

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 19207 of ANC 6C, pursuant to 11 DCMR §§ 3100 and 3101¹, from an October 1, 2015 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1509391 (revised as B1512716), to allow the construction of a second-story addition with balcony to a one-family dwelling in the CAP/R-4 District at premises 518 6th Street, N.E. (Square 835, Lot 29).

HEARING DATES: March 8, 2016 and April 12, 2016
DECISION DATE: April 12, 2016

DISMISSAL ORDER

On November 23, 2015, Advisory Neighborhood Commission (“ANC”) 6C (“Appellant”) filed this appeal to the Board of Zoning Adjustment (“Board”). (Exhibits 1 – 4J.) The appeal challenges a decision made by the Zoning Administrator (“ZA”) at the Department of Consumer and Regulatory Affairs (“DCRA”) to issue Building Permit No. B1509391, as revised by Building Permit No. B1512716 (the “Permits”), for construction of a second-story addition with balcony to a one-family dwelling in the CAP/R-4 District at premises 518 6th Street, N.E. (Square 835, Lot 29) (“Subject Property”). (Exhibit 4.) The first permit, No. B1509391, was issued on July 2, 2015; a revised permit, No. B1512716, was issued on October 1, 2015.

In its appeal, the Appellant claims that the ZA erred by approving the Permits where the existing structure exceeded the matter-of-right lot occupancy and also by failing to revoke the Permits after receiving information that the plans in the permit application materially misrepresented the property’s existing conditions. The Appellant claimed that the permit application contained false information that affected the calculations. (Exhibits 4-4J.)

The property owner of the Subject Property, Redux Properties, LLC, (the “Property Owner” or “Permit Holder”) did not attend or participate in the hearing.

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraph, are to provisions that were in effect on the date this Appeal was decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text (“the 2016 Regulations”).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.

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Motion to Intervene. On February 22, 2016, Thomas Atkins and Edwin Rodriguez, owners of 520 6th Street, N.E., the abutting property to the south of the Subject Property, (“Intervenors”) submitted a motion to intervene in the appeal. (Exhibits 16 and 17.) The Board granted the motion to intervene at its March 8, 2016 hearing. The Intervenors attended the March 8 and April 12, 2016 hearings and in response to the Board’s questions, provided testimony of the current conditions of both their property and the Subject Property.

Motion to Dismiss. At the hearing on March 8, 2016, the Department of Consumer and Regulatory Affairs (“DCRA”) moved to dismiss the appeal as moot. DCRA’s counsel acknowledged that the Permits were issued based on an erroneous plat and that, therefore, the Permits were issued in error. DCRA indicated that the Permit Holder surrendered the Permits and that DCRA had cancelled their open building permit applications. The Appellant opposed the motion to dismiss, arguing that DCRA must revoke the permit, based on the revocation procedures outlined in the Construction Code, in order to moot the issue. Because the Permits were instead surrendered by the Property Owner and cancelled by DCRA, using internal procedures not codified in the regulations, the Appellant argues that the permit may still be revived and the issue is not yet moot.

After taking testimony on the issue from DCRA and the Appellant on March 8 and April 12, 2016, the Board voted to grant DCRA’s motion and dismiss the appeal as moot.

FINDINGS OF FACT

1. The property is located at 518 6th Street, N.E. (Square 835, Lot 29) (“Subject Property.”) The Subject Property is currently improved with a one-family dwelling.
2. The Subject Property is located in the CAP/R-4 District.
3. Redux Properties, LLC, (the “Property Owner” or “Permit Holder”) filed an application with the Department of Consumer and Regulatory Affairs (“DCRA”) for a building permit for extensive interior renovation and exterior construction to an existing one-family dwelling on June 26, 2015. That application was approved by DCRA and Building Permit No. B1509391 was issued on July 2, 2015.
4. The plans approved in Building Permit No. B1509391 depict the structure on the Subject Property as having an existing two-story rear addition, although the actual existing rear addition was one story at the time of the filing of the application. (Exhibits 4 and 4B.) The adjacent neighbor to the Subject Property alerted DCRA of the misrepresentation of the existing structure in the approved plans.
5. The Property Owner filed revised plans to DCRA, depicting the existing one-story rear addition and requesting a building permit to construct the second-floor rear addition. (Exhibit 4E.)

