

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 19155 of Advisory Neighborhood Commission 3C and 2926 Neighborhood and Safety Coalition, pursuant to 11 DCMR §§ 3100 and 3101,¹ from an August 13, 2015 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1511364, for a 10-space accessory parking area at the rear of the apartment building located in the R-2 District at 2926 Porter Street, N.W. (Square 2068, Lot 95).

HEARING DATE: January 12, 2016

DECISION DATE: March 1, 2016

ORDER DENYING APPEAL

This appeal was submitted on October 2, 2015 by Advisory Neighborhood Commission (“ANC”) 3C and the 2926 Neighborhood and Safety Coalition, to challenge a decision of the Zoning Administrator (“ZA”), at the Department of Consumer and Regulatory Affairs (“DCRA”), made August 13, 2015, to issue Building Permit No. B1511364 (“the permit”), allowing the installation of a 10-space accessory parking area at the rear of an apartment building located in the R-2 Zone (“the property”). Following a full public hearing, the Board of Zoning Adjustment (“the Board”) voted to affirm the decision of the ZA and deny the appeal.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on January 12, 2016. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellants, to DCRA, and to the owner of the subject property, Adams-Porter LLC (the “Owner”).

¹ All references to Title 11 DCMR within the body of this order are to provisions that were in effect on the date the case was decided by the Board of Zoning Adjustment, but which were repealed as of September 6, 2016 (the “1958 Zoning Regulations”) and replaced by new text (the “2016 Zoning Regulations”). The repeal and adoption of the replacement text has no effect on the validity of the Board’s decisions in this case or of this order.

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Parties

Appellant

The Appellant is Advisory Neighborhood Commission (“ANC”) 3C and the 2926 Neighborhood and Safety Coalition (collectively, the “Appellant”). ANC 3C is the ANC for the area within which the property that is the subject of the appeal is located. The 2926 Neighborhood and Safety Coalition is a group of approximately 20 neighbors in the immediate vicinity of the property. The Appellant was represented by the Law Offices of Andrea C. Ferster, Andrea C. Ferster, Esq.

DCRA

The Appellee, DCRA, is the agency of the government of the District of Columbia that is authorized, among other things, to issue building permits. DCRA was represented by its Office of the General Counsel, Maximillian Tondro, Esq. The Zoning Division of DCRA is headed by the Zoning Administrator (“ZA”), Matthew LeGrant, and is charged with administering the Zoning Regulations. Mr. LeGrant testified at the public hearing on behalf of DCRA.

Property Owner

As the owner of the subject property, Adams-Porter LLC is automatically a party under 11 DCMR § 3199.1, and will be referred to as the Owner. The Owner was represented by Holland & Knight, Christopher Collins, Esq.

ANC 3C Report

In a resolution dated September 21, 2015, issued after a regularly scheduled meeting with a quorum present, the ANC voted to oppose “the creation of a multi-space parking lot” behind the subject property, stating it believes a special exception or a variance is necessary to create the 10 additional parking spaces. (Exhibit 3.) Because the ANC is an appellant in this case, the ANC participated fully during the appeal.

Motions

Appellant’s Request to Amend Appeal to Include C of O

In its Pre-Hearing Statement, the Appellant stated that DCRA had issued a “certificate of occupancy” (“C of O”) for the property which referenced the 10 new parking spaces that are the subject of this appeal. (Exhibit 15.) Because the C of O was issued after the appeal was filed, the Appellant requested that the C of O be incorporated into the appeal. DCRA objected to the incorporation of the C of O on the grounds that such an amendment to the appeal would be untimely. (DCRA’s Pre-Hearing Statement, Exhibit 17.) DCRA also noted that there was no need to incorporate the C of O if the Appellant’s challenge to it were limited to the portion of the C of O relating to the 10 new parking spaces. DCRA further noted that the C of O must conform to any Board ruling relating to the permit, such as a decision by the Board to grant the appeal. At the public hearing, the Appellant stipulated that it was only challenging the C of O’s reference to the

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10 new parking spaces, and did not press the motion to amend the appeal. (Hearing Transcript (“Tr.”), January 12, 2016.) Based upon these arguments and representations, the Board concluded there was no reason to incorporate the C of O into the present appeal.

Owner’s Motion to Dismiss Appeal

On January 6, 2016, the Owner submitted a motion to dismiss the appeal for failure to state a claim upon which relief can be granted. (Exhibit 16.) DCRA indicated in its Pre-Hearing Statement that it joined in this motion. (Exhibit 17.) The Board found that the arguments supporting the motion to dismiss went to the merits of the appeal. Rather than rule on the motion without a full hearing, the Board decided to suspend argument on the motion and conduct a full public hearing regarding the merits of the appeal.

