

**DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS' PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW IN BOARD OF ZONING ADJUSTMENT APPEAL
NO. 17663**

Friends of Babcock-Macomb House

Appeal No. 17663 of Friends of Babcock-Macomb House pursuant, to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs concerning the matter-of-right determination that the premises at 3417 Massachusetts Avenue, NW, Washington, DC, Square 1939, Lot 42 would be used as a church or place of worship and the approval and issuance of three building permits; the final permit authorizing the construction of the church or place of worship.

HEARING DATES: October 9, 2007 and October 16, 2007.

DECISION DATE: December 4, 2007

DECISION AND ORDER

INTRODUCTION

Friends of Babcock-Macomb House ("Appellant") filed this appeal with the Board on May 1, 2007, challenging the March 2, 2007 decision of the Zoning Administrator ("ZA") for the Department of Consumer and Regulatory Affairs ("DCRA/Appellee") which determined that the building proposed at 3417 Massachusetts Avenue, NW, by Soka Gakkai International ("SGI/Property Owner"), is a church or place of worship and thus is permitted as a matter-of-right in the Diplomatic and Naval Observatory Precinct District Overlay / R-1-B Single Family Residential District ("D/NOPD / R-1-B District").

The Appellant also alleged that the November 30, 2006 excavation, sheeting and shoring building permit (Building Permit No. 98193); the December 11, 2006 covered pedestrian walkway and temporary construction fence building permit (Building Permit No. 100009) were erroneously issued and the April 10, 2007 building permit to construct the church or place of worship on the premises (Building Permit No. 96928) was also erroneously issued.

In response, Appellee asserts that based on the information submitted by SGI in support of its building permit application and plans, Appellee properly determined that the predominant use of the building is a church or place of worship. Therefore, this use is a permitted as a matter-of-right in the D/NOPD / R-1-B District and Appellee approved the issuance of Building Permit No. 96928.

The Appellee also asserts that the Appellant's appeal of Building Permit Nos. 98193 and 100009 is untimely. Building Permit No. 98193 was issued on November 30,

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2006 and Building Permit No. 100009 was issued on December 11, 2006. The deadline to file an appeal of Building Permit No. 98193 was January 30, 2007. The deadline to file an appeal of Building Permit No. 100009 was February 11, 2007. The Appellant filed this appeal on May 1, 2007. Therefore, pursuant to 11 DCMR § 3112.2(a), the appeal of these permits is untimely.

SGI filed a Motion to Dismiss this appeal on October 2, 2007. At the October 9, 2007 hearing, Appellant requested that the Board postpone its decision on the motion to allow the Appellant to file its opposition. The Board granted the Appellant's request and Appellant filed its Opposition to SGI's Motion to Dismiss on October 15, 2007. The Board proceeded with the merits of the case on October 9, 2007, and decided the Motion to Dismiss on October 16, 2007.

The Advisory Neighborhood Commission ("ANC 3C") did not participate in this appeal. The Appellant submitted ANC 3C Resolution 2005-006, dated January 25, 2005, which opposed the construction of SGI's church or place of worship. However, ANC 3C did not submit a written report in advance of the hearing, nor did it provide any evidence or testimony in support or opposition to the appeal. Therefore, the resolution of ANC 3C is not afforded great weight pursuant to 11 DCMR §3115.2.

FINDINGS OF FACT

1. The Appellants are comprised of several neighboring property owners who reside near 3417 Massachusetts Avenue, NW. John R. Magnus represented the Appellants and testified on their behalf in this appeal.
2. On November 30, 2006, DCRA issued Building Permit No. 98193 to SGI for the purpose of excavating, sheeting and shoring at 3417 Massachusetts Avenue, NW.
3. Pursuant to 11 DCMR § 3112.2(a), an appeal to the issuance of Building Permit No. 98193 must have been filed by January 30, 2007. Appellant untimely filed its appeal of the excavation, sheeting and shoring building permit (Building Permit No. 98193) on May 1, 2007. Appellant testified that it was aware of the issuance of the permit on or about December 27, 2006. Although Appellant alleged that it did not file its appeal earlier because it mistakenly relied on statements made by the former Zoning Administrator, the Board determined that "reliance on another party is not sufficient with respect to that test of substantially impairing the Appellant's ability to appeal."
4. On December 11, 2006, DCRA issued Building Permit No. 100009 to SGI for the purpose of placing a covered pedestrian walkway and temporary construction fence at 3417 Massachusetts Avenue, NW.
5. Pursuant to 11 DCMR § 3112.2(a), an appeal to the issuance of Building Permit No. 100009 must have been filed by February 11, 2007. Appellant untimely filed

its appeal of the covered pedestrian walkway and temporary construction fence building permit (Building Permit No. 100009) on May 1, 2007. Appellant testified that it was aware of the issuance of the permit on or about December 27, 2006. Although Appellant alleged that it did not file its appeal earlier because it mistakenly relied on statements made by the former Zoning Administrator, the Board determined that “reliance on another party is not sufficient with respect to that test of substantially impairing the Appellant’s ability to appeal.”