6. On October 1, 2015, the Zoning Administrator (“ZA”) authorized the issuance of Building Permit No. B1512716, which revised Building Permit No. B1509391, to allow the second-story rear addition. (Exhibit 4G.)
7. On October 15, 2015, ANC 6C04 Commissioner Mark Eckenwiler alerted DCRA that, based on the plat for the Subject Property and the plans approved in Building Permit No. B1512716 and Building Permit No. B1509391 (the “Permits”), the existing structure on the lot exceeds the 60% lot occupancy permitted by-right. Based on those calculations, Commissioner Eckenwiler raised the issue that the Permits wrongfully authorized construction that would require zoning relief, as the existing structure is nonconforming. (Exhibit 4H.)
8. On November 12, 2015, ANC 6C voted 4-0-0 to appeal the ZA’s decision to approve the Permits to the BZA and to authorize Commissioner Eckenwiler to represent the ANC before the Board. (Exhibit 3.)
9. Commissioner Eckenwiler, on behalf of ANC 6C, filed this appeal on November 23, 2015. (Exhibits 1-5.)
10. In response to Commissioner Eckenwiler’s comments, the ZA first issued a Stop Work Order on the Subject Property and then required the Permit Holder to provide a professional survey confirming the dimensions of the existing building. (Board of Zoning Adjustment Hearing Transcript (“Tr.”) of March 8, 2016, p. 13.)
11. When this survey was provided by the Permit Holder, it showed that the allowable lot occupancy of 60% had been exceeded by the existing structure on the Subject Property. (Exhibit 19.) Accordingly, the ZA determined that the Permits were improperly issued. (Tr. of March 8, 2016, pp. 13-14.)
12. Based on this determination, the ZA informed the Permit Holder that the Permits would be revoked unless the Permit Holder agreed to surrender the Permits and cancel all building permit applications based on the erroneous building plat, forfeiting all fees paid at that time. (Exhibit 19; Tr. of March 8, 2016, pp. 13-14.)
13. The Construction Code allows the code official at DCRA to revoke permits or approvals issued under the Constructions Codes or the Zoning Regulations if certain conditions are met; for example, where there has been a “false statement or misrepresentation of fact, or other significant inaccuracy,” where the permit does not comply with the Zoning Regulations, or where the permit has been issued in error or on the basis of incorrect information supplied.” (12A DCMR § 105.6.)
14. Except for the case of a Summary Revocation, where the code official may declare the permit null and void within five days of the permits’ issuance, the code official must

provide written notice of the order to revoke the permit, which gives rise to appeal rights by the permit holder. (12A DCMR § 105.6.2.)

15. DCRA describes the process of surrender and cancellation of a permit as an alternative to the process of revocation where the Permit Holder voluntarily renounces its rights under the permit and the permit is therefore classified as “withdrawn or cancelled effective immediately upon the surrender of the permit.” (Exhibit 23.)
16. In order to document the surrender and cancellation of a permit, DCRA requires the permit holder to sign a notarized form requesting cancellation. (Exhibit 23.)
17. In this case, the Property Owner surrendered the Permits and submitted a signed and notarized Letter of Cancellation. (Exhibit 19.) DCRA cancelled the Permits and deemed them null and void. (Tr., March 8, 2016, pp. 19-20.)
18. The ZA notified the Appellant of the surrender and cancellation. DCRA’s email dated January 11, 2016 from the ZA to the Appellant indicated that the Permit Holder had surrendered the Permits on January 8, 2016. (Exhibit 19.)
19. The Permits were shown as withdrawn in DCRA’s Property Information Verification System as updated on January 20, 2016. (Tr., March 8, 2016, p. 14.)
20. At the hearing on March 8, 2016, DCRA moved to dismiss the appeal as moot. DCRA’s counsel acknowledged that the Permits originally were issued based on an erroneous plat, agreeing with the claim raised by the Appellant in this appeal that the Permits were wrongfully issued. (Tr., March 8, 2016, pp. 13-14.)
21. The Appellant objected to the motion to dismiss, arguing that the revocation of a permit, under the revocation procedures of Title 12A, is the sole legal mechanism for DCRA to void the Permits and moot the legal issue at hand. (Exhibit 20.)
22. The Appellant cited testimony provided by the Director of DCRA to the D.C. Council, wherein the Director noted that “[t]he Code Official may restore a permit or issue a new one if the permit has been revoked or surrendered.” (Exhibit 23.)
23. According the testimony of DCRA’s counsel, DCRA’s Director, in speaking before the Council, was “reserving rights for potential hypothetical situations” but “in this particular case there’s no reason for why this permit would be revived.” (Tr. of April 12, 2016, p. 19.)
24. At the April 12 continued hearing, the Board questioned DCRA as to whether the documents on record in this case, i.e. the cancellation of the Permits and the notarized

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document, meant that these surrendered permits could not be revived, to which DCRA answered in the affirmative.

