

**BOARD OF ZONING ADJUSTMENT
DISTRICT OF COLUMBIA**

Appeal of MICHAEL CUSHMAN, pursuant to 11 DCMR §§ 3100 and 3101, from a March 10, 2015, decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. CO1501450, to permit an existing non-public garage on an alley lot containing seven spaces and four additional open spaces (11 spaces total) in the R-4 District at premises 20 14th Street (Square 1035, Lot 810).

**OWNER-
INTERVENOR'S
OPPOSITION TO
APPELLANT'S MOTION
TO REHEAR AND
RECONSIDER**

Appeal No. 19047

INTRODUCTION AND SUMMARY OF ARGUMENT

On April 29, 2016, the Board of Zoning Adjustment (“Board”) issued a Decision and Order (“Order”) explaining that, by unanimous vote, the Board dismissed that portion of the appeal pertaining to the seven covered, private parking spaces. Order at 6. In addition, by a 4-1 vote, the Board denied the appeal as it pertained to the four uncovered, private parking spaces. *Id.* On May 9, 2016, Michael Cushman (“Appellant”) filed a Motion to Rehear and Reconsider (“Motion”).

The Board may rehear an appeal only if an interested party presents new facts that were not known or presented at the time of the Board’s decision. Similarly, the Board may reconsider a decision only if an interested party carries its burden of showing that the Board’s decision was erroneous. Here, Appellant fails to raise any new fact that was not known to the Board prior to its issuance of the Order. Likewise, Appellant fails to explain how the Board’s conclusion was clearly erroneous.¹

¹ In addition, Appellant fails to specify the relief he seeks, a requirement under the Board’s rules of practice and procedure. See 11 DCMR § 3126.4.

Accordingly, RAMIN TAHERI, as owner (“Owner”) of the subject property, presents this Opposition, pursuant to 11 DCMR § 3126.5, and respectfully requests that the Board deny the Motion.

APPLICABLE LEGAL STANDARD

The Board shall not consider a request for rehearing unless “new evidence is submitted that could not reasonably have been presented at the original hearing.” 11 DCMR § 3126.6. Likewise, a request for reconsideration must demonstrate that the original decision was erroneous and must clearly state the relief sought. Id. at 3126.4.

The Board is responsible for interpreting the zoning regulations. See Murray v. District of Columbia Bd of Zoning Adjustment, 572 A.2d 1055 (D.C. 1990); Keefe Co. v. District of Columbia Bd. of Zoning Adjustment, 409 A.2d 624, 625 (D.C. 1979). Any such interpretation is entitled to great deference and will be upheld by a reviewing court unless it is clearly erroneous. See Sisson v. District of Columbia Bd. of Zoning Adjustment, 805 A.2d 964 (D.C. 2002) (citing Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n, 431 A.2d 560, 565 (D.C.1981)); see Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding that an agency’s construction of its own regulations is “controlling” unless “plainly erroneous”).

ARGUMENT

I. APPELLANT FAILS TO PRESENT ANY NEW FACTUAL EVIDENCE

Appellant fails to present any new facts or evidence that could not reasonably have been presented at the time of the hearing, and the Board must therefore deny Appellant’s Motion to Rehear.

The Board will only consider a motion to rehear if an interested party presents “new evidence . . . that could not reasonably have been presented at the original hearing.” 11 DCMR § 3126.6. Here, Appellant does not attempt to introduce any new evidence that was not presented at the time of the hearing. Instead, Appellant argues that, until the issuance of the Order, “it was [not] possible to determine what rationale was used to dismiss the appeal and to discover that the supposed precedent does not exist.” Appellant’s Mot. at 1. This argument fails in two respects. First, the legal reasoning employed by an appellate body cannot, by definition, constitute new factual evidence that would compel that body to repeat its own deliberations. Second, in order to support his argument, Appellant points to case law that was not cited by the Board in its Order. Accordingly, because Appellant failed to carry his burden of presenting new factual evidence, the Board must deny the Motion to Reconsider.

II. APPELLANT FAILS TO EXPLAIN HOW THE BOARD ERRED

Appellant fails to explain how the Board’s conclusion was clearly erroneous. The Board must therefore deny the Motion for Reconsideration.