6. On March 2, 2007, DCRA’s former Zoning Administrator Bill Crews issued a zoning determination letter, finding that “[a]fter careful consideration and reliance upon the attached information provided by SGI, it is clear to me that the principal use of the proposed building will be as a place of worship...” The letter further determined that “[t]he layout of the building with the large main room and smaller room for worship activities as well as classrooms, fellowship hall and a small amount of office space is very typical of churches and other places of worship. You have provided a typical schedule of activities which again mirrors other faiths’ regular activities in their churches or places of worship.” “This property is within an R-1-B (Residential) District ... Use as a ‘place of worship’ is a matter of right use within the R-1-B District and is not prohibited ...”
7. Based on Bill Crews’ March 2, 2007 zoning determination letter, DCRA issued its April 10, 2007 building permit (Building Permit No. 96928) to construct the church or place of worship at 3417 Massachusetts Avenue, N.W.
8. Pursuant to 11 DCMR § 3112.2(a), an appeal to the Zoning Administrator’s determination letter must have been filed by May 2, 2007. Appellant timely filed its appeal of the Zoning Administrator’s determination letter on May 1, 2007. Appellant alleged that the Zoning Administrator’s finding that 3417 Massachusetts Avenue, N.W. is a church or place of worship was unreasonable because worship will not be the predominant use of the building. However, Appellants did not specify any facts to show what use would occur, if not worship.
9. Pursuant to 11 DCMR § 3112.2(a), an appeal to the issuance of Building Permit 96928 must have been filed by June 10, 2007. Appellant timely filed its appeal of the building permit to construct the church or place of worship at 3417 Massachusetts Avenue, N.W. on May 1, 2007. Appellant alleged that DCRA erroneously issued the building permit because worship will not be the predominant use of the building and thus its construction is not permitted as a matter-of-right. However, Appellants did not specify any facts to show any other use not within the matter-of-right category.
10. Matthew LeGrant, the Acting Zoning Administrator for DCRA testified on behalf of the Appellee. In March 2007, in his capacity as the Deputy Zoning Administrator, Mr. LeGrant reviewed SGI’s building permit application and plans to determine the building’s use as a church and compliance with the development

standards (i.e., height limits, lot occupancy and parking requirements) associated with that use. Based on the depictions in the drawings, review of the base zone, district overlays and the information contained in the application, Mr. LeGrant determined that 3417 Massachusetts Avenue, NW met the development standards applicable to a church or place of worship and thus was permitted as a matter-of-right in its D/NOPD/R-1-B District.

11. In furtherance of his duty as the Acting Zoning Administrator, Mr. LeGrant conducted an independent review and analysis of the documents in paragraph 10, as well as: (A) two letters from religious organizations, and (B) SGI's 501(c)(3) non-profit organizational status. Based on this review, Mr. LeGrant "agreed with the previous Zoning Administrator's decision that, in fact, it was a church use" and "that the building permit was, in fact, correctly issued."
12. Mr. LeGrant's review entailed identifying several rooms that were relevant to a church or place of worship. The four rooms that were identified included: the large and small sanctuary, chanting room and fellowship room. These rooms accounted for 56.18 percent of space used for worship or religious assembly, and thus identified the predominant use of the building as a church or place of worship.
13. Mr. LeGrant conservatively analyzed the predominant use of the building and excluded several rooms from his calculation - three studies, a family room, a pantry, a classroom, an office and bookstore. Despite these exclusions, it was undisputable that the large and small sanctuary, fellowship room and chanting room would be used for religious assembly and thus constituted the predominant use of the building. Since the building is used as a church or place of worship, its construction is permitted as a matter-of-right in the D/NOPD/R-1-B District.
14. William Aiken, the Public Affairs Director of SGI, testified on SGI's behalf in this appeal. He explained that SGI is the second oldest Buddhist community in the Washington, D.C. metropolitan area and that its centers are considered places of worship in all areas in which they are located.
15. Mr. Aiken concurred with Mr. LeGrant's determination that the large and small sanctuary, fellowship room and chanting room are used for worship. Mr. Aiken noted that the large sanctuary will be used for larger gatherings, including the service on the first Sunday of the month. It is the sacred space where followers carry out both the recitation of the liturgy, in addition to reciting the mantra. The small sanctuary will be used for the same purpose, but on a smaller scale. The fellowship lounge is for dialogue among members of SGI's community because one of the three treasures of Buddhism is the community, so the bonds of community are critical to worshipping. Finally, the chanting room will be used for chanting, which is a form of prayer.

