



October 19, 2007

VIA HAND DELIVERY

Ruthanne Miller, Chairperson
D.C. Board of Zoning Adjustment
Office of Zoning
441 4th Street, NW, Room 210
Washington, DC 20001

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17667

EXHIBIT NO. 32

JOHN T. EPTING
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**Re: Minshall Stewart Properties, LLC ("Appellant") –
Appeal No. 17667: Appeal of Zoning Administrator's Determination
Regarding Property Located At Lot 83 in Square 73
Appellant's Post-Hearing Submission**

Dear Chairperson Miller and Members of the Board:

At the close of the public hearing in the above-referenced case on October 9, 2007, the Board requested that the parties provide a post-hearing submission on the issues raised during the hearing. Attached please find the following:

1. A legal summary of the Appellant's argument and response to questions raised by members of the Board.
2. A legal statement regarding the Appellant's authority to file the appeal.
3. A brief legal analysis as to why the ANC 2A Report is not entitled to "great weight" in the appeal.

We look forward to the Board's decision on this matter at the October 23, 2007 special public meeting.

I. Legal Summary

A. Introduction

The only relevant question in this Appeal is whether the Zoning Administrator responsible for issuing the building permit and certificates of occupancy for the original structure in 1981-92 determined that the structure was a single building for zoning purposes, based on the definition of "building" in effect at the time of BZA approval on May 19, 1980.

Both DCRA and Intervenor erroneously seek to apply the current interpretation of the definition of "building" to the structure, but such an inquiry is both irrelevant and unnecessary. To answer the Board's question, the relevant standard is the definition of "building" in place upon the effective date of BZA Order No. 13148. This is the standard that the Zoning Administrator applied when he reviewed and approved the building permit for a single mixed-use office/residential building, and it is also the standard that he applied when he reviewed and

Board of Zoning Adjustment
District of Columbia
CASE NO. 17667
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issued the certificates of occupancy. Whether the building operates as two buildings with distinct and separate uses, or whether the building conforms to the present-day understanding of the definition of “building” does not matter when, as in this case, the building was approved and certificates of occupancy were issued 25 years ago pursuant to a BZA Order as a single building for purposes of zoning.

B. All of the Relevant Evidence in the Record Clearly Indicates the Building was Reviewed and Approved as a Single Building for Purposes of Zoning

Section 3202.1 of the Zoning Regulations is clear that “a building permit shall not be issued . . . unless that structure complies with the provisions of this title,” and Section 3203.1 of the Regulations is also clear that “no person shall use any structure, land, or part of any structure or land for any purpose other than a one-family dwelling unless until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title.” The issuance of the building permit for the “one new 11 story office/residential” building, as well as issuance of original Certificates of Occupancy for the residential and office uses are prima facie evidence, therefore, that the building complied with zoning. The certificates of occupancy still exist and are evidence of continued compliance.

Since the building was constructed in accordance with an approved building permit, the logical way to look at the Property is in a manner in which the structure conforms with the Regulations. As noted above and conclusively demonstrated in the record, the only way in which the structure that currently exists can comply with zoning is if it is considered to be one building for purposes of zoning. Therefore, when the former Zoning Administrator reviewed and approved the building permit and certificate of occupancy applications in 1981-82, his approval served to confirm that the building complied with all aspects of the Zoning Regulations, including the definition of “building.”¹

Indeed, every shred of relevant evidence in the record—the BZA transcript and order, the building permit application, and the Zoning Computation sheet—indicates that the structure was clearly reviewed and approved as one building for zoning purposes. But for its status as one building for purposes of zoning, it would not have needed relief for multiple roof structures on the “same roof.” There was no reason for the original applicant to seek relief for multiple roof structures unless the project was one building for purposes of zoning. This is why counsel for Intervenor was unable to explain why the original building needed relief for multiple roof structures in Application No. 13148. If the structure were separate buildings, as counsel for the Intervenor alleges, there is nothing in the regulations that would require—or even allow—the construction of one roof structure on two separate buildings with separate record lots.

¹ The Zoning Computation sheet is critical here. Because it was prepared by the Zoning Administrator during the review and approval of the original building permit for “one 11 story residential/office bldg”, it serves as concrete evidence that the Zoning Administrator considered the two structures to be one building for purposes of zoning, as did the BZA.

And but for its status as one building for zoning purposes on one record lot, the residential structure could not have shared the same measuring point as the office structure. Indeed, the cases cited by both DCRA and the Intervenor are clear on this point. If the structures are separate buildings, then they must (a) exist on separate record lots and (b) have separate and distinct measuring points for height. **Here, the two structures are located on one record lot (Lot 83), and as is clear on the Zoning Computation sheet, they share a measuring point on K Street, NW.** (The Zoning Computation sheet is, of course, the document prepared by prior Zoning Administrators during the review of building permit applications to confirm the building's compliance with the Zoning Regulations.) Neither DCRA nor the Intervenor offered any evidence to the contrary that would demonstrate how the structures could have existed as separate buildings yet also complied with the Zoning Regulations in 1982. Moreover, evidence regarding the operation and use of the structures is irrelevant to any discussion of whether the structures are one building for purposes of zoning.