The Board may grant a request for reconsideration only when an interested party demonstrates that the original decision was erroneous. 11 DCMR § 3126.4. The Zoning Administrator is responsible for interpreting, applying, and enforcing the zoning regulations, and the Board has the ultimate responsibility for interpreting the zoning regulations as part of its review of the Zoning Administrator’s actions. The Board’s interpretation of the zoning regulations, in turn, is “accord[ed] great deference . . . , and [a court] will uphold that construction unless clearly erroneous.” Keefe, 409 A.2d at 625. In this case, as was amply explained in the Order, because the zoning regulations “are

silent as to whether open private parking spaces on an alley lot are a matter-of-right use[.]” the Board exercised its discretion to interpret and give meaning to the regulatory ambiguity by, among other things, relying on analogous provisions and placing weight on the Zoning Administrator’s experience in interpreting and administering the provisions in question. In so doing, the Board heard testimony from the Zoning Administrator, who explained that, in his view, there is no material difference between a private parking space that is covered and a private parking space that is not covered. The Zoning Administrator has routinely interpreted a private parking space on an alley lot to be functionally the same as a private parking space that is located in a garage on an alley lot:

The Code is silent as to whether a private parking space on an alley lot is permitted as a matter of fact. The Code is silent on this. My office has ruled that that situation is a matter of right by virtue of the fact that the closest definition is a private parking garage. And as my counsel noted, this is a very common arrangement. I’ve not been faced to date, perhaps except of this appeal, of that being challenged for that arrangement.

Transcript at 81. The Board, in considering the Zoning Administrator’s interpretation, agreed with his reasoning, stating:

The Zoning Regulations are silent as to whether open private parking spaces on an alley lot are a matter-of-right use. The only distinction between a private garage and a private open parking space is that the former is covered and the latter is not. To the Board, that is a distinction without a difference.

Order at 6. The Board’s interpretation is reasonable, supported by evidence — including testimony from the Zoning Administrator — and is clearly within the discretion of an administrative body responsible for interpreting its own regulations.

Appellant, in his Motion, fails to identify how this interpretation is not reasonable or is otherwise plainly erroneous. Instead, Appellant objects to the Board’s conclusion, parsing the definition of the word “temporary,” referencing several cases that are

inapposite, and characterizing a litany of regulatory provisions as “findings of fact which were ignored.” Mot. at 4-6. In no way, however, does Appellant explain how the Board erred in affirming the Zoning Administrator’s decision or otherwise exceeded its authority to interpret the zoning regulations. Appellant, for example, cites to Case No. 17906 to support his argument that the Board erred. That case, however, is instructive chiefly in that it provides an example of how the Board, as the body responsible for interpreting the zoning regulations, must use its judgment where the regulatory text is silent or unclear. This discretion is an inherent part of the Board’s authority, and the Board’s ultimate conclusion is controlling unless plainly erroneous. See Dupont Circle Citizens Ass’n, 431 A.2d at 565; see also Auer, 519 U.S. at 461. As Chairman Jordan noted in the instant appeal, the Board may “have to fill in a gap for where the regulations are silent. And that's what we typically and regularly do.” Transcript at 82.

Accordingly, because Appellant has failed to carry his burden of demonstrating error in the Board’s decision, the Board must deny the Motion for reconsideration.

CONCLUSION

Appellant fails to raise any new factual evidence that was not known to the Board prior to its issuance of the Order. Likewise, Appellant fails to point to any clear error in the Board’s reasoning and conclusion or to request any specific relief. For the reasons

stated above, Owner respectfully requests that the Board deny Appellant's Motion to Rehear and Reconsider.²

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ramin Taheri', written in a cursive style.

Ramin Taheri
Owner, 20 14th St., NE (Sq. 1035, Lot 810)

² Should the Board grant Appellant's Motion, Owner explicitly reserves the right to address the various other alternative theories under which the Board could have dismissed or denied the instant appeal.

CERTIFICATE OF SERVICE

I hereby certify that on this, the 16th day of May, 2016, a copy of the foregoing Opposition was served, via electronic mail, on:

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Ramin Taheri
Owner, 20 14th St., NE (Sq. 1035, Lot 810)