16. Mr. Aiken identified that the classroom and dialogue room are also critical for worshipping at the center. An altar will be included in the classroom, making it an additional room used for worship. Similarly, the dialogue room will be used for religious ceremonies, personal and small group guidance, and more forms of worship. Therefore, the space used for worship in the building actually exceeds the 56.18 percent that was identified by Mr. LeGrant.
17. A church or place of worship is not defined in the Zoning Regulations under 11 DCMR § 199.1. However, pursuant to 11 DCMR § 199.2(g), “words not defined ... shall have the meanings given in Webster's Unabridged Dictionary.” Webster's Unabridged Dictionary defines a “church” as “a place of worship for any religion.” The word “worship” is defined as “[t]he act of paying divine honors to the Supreme Being; religious reverence and homage; adoration or acts of reverence paid to a god or being viewed as god; to pay divine honors to or to reverence with supreme respect and veneration; to perform religious exercises in honor of; to adore; to venerate; to perform acts of homage or adoration.”
18. Pursuant to 11 DCMR § 201.1(g), a “[c]hurch or other place of worship, but not including rescue mission or temporary revival tents” is permitted as a matter-of-right in an R-1 Residential District. Since 3417 Massachusetts Avenue, N.W. is zoned as a D/NOPD/R-1-B District and its use is a church or place of worship, its construction is permitted as a matter of right.
19. Based on the evidence submitted, the Board finds that DCRA properly determined that 3417 Massachusetts Avenue, N.W. is a church or place of worship and that construction of the building is permitted as a matter of right.
20. Based on the evidence submitted, the Board finds that DCRA properly issued Building Permit No. 96928 to construct SGI's church or place of worship at 3417 Massachusetts Avenue, N.W.

CONCLUSIONS OF LAW

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(1) (2001 ed.) to hear and decide appeals where it is alleged that there is error in any order, requirement, decision, determination, or refusal made by the Zoning Administrator in the enforcement of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §3100.2.

DCRA's former Zoning Administrator Bill Crews properly determined that SGI's building located at 3417 Massachusetts Avenue is a church or place of worship and thus is permitted to be constructed as a matter-of-right in its D/NOPD/R-1-B District. Based on the evidence submitted, which included the building permit applications, plans and testimony from the Appellant, SGI, and DCRA's Acting Zoning Administrator, it is clear that DCRA properly issued Building Permit No. 96928 to construct the church or place of worship as it is permitted as a -of-right pursuant to 11 DCMR § 201.1(g).

The Appellants appeal of Building Permit No. 98193 (excavation, sheeting and shoring permit) and Building Permit No. 100009 (covered pedestrian walkway and temporary construction fence) are untimely. A timely appeal of Building Permit No. 98193 must have been filed by January 30, 2007. A timely appeal of Building Permit No. 100009 must have been filed by February 11, 2007. The Appellant appealed both building permits on May 1, 2007. Pursuant to 11 DCMR § 3112.2(a), "an appeal must be filed within sixty (60) days from the date the person filing the appeal had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier." 11 DCMR § 3112.2(d) provides an exception to subsection (a) whereby "the Board may extend the 60 day time limit only if the appellant demonstrates that: (1) there are exceptional circumstances that are outside the appellant's control and could not have reasonably been anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal." The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). Since the Board determined at the October 16, 2007 hearing that Appellant did not timely file its appeal, the Board grants SGI's Motion to Dismiss, in part, because the Board lacks jurisdiction to hear the Appellant's appeal of Building Permit Nos. 98193 and 100009.

In view of the foregoing, the Board concludes that DCRA's Zoning Administrator properly determined that 3417 Massachusetts Avenue, N.W., is church or place of worship, which is permitted as a matter-of-right in its D/NOPD/R-1-B District. The Board also concludes that DCRA properly issued Building Permit No. 96928 to construct the church or place of worship at 3417 Massachusetts Avenue, N.W.

Accordingly, it is **ORDERED** that this appeal is **DENIED**.

VOTE: _____, to deny the appeal;

_____, to sustain the appeal)

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

Each concurring Board member approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

FINAL DATE OF ORDER: _____, 2007

PURSUANT TO 11 DCMR §3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11DCMR §3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

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CERTIFICATE OF SERVICE

I, Shakira D. Pleasant hereby certify that on November 27, 2007, a copy of the District of Columbia's Department of Consumer and Regulatory Affairs' Proposed Findings of Fact and Conclusions of Law in Board of Zoning Adjustment Appeal No. 17663 Friends of Babcock-Macomb House was sent first class mail to the following:

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