C. The Zoning Regulations Clearly State that Building Permits and Certificates of Occupancy Authorized by BZA Orders are Reviewed Under the Regulations In Effect on the Date the Order is Issued.

The Zoning Regulations are clear that applications for building permits and certificates of occupancy authorized by orders of the Board of Zoning Adjustment are processed in accordance with the Zoning Regulations in effect the date the orders are promulgated. See 11 DCMR §§ 3202.6, 3203.9. BZA Order No. 13148 was published on May 19, 1980. Under the Regulations, then, the Zoning Administrator who reviewed the original building permit and certificate of occupancy applications was bound to review whatever building connection was alleged based on the understanding of what constituted a “building” under the Zoning Regulations in effect on May 19, 1980. Subsequent interpretations of the definition of “building” are not applicable.

Here, none of the cases cited by counsel for DCRA or Intervenor as precedent for the definition of “building” were in effect as of 1980. The cited decisions of the Zoning Commission and BZA generally date within the last decade, during the period in which the definition of “building” set forth in Section 199.1 has been further fleshed out and refined. They do not inform our understanding of the definition of “building” as it would have been understood by the BZA and Zoning Administrator twenty-five years ago.

As for Goto v. D.C. Board of Zoning Adjustment, as discussed during the hearing, the discussion comes from a footnote in Judge Kelly's concurrence/dissent and is clearly dicta. Even if this footnote was binding as a matter of law, the case was decided on November 5, 1980—nine months after the Board's decision in Application No. 13148 and six months after the issuance of the order—and therefore does not inform the definition of “building” in effect on May 19, 1980.

Moving forward to present day, and to answer the question posed by Board members Ethlerly and Loud, Sections 3202.6 and 3203.9 also operate to bind the present-day Zoning

Administrator to review the building under the definition of “building” that was in effect on May 19, 1980. However, in this instance, there was no need for the present-day Zoning Administrator to even undertake an analysis of whether the building meets either definition of “building”, because the issuance of the 1982 certificates of occupancy obviates the entire inquiry. Again, the issuance of the original building permit and certificates of occupancy in 1981-82 serve as prima facie evidence that the Zoning Administrator reviewed and approved the building as compliant with zoning. If the connection was insufficient, then the opportunity to challenge the Zoning Administrator’s determination was at that time of the issuance of the original building permit certificate of occupancy. Section 3112.2 is clear that any challenge to a determination of an administrative officer must be “timely”, and under any interpretation of the section (either as originally drafted or as amended by Z.C. Order 02-01), an attempt to challenge the original determination 25 years later is untimely.

Accordingly, DCRA and Intervenor’s efforts to inquire into the validity of the building connection are clearly time-barred. The Appellant did not request that the Zoning Administrator review the structure as it currently exists and issue a contemporary determination as to whether it is one building. Rather, the Appellant sought to confirm the original understanding that the structure was one building for zoning purposes, based on the well-established premise that the underlying valid building permit and certificates of occupancy serve as prima facie evidence that the building conformed to the Zoning Regulations. The present day Zoning Administrator, however, ignored the certificates of occupancy, which were predicated on a finding by the prior Zoning Administrator that the structures complied with the definition of “building” as well as all other aspects of the Zoning Regulations. Instead, he undertook a *de novo* review and analyzed the structure based on the current interpretation of “building”, ignoring Sections 3202.6 and 3203.9. The present-day Zoning Administrator effectively overturned his predecessor’s determination 25 years later, and there is nothing in the Zoning Regulations that authorizes the Zoning Administrator—or anyone else—to overturn validly issued certificates of occupancy 25 years after issuance, particularly in light of Sections 3202.6 and 3203.9, which bind the Zoning Administrator to review the building in accordance with the Regulations in effect at the time of the BZA decision.

To the extent that *Goto* is relevant to the instant case, it is to affirm the equitable principles that forbid the District from reversing its earlier decision (i.e. the issuance of the permits and certificates of occupancy) when the Appellant clearly relied on such decisions. See Goto, 423 A.2d 917, 925 n.15. Here, the Appellant has maintained throughout the entire course of proceedings regarding the Property, including the original statement in support of Application No. 17594 (the “Variance Case”), that the structure was one building for purposes of zoning, and clearly relied on this understanding, since the status of the structure as one building for zoning purposes was the basis for the claim that the Property was confronted with an “exceptional condition.” See Statement of the Applicant, Dec. 11, 2006, at 2, 6, 7, 8, 10, 11, 13, 14.

