage - as shown on the screenshot (**Attachment A**) by the day after issuance, August 21, 2015. Appellants are very familiar with the permitting process and zoning regulations, and had retained an attorney, Ms. Ferster, that specializes in zoning and permit appeals prior to August 11, 2015, based on an email from Appellants to DCRA Zoning staff (**Attachment B**). Therefore, under established Board practice, the sixty day appeal period for Appellants to appeal the CofO started on the date of PIVS publication – August 21, 2015 – and ended on October 20, 2015. Yet Appellants waited until December 27, 2015 – 132 days after issuance and publication, more than twice the maximum 60 day period permitted under Subsection 3112.2.

Subsection 3112.2(d) establishes the only circumstances in which the Board is authorized to extend the 60 day appeal period – if an appellant demonstrates that “exceptional circumstances” outside of the appellant’s control which could not have been “reasonably anticipated” “substantially impaired” the appellant’s ability to file an appeal and if the extension will not prejudice the parties to the appeal. Appellants have not provided any “exceptional circumstances” – the CofO was posted publicly on a website known to Appellants and their counsel, who reasonably should have consulted all public information on the property available on the DCRA website. On the other hand, the extension of time would definitely prejudice both

² *Basken v. District of Columbia Board of Zoning Adjustment*, 946 A.2d 356, 366 (D.C. 2008)(no specific notice required to trigger the Board’s appeal period); *BZA Appeal No. 18469 of Susan L. Lynch* (March 9, 2013) (denotation of “approved” in PIVS sufficient to announce Zoning Administrator’s approval and so trigger the Board’s appeal period).

DCRA and the Owner. The finite appeals period in Subsection 3112.2 was created to ensure that DCRA and permit holders could move onto other projects after the sixty days. Allowing an appeal this late vastly prejudices the Owner who has relied on the appeal period of the Permit having expired months ago; and prejudices DCRA by devoting resources to responding to an appeal months after a permit's appeal period closed.

Appellants allege that the Board has allowed analogous additions to appeals without regard to the 60 day period established by Subsection 3112.2. Appellants' citation to *Appeal of ANC 2E, BZA Appeal No. 17519* is inapposite as the Board in that case permitted an additional legal theory justifying the appeal – in this Appeal the inclusion of the CofO would expand the scope of the appeal to a separate issuance, only part of which is relatable to the appeal of the Permit.³ Appellants' citation to *Sisson v. DCBZA*, 805 A.2d 964 (D.C. 2002) is similarly inapposite, as the Board in that decision, as upheld by the Court of Appeals, (i) was governed by a prior provision to Subsection 3112.2 which did not have a set time period for appeals provided they were “timely”⁴ and (ii) deemed the appeal as “timely” because of “extraordinary circumstances” that included a lack of access to various permits at issue. In this Appeal the CofO was posted on the DCRA public website with which the Appellants and their attorney are familiar.

Furthermore, to the extent Appellants are concerned only about the 10 additional parking spaces authorized under the Permit – the subject of this Appeal – there is no need to incorporate the CofO because if the Board sustains this Appeal, the CofO must be revised to conform to the Board's ruling.

Therefore, DCRA respectfully requests that the Board deny Appellants' request to include the CofO in this Appeal. If, however, the Board determines to include the CofO in this appeal, DCRA respectfully requests that this inclusion be limited to the portion of the CofO that relates to the subject of this appeal - the 10 new parking spaces permitted under the Permit.

APPELLANTS' ALLEGATIONS

Appellants allege that the ZA erred in approving the Permit because the Zoning Regulations

(i) impose a parking maximum in the R-2 Zone District based on Subsection 202.7;

³ *BZA Appeal 17519* at 5-6.

⁴ *Sisson*, 805 A.2d at 969.

- (ii) the 10 parking spaces represent an expansion of the nonconforming principal use of the Property as an apartment house that predated the Zoning Regulations and so is grandfathered under Subsection 2000.4; and
- (iii) the 10 parking spaces increase the existing nonconforming nature of the current rear yard in violation of Subsection 2000.6.