The Positions of the Parties

Appellant’s Position - The Appellant asserts that the Zoning Regulations do not provide for additional matter of right parking at the condominium apartment building, because the building was built prior to the adoption of the 1958 Zoning Regulations, and is now a nonconforming use in the R-2 Zone District. The Appellant also claims that additional parking spaces are prohibited because the Regulations (§ 2101 parking schedule) do not list a minimum required number of parking spaces for this specific use (an apartment house) in the R-2 Zone. Finally, the Appellant claims that, as a nonconforming use, the apartment house may not be enlarged, expanded, extended, or changed from one nonconforming use to another, and the 10 additional spaces at the property represents such an enlargement or expansion.

DCRA’s Position – DCRA asserts that the nonconforming apartment house is a permitted principal use under § 2000.4 of the Regulations. The permit at issue does not authorize any expansion of the nonconforming use; instead the permit authorizes the 10 parking spaces as accessory uses that are incidental to the principal use – the apartment house. The parking at issue is not an expansion of the nonconforming apartment house use, but is a permitted accessory use in the R-2 Zone under 11 DCMR §§ 300.2 and 301.1(c). The Zoning Regulations do not establish parking maxima. Therefore, the number of parking spaces authorized by the permit may exceed the minimum number required by the parking schedule contained in § 2101.1 even where, as here, no spaces are required.

The Owner’s Position – The Owner also asserts that the apartment house is the principal use at the property, and is the only nonconforming use at the property. The Owner asserts that the parking spaces are accessory to the apartment house use (not part of the principal use), and are permitted as a matter of right. Further, the Owner asserts that the 10 additional accessory parking spaces are not an expansion of the apartment house use, because the accessory parking use is separate from the principal use. The Owner maintains that §§ 2101.2 and 2101.3 of the Regulations allow a property owner to provide more than the minimum amount of accessory parking even if, as here, no parking is required for a particular principal use. Finally, the Owner asserts that the Zoning

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Regulations do not impose a maximum limitation on the number of accessory parking spaces for any use in the R-2 Zone.

FINDINGS OF FACT

The Property

1. The property which is the subject of this appeal includes a 23-unit apartment building located in the R-2 Zone.
2. The apartment building was constructed in 1923, prior to the enactment of the 1958 Zoning Regulations, and is a nonconforming use in the R-2 Zone.
3. Subsection 2000.4 of the Zoning Regulations allows any nonconforming use of a structure that was lawfully existing on May 12, 1958 to be continued, operated, occupied, or maintained, subject to the limitations in Chapter 20 of the Regulations governing “Nonconforming Uses and Structures”.
4. Since a date prior to the issuance of the subject permit, there have been three accessory parking spaces in the side yard at the property. (Exhibit 16 C.)

The Building Permit

5. On August 12, 2015, the Owner applied for a permit to add a 10-space parking area at the rear of the property.
6. On August 13, 2015, the ZA approved the issuance of Building Permit No. B1511364 (the permit) to “stripe 10 additional parking spaces in the existing rear yard” in addition to the three pre-existing parking spaces at the property. (Exhibit 10.)

The Appeal and the Public Hearing

7. The Appellant filed this appeal on October 2, 2015 after learning of the permit to allow the additional 10 parking spaces.
8. The Board conducted a public hearing during which all of the parties participated.
9. Evidence adduced at the hearing indicated that other nonconforming apartment houses in the vicinity have on-site accessory parking for several vehicles. (Photos, Exhibit 16B.)
10. The ZA testified that accessory parking is a permitted use in all zone districts, and the fact that the parking would be accessory to the nonconforming use is not germane.
11. The ZA testified that he has approved additional accessory parking for nonconforming apartment buildings in a number of previous instances.

CONCLUSIONS OF LAW

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2), to hear and decide appeals when it is alleged by the appellant that there is an error in any decision made by an administrative officer in the administration of the Zoning Regulations. (11 DCMR §§ 3100.2 and 3200.2.) In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. (11 DCMR § 3100.4.) After considering the pleadings, the evidence in the record, and the argument by the parties, the Board is not persuaded by the Appellant that the ZA erred in issuing the permit. Rather, the Board concludes that the ZA's decision was lawful and proper.

The apartment house is a nonconforming use that may be continued

By statute, a nonconforming use “may be continued ... provided no structural alteration ... or no enlargement is made or no new building is erected.” D.C. Official Code § 6-641.06(a). The Zoning Regulations, at § 2000.4, allow a nonconforming use to be “continued, operated, occupied, or maintained” (subject to certain provisions). The Appellant cites nothing in the Zoning Regulations stating that a nonconforming use should be treated differently from any other permitted use, except with respect to alterations or enlargement of the nonconforming use.