25. DCRA testified that the only way that this permit holder could get a new permit, or have a permit on this property to finish the work, would be to file a new permit application. (Tr., April 12, 2016, pp. 19-20.)

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. Subsection 3100.7 of the Zoning Regulations prohibits the Board from considering moot questions. As established by the D.C. Court of Appeal, a case before the Board is moot “when the legal issues present are no longer ‘live’ or when the parties lack a legally cognizable interest in the outcome.” *Appeal No. 18857 of Advisory Neighborhood Commission 3D* (2015), citing *Appeal No. 18321 of the Citizens Association of Georgetown*, 60 DCR 6821, 6825 (2013) (quoting *N St. Follies, Ltd. P’ship v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584, 588 (D.C. 2008)). Further, “the central question is ... whether the decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties.” *N St. Follies, Ltd. P’ship v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584, 588 (D.C. 2008)

DCRA argues that the legal issues presented by the appeal are no longer “live” because the Permits have been surrendered by the Property Owner and cancelled by DCRA, based on the ZA’s acknowledgement that the Permits were issued in error. The Appellant objects to that argument, claiming that unless the procedure for revocation outlined in the Construction Code is followed, the Permits are not null and void. Further, based on testimony from the Director at DCRA before the D.C. Council that a surrendered permit may be revived, the Appellant argues that the possibility of the permit’s revival means that the controversy remains “live” and must not be dismissed as moot.

The Board finds that the ZA’s admission that the Permits were improperly issued, followed by the surrender of the Permits by the Property Owner and the cancellation of the Permits by DCRA, moot the “live” legal issues in the appeal. First, the Board was not persuaded by the Appellant’s argument that revocation is the only procedure available to moot the legal issue at hand in this appeal. In recent cases, the Board has accepted the Property Owner’s surrender of a challenged permit as evidence of the end of a “live” controversy, and therefore, has dismissed the appeal as moot. *Appeal No. 19092 of Patricia Schaub* (2016); *Appeal No. 19077 of Massachusetts Avenue Heights Citizens Association* (2016); *Appeal No. 19114 of ANC 2B* (2016). The Board has not previously found that revocation under the of Title 12A is the sole mechanism for mooted legal issues raised in a building permit and declines to make that finding in this case.

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The Board further finds that due to the surrender and cancellation of the Permits, supported by the ZA's testimony that the Permits were issued in error and will not be revived, there is no longer "a sufficient prospect that the decision will have an impact on the parties." *N St. Folliess, Ltd. P'ship v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584, 588 (D.C. 2008). Although it is correct that, even when DCRA acknowledges that the permit was issued an error, if the action to revoke or cancel a permit is not final, the legal issue is not yet moot. *See Appeal No. 18321 of Citizens Association of Georgetown (2013)* (The Board did not grant a motion to dismiss from DCRA when a notice of revocation was issued for the challenged permit, but the notice period for revocation had not yet expired. The Board later granted DCRA's motion to dismiss the appeal only after the expiration of the time when the property owner could have submitted revised plans for a revised permit.)

In this case, the Board must consider not only DCRA's admission that the Permits were improperly issued based on an erroneous plat, but also consider the evidence and testimony regarding whether the actions taken by the Property Owner and DCRA convey a final action sufficient to moot the issue. Unlike in *Appeal No. 18321 of Citizens Association of Georgetown*, there is no notice period pending for the cancellation of the permit and there was confirmation on the record from the ZA that the Permits would not be revived. Despite general testimony cited by the Appellant by the Director of DCRA indicating that a revoked or surrendered permit may be revived, the Board finds that this general testimony regarding potential hypothetical situations is outweighed by the testimony from the ZA specific to the situation at hand that the Permits' cancellation was final. As indicated in DCRA's testimony, the Property Owner would be required to file a new permit application if it wishes to continue with the project. Thus, DCRA's issuance of a building permit based on that potential permit application could be appealed to the Board. The dismissal of the instant appeal as moot would not affect the Appellant's ability to avail itself of that process if there were future claims relating to the interpretation or application of the Zoning Regulations. Accordingly, the Board finds the "legal issues present are no longer 'live'" based on DCRA's agreement with the Appellant's claim that the Permits were issued in error and that there is no "sufficient prospect that the decision will have an impact on the parties" as DCRA has stated on the record that the Permits are cancelled and will not be revived.

It is therefore **ORDERED** that the appeal is **DISMISSED**.

VOTE: 4-0-1 (Peter G. May, Frederick L. Hill, Marnique Y. Heath, and Jeffrey L. Hinkle to DISMISS; Anita Butani D'Souza, not participating.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

The majority of the Board members approved the issuance of this order.

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ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: February 1, 2018

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.