D. Conclusion

The building has not been substantially modified since its original construction, and it continues to exist as a single building on a single record lot with a single roof featuring multiple roof structures, shared courts and rear yard, shared parking access, shared parking and loading, and a shared measuring point—which are all relevant indicia for zoning purposes. The current Zoning Administrator ignored the clear weight of this evidence, which shows the structure was reviewed and approved as one building for purposes of zoning. Instead, the current Zoning Administrator erroneously applied contemporary standards when the Regulations clearly called for deference to the understanding of the Regulations as they stood in 1980, at the time of BZA approval. Most importantly, the Zoning Administrator had no authority or ability under the Regulations or established principles of law to even challenge his predecessor’s twenty-five year old issuance of building permit or certificates of occupancy.

For its deliberation, the Board needs to step back and analyze what is really at issue in this Appeal. The issuance of Order No. 13148 by the prior Board of Zoning Adjustment bound the prior Zoning Administrator reviewing the approved building to review it based on the Zoning Regulations in effect on the date the order was issued, and the present-day Board of Zoning Adjustment and Zoning Administrator are similarly bound by the Regulations in effect in 1980. Moreover, the relevant decision on whether the building connection was sufficient was made when the Zoning Administrator approved the building permit and issued the certificates of occupancy in 1981 and 1982, applying the definition of “building” that was in effect on May 19, 1980. **Therefore, any challenge to the existence or sufficiency of the building connection needed to come in a “timely” manner following the issuance of the permits or COs at that time, and in any event would have been based on the 1980 understanding of “building.”** For all of the reasons above, the Board should find that the Zoning Administrator erred in his determination that the structure is two buildings for purposes of zoning.

II. Right to Appeal

The Zoning Regulations clearly permit any person “aggrieved by any order, requirement, decision, determination or refusal made by an administrative officer or body” to appeal that decision to the Board. 11 DCMR § 3112.2. Nothing in the Regulations requires that all property owners join in the appeal.² Indeed, the Regulations explicitly contemplate that the owner of the property involved may not be the appellant in the order of procedure, 11 DCMR § 3117.11(a)(3), and this Board has been clear that the division of property for purposes of ownership (i.e. through assessment and taxation lots) plays not part in the regulatory scheme. See Appeal No. 14621 (Portsmouth Construction Company) at 3-4. Therefore, nothing inhibits the Appellant from bringing this appeal as a person aggrieved by a determination of the Zoning Administrator.

² The Appellant notes, however, that in this instance the West End Place condominium owners should join in the appeal, because a determination that the structure is two buildings would render West End Place nonconforming as to height under both the Regulations and the Height Act.

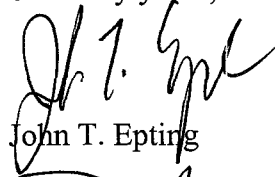
III. ANC 2A's Letter

Section 3115.1 sets forth the basic requirements for an ANC Report in order for it to be entitled to "great weight." The letter from ANC 2A dated October 9, 2007 fails these basic requirements for two reasons:

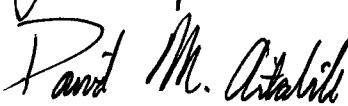
- The Report was not filed at least 7 days in advance of the hearing. It was filed on October 9, 2007 at the continuation of the public hearing, four weeks after the public hearing commenced. Furthermore, the ANC meeting and vote took place on September 19, 2007, a week after the commencement of the public hearing when the parties were established.
- The Report was not properly noticed. The Report itself does not allege that the meeting was properly noticed. Attached is the ANC agenda for the meeting in question. Note that it does not reference the Appellant or the BZA Appeal number at all. It does include an agenda item for "West End Place Condo" but that does not indicate any relationship to the BZA appeal. Also attached are copies of the ANC agenda pages from the Georgetown Current for September 12, 2007 and September 19, 2007. Neither summary references the appeal.

Here, representatives of (and counsel for) ANC 2A were well aware of the filing of the appeal back in May 2007, and had every opportunity to address the appeal prior to the hearing at either a regularly scheduled and duly noticed public meeting in May, June, July, or August, or at a duly noticed special public meeting during that timeframe. ANC 2A did not act prior to the commencement of the hearing on September 11. Indeed, but for the continuance by DCRA, ANC 2A would have not had any opportunity to submit any correspondence during the public hearing. The letter from ANC 2A fails to meet the basic requirements for qualification as an ANC Report, and is accordingly not entitled to "great weight."

Sincerely yours,



John T. Epting



David M. Avitabile

Enclosure

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2007, a copy of this letter and enclosure was served by electronic mail to the following:

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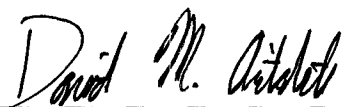
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