ARGUMENT

The Zoning Regulations do not establish parking maxima

Subsections 2101.2 and 2101.3 state that accessory parking spaces that exceed the number required by the minimum parking schedule of Subsection 2101.1 are not prohibited as long as the non-required parking spaces comply with the other regulations of Chapters 21 and 23.

In this case, the 10 parking spaces authorized under the Permit fully comply with Chapters 21 and 23.

The 10 parking spaces are not an expansion of a nonconforming use but are accessory uses

Contrary to Appellants' argument, the 10 parking spaces do not expand a nonconforming principal use of the Property. Instead the 10 parking spaces are accessory uses permissible under both Sections 300.2 and 301.1(c).

Subsection 300.2 provides that the parking regulations of Chapter 21, which includes Subsections 2101.2 and 2101.3 cited above, may authorize other uses for the R-2 Zone District than those specified in Sections 300-319 for the R-2 Zone District. Subsection 301.1(c) permits accessory uses incidental to permitted uses in the R-2 Zone District.

Furthermore, Subsection 214.1, applicable to the R-2 Zone District by Subsection 302.1, indicates that the Zoning Regulations anticipated accessory parking as permissible because it required a special exception only for "accessory automobile parking spaces *elsewhere than on the same lot or part of a lot on which any principal R-1 use is permitted*, except for a one family dwelling" (underscore added). This regulation does not apply to accessory parking on the same lot as the principal use, clearly indicating that is permissible.

In this case, the existing nonconforming apartment house on the Property is a permitted principal use under Subsection 2000.4. The Permit does not authorize any expansion of the

principal permitted nonconforming use; instead the Permit authorizes the 10 parking spaces as accessory uses incidental to the permitted principal nonconforming use of the Property. The 10 parking spaces do not require a special exception approval under Subsection 214.1 because these spaces are all on the same property as the permitted principal use.

Appellants' citation of Subsection 202.7 does not apply to the Property as Section 202.7 only governs accessory parking for "a one family detached dwelling". The Property is not a single family dwelling, so Subsection 202.7 is inapplicable.

Therefore Appellants' assertion is unfounded and should be dismissed.

The 10 parking spaces do not alter the nonconforming rear yard

Contrary to Appellants' assertion that the 10 parking spaces alter the nonconforming rear yard, the Zoning Regulations are clear that parking spaces do not count against a required rear yard unless located in a building or a structure that is four feet or higher above ground:

- Subsection 199.1 defines "yard, rear" and states that a "rear yard ... shall be unoccupied, *except as specifically authorized in this title [the Zoning Regulations].*" (italics added)
- Subsection 2503.1 specifies that "*except for the structures and exceptions specified in this section*, every part of a yard required under this title shall be open and unobstructed to the sky from the ground up." (italics added)
- Subsection 2503.2 specifies that structures up to four feet above grade "*may occupy any yard required* under the provision of this title." (italics added)

In this case, the Permit did not authorize any building or structure, just the provision of 10 parking spaces at grade. These 10 parking spaces therefore have no effect on the existing nonconforming rear yard.

Thus Appellants' assertion is erroneous and should be dismissed.

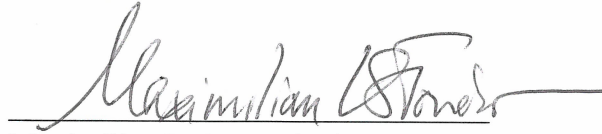
CONCLUSION

For the reasons stated above, DCRA asserts that the allegations stated in the Appeal are without merit and that the Appeal fails to establish a valid reason to overrule the ZA's approval of the Permit. DCRA therefore joins the Owner's Motion to Dismiss and respectfully requests that the Board affirm that the Zoning Administrator correctly applied the Zoning Regulations to evaluate and approve the Permit, and that the Board therefore deny this Appeal.

Respectfully submitted,
CHARLES THOMAS
General Counsel
Department of Consumer and Regulatory Affairs

Date:

1/8/16



Maximilian L. S. Tondro*

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* Admitted to practice in Maryland. Practicing in the District of Columbia pursuant to D.C. Court of Appeals Rule 49(c)(4).