The 10 accessory parking spaces are allowed in the R-2 Zone as a matter of right

The Appellant argues that the Zoning Regulations do not allow the new accessory parking as a matter of right, but prohibit the addition of the new parking area, especially in a nonconforming rear yard. The Appellant relies on § 300.3 and § 201 (enumerates uses permitted as a matter of right in the R-2 Zone) and § 301.1 (enumerates accessory uses permitted as a matter of right in the R-2 Zone), claiming none of these sections expressly permit the accessory parking uses. The Appellant also claims, without citing a specific regulation, that the Zoning Regulations do not allow new unlimited matter of right accessory parking at a nonconforming apartment house in the R-2 Zone. The Appellant's main assertion is that an apartment house is “not a use permitted for R-2 districts in §§ 300-319” and that § 2000 (generally concerning nonconforming uses) is not within §§ 300-319, so there is no basis in § 301 to affirm the issuance of the permit for the new parking area. The Appellant also argues that § 2101.3 was not intended to create unfettered matter of right accessory parking.

However, as stated in the Findings of Fact, the ZA testified that accessory parking is a permitted use in all zone districts, and the fact that the parking would be accessory to a nonconforming use is not germane. The Board agrees and finds that the 10 accessory parking spaces are accessory uses permissible under §§ 300.2 and 301.1(c). Subsection 300.2 provides that the parking regulations of Chapter 21 may authorize other uses for the R-2 Zone District than those specified in §§ 300-319. Significantly, § 301.1(c) permits accessory uses incidental to permitted uses in the R-2 Zone Districts.

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In addition, § 2101.3 of the Regulations allows accessory parking even if no parking is required for a particular use, and even for a nonconforming use. The Appellant claims that § 2101.3 relates only to *required spaces*. (Appellant's Statement, Exhibit 2.) (emphasis in original) However, the Appellant ignores the plain language in § 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 supplied.) Thus, there is nothing in § 2101.3 which supports the Appellant's contention that this section applies only to required parking.

The 10 spaces are not an expansion of a nonconforming use

The Appellant claims that because the existing pre-1958 apartment house use is a nonconforming use, based upon 11 DCMR §§ 2000.2, 2000.3, and 2000.6 (all governing nonconforming uses), changing the nonconforming apartment house with three parking spaces to a nonconforming house with 13 parking spaces, represents a prohibited expansion, and a prohibited change from one nonconforming use to another. To the contrary, the Board finds that the 10 parking spaces do not expand the nonconforming principal use of the property. The existing nonconforming apartment house on the property is a permitted principal use under § 2000.4. (This provision states, in substance, that a lawful nonconforming use may be continued, subject to Chapter 20 of the 1958 Zoning Regulations.).

The Regulations do not limit the number of accessory parking spaces allowed

The Appellant claims that the "10-car parking lot"² exceeds any permitted or required parking for the property. (Exhibit 2, p. 2 and Exhibit 15, pgs. 3-4.) As stated above, accessory parking spaces are permitted even where there is no parking requirement. Subsection 2101.2 expressly states: "Nothing contained in this section shall be construed to prohibit the establishment of accessory parking spaces in an amount that exceeds that required by § 2101.1...." What is more, the Board has ruled that the Zoning Regulations do not mandate parking maxima. *Appeal No. 17746 of Reed Cooke Neighborhood Association* (2009).

The accessory parking spaces do not alter the nonconforming rear yard

Contrary to the Appellant's assertion, the 10 accessory spaces do not count against a required rear yard unless in a building or structure that is four feet or higher above the ground. Subsection 2503 of the Regulations specifies that structures up to four feet above grade "*may occupy any yard required* under the provision of this title." (Emphasis supplied.) The permit did not authorize any building or structure, only the provision of 10 parking spaces at grade. Therefore, these 10 parking spaces have no effect on the existing nonconforming rear yard.

² The Appellant interchangeably describes 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".

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The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code §1.309.10(d) (2012 Repl.)). In this case, ANC 3C was an appellant and submitted a resolution stating the same issues and concerns it presented during the hearing, and which, for the reasons stated above, the Board found to be unpersuasive.

Based on the evidence of record and the submissions of the parties, the Board concludes that DCRA did not err in its decision to issue the permit authorizing the 10 accessory parking spaces at 2926 Porter Street, N.W. It is therefore **ORDERED** that the ZA’s determination is **SUSTAINED**, and this appeal is **DENIED**.

VOTE: 3-1-1 (Marnique Y. Heath, Frederick L. Hill, and Peter G. May voting to AFFIRM the Zoning Administrator’s decision and DENY the appeal; Jeffrey L. Hinkle voting by absentee ballot to grant the appeal; 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.

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: September 6, 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.