Attachment A

Screenshot of the DCRA PIVS website for 2926 Porter Street, NW showing the issuance of the CofO (CO1503112) on August 20, 2015 when it was posted online

Property Information Verification System

Property Information by Exact Address

Address: 2926 PORTER ST NW
Zip Code: [Zip Lookup](#)
SSL: 2068 0095
Cluster: Cluster 15
Ward: Ward 3
ANC: ANC 3C
SMD: SMD 3C05
Census Tract: 000600
Zone: *

* Check the [Zoning map](#) for recent changes.
* Check the [Zoning orders](#) for recent changes.

Find Property By: Exact Address SSL

St. No.* St. Name* St. Suffix Quad
2448 18TH Street My

St. No. Suffix



1/2

Printer-friendly Reports



Links > [Google Street View](#) [Google Address Search](#) [Track Building Permit Status](#)
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Owners

CAMA

Residential Cases

Commercial Inspections

Occupancy

BBL

Abatement

DDOT PS Permits

Current ABRA Licenses

Elevator

Weights Measures

Show records per page: 10

Occupancy : No. of Records = 4

Address	Unit	SSL	D	Type	Date Issued	Completion Status	Completion Date	Detailed Description
2926 PORTER ST NW		2068 0810	CO1202439	Certificate of Occupancy	2013/06/17	Completed	2013/06/20	APARTMENT HOUSE, 19 UNITS
2926 PORTER ST NW		2068 0810	CO1202439	Certificate of Occupancy	2013/06/20	Completed	2013/06/20	APARTMENT HOUSE, 19 UNITS
2926 PORTER ST NW		2068 0810	CO1502225	Certificate of Occupancy	2015/06/01	Completed	2015/06/01	APARTMENT BUILDING WITH 23 UNITS.
2926 PORTER ST NW		2068 0095	CO1503112	Certificate of Occupancy	2015/08/20	Completed	2015/08/20	APARTMENT BUILDING WITH 23 UNITS AND 13 OFF STREET PARKING SPACES.

Zoning Enforcement : No. of Records = 0

No Zoning Enforcement Records.

FileNet CofO's :

[Log in to FileNet](#)

Disclaimer:

This application was created for DCRA from a variety of agency and non-agency data sources. It is not a legal document. Data may need to be cross-referenced to the original source system. Information provided by other agencies should be verified with them where appropriate.

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Attachment B

Email from Glen Zwicker to Tarek Bolden dated August 11, 2015

From: Bolden, Tarek (DCRA)
Sent: 12 Aug 2015 08:46:03 -0400
To: Reid, Rohan (DCRA)
Cc: LeGrant, Matt (DCRA)
Subject: FW: 2926 Porter Street NW

Regards,

Tarek Bolden

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From: Zwicker, Glen [mailto:zwickerg@hhmi.org]
Sent: Tuesday, August 11, 2015 9:29 PM
To: Bolden, Tarek (DCRA)
Subject: Re: 2926 Porter Street NW

Dear Tarek,

Please provide an update. The neighborhood is losing patience with the illegal parking, illegal illumination of the entire zone at all hours, and other issues. This is a small project which can't take much longer to review if appropriate attention is given.

The neighborhood's attorney has advised that if we don't hear from you shortly that we file official complaints/lawsuits against the developer and DC for failing to comply with applicable regulations. None of us want that, but the issues are real and no remedial action has been taken despite more than two months passing since DCRA was first informed in writing of the concerns.

Looking forward to hearing from you this week. Thank you.

Glen

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CERTIFICATE OF SERVICE

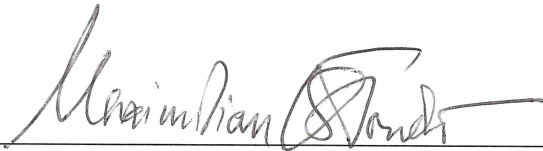
I hereby certify that on this 8th day of January 2016, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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