

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

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

HEARING DATE: January 12, 2016

DECISION DATE: March 1, 2016

ORDER GRANTING APPEAL

This appeal was submitted on October 2, 2015 by Advisory Neighborhood Commission 3C (“ANC”) and the 2926 Neighborhood and Safety Coalition (collectively, the “Appellants”) to challenge a decision of the Zoning Administrator, at the Department of Consumer and Regulatory Affairs (“DCRA”), made August 13, 2015 to issue Permit No. B1511364 (the “Permit”) allowing the installation of a new 10-space parking area at 2926 Porter Street, N.W. (Square 2068, Lot 95) (the “Property”). Following a public hearing, the Board of Zoning Adjustment (“Board”) voted on March 1, 2016 to grant the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated October 14, 2015 the Office of Zoning provided notice of the appeal to the Zoning Administrator at DCRA, with a copy to Adams-Porter, LLC, the owner and developer of the property that is subject of the appeal (“Developer”); the Office of Planning; the Councilmember for Ward 3; the ANC and Single Member District/ANC 3C05. Pursuant to 11 DCMR § 3112.14, on October 19, 2015 the Office of Zoning provided notice of the hearing to the Appellants, the Zoning Administrator, and the owner of the subject property. Notice was also published in the *D.C. Register* on ___, 2015.

Party Status. The parties in this proceeding are the Appellants (the ANC and the 2926 Neighborhood and Safety Coalition, a group of approximately 20 neighbors in the immediate vicinity of the Property), DCRA and the Developer. There were no other requests for party status.

Appellants’ Case. The Appellants challenged the decision of the Zoning Administrator to issue the Permit for a new 10-space parking area, based on the Zoning Administrator’s conclusion that such new parking area was permitted as a matter of right (without one or more variances or other zoning relief). The Appellants asserted that the Zoning Regulations do not provide for matter of right new/increased accessory parking at the nonconforming apartment building in the single-family home R-2 District. The Appellants separately asserted that the Zoning Regulations prohibit the addition of the new parking area.

DCRA. The DCRA argued that the Zoning Administrator properly reviewed and approved the Permit and that the Permit was properly issued because the new 10-space parking area was permitted as a matter of right without a variance or other zoning relief.

Developer. The Developer concurred with the DCRA's arguments.

ANC Report. By resolutions adopted at public meetings on April 21, 2014 and September 21, 2015, the ANC expressed its opposition to the new 10-space parking area at the Property. Because the ANC is one of the Appellants, no separate ANC report was submitted beyond the filings and testimony of the Appellants.

Certificate of Occupancy. After filing the appeal, the Appellants learned that a newly issued Certificate of Occupancy No. CO1503112 also referenced the 10 new parking spaces at the Property, and the Appellants subsequently requested that the Certificate of Occupancy be subject to the appeal as a matter of completeness. In the DCRA's pre-hearing submission, the DCRA acknowledged that "there is no need to incorporate the CoFO [Certificate of Occupancy] because if the Board sustains this Appeal, the CoFO must be revised to conform to the Board's ruling." (Exhibit 17). At the public hearing, the Appellants stipulated that they were only challenging the Certificate of Occupancy's reference to the new 10-space parking, and that the Appellants agreed with the DCRA's position that the Certificate of Occupancy would be revised to conform to any Board ruling granting the appeal of the Permit itself. (Hearing Transcript of January 12, 2016 ("Tr."), p. 44). Therefore, the Board need not address the Certificate of Occupancy as a separate matter given that the appeal as it relates to the Permit is granted by this Order and the Certificate of Occupancy shall be revised accordingly.

Motions to Dismiss. The Developer labeled its pre-hearing submission as a motion to dismiss the appeal, and the DCRA joined in such motion in the DCRA's pre-hearing submission. However, at the hearing, the Board indicated that the motion to dismiss consisted merely of arguments against the appeal on its merits and that therefore the Board would hear the appeal and rule on it rather than ruling on the motion to dismiss. There were no objections by the DCRA or the Developer in this regard, and no need for the Board to rule separately on the motion to dismiss in addition to ruling on the appeal itself.

FINDINGS OF FACT

1. The Property that is subject of this appeal is located at 2926 Porter Street, N.W. (Square 2068, Lot 95). The Property was constructed in 1923 and purchased in 2012 by the Developer. The Property has undergone extensive interior and exterior redevelopment since purchase by the Developer. The addition of a 10-space parking area as part of the redevelopment is the subject of this appeal.
2. The Property is zoned R-2, but currently contains a multi-family 23-unit apartment building. It is surrounded on all four sides by single-family dwellings and is located within the Cleveland Park Historic District.

3. The Property is nonconforming because it is used as a multi-family apartment building in the R-2 district. The Property is also nonconforming because its rear yard does not meet the minimum size requirements in the Zoning Regulations, specifically not meeting the minimum 20-foot depth requirement set forth in § 404 for structures in R-2 districts. The Appellants argued that a third relevant nonconformity exists at the Property because the Property has had three car parking spaces in its eastern side yard; however, the Appellants have not challenged the continuation of such pre-existing three parking spaces and they are not the subject of this appeal.
4. The south and southwest sides of the Property abut an alley. Prior to the redevelopment undertaken by the Developer, the land on these south and southwest sides of the Property was a sunken yard several feet below the level of the alley, consisting solely of green space containing grass, sizable trees and shrubs, all behind a fence separating the Property from the alley. As part of its redevelopment, the Developer removed 100% of the prior green space, removed the fence, and raised the level of the land on the south and southwest sides of the building by several feet in order to create 10 new parking spaces on a newly-poured gravel surface.
5. The Developer began construction at the Property in 2013, but did not apply for a permit for the addition of the new 10-space parking area until August 12, 2015. The Permit was issued by the DCRA per the instructions of the Zoning Administrator on the following day, August 13, 2015.
6. The Appellants had voiced their unanimous objections to the new 10-space parking at the Property due to alleged conflicts with the Zoning Regulations and concerns surrounding safety, traffic, light/noise, snow and garbage removal, ingress/egress, and other reasons. The ANC then unanimously passed a resolution on April 21, 2014 objecting to new parking at the Property and then reiterated its objection unanimously on September 21, 2015. Appellants filed this appeal on October 2, 2015 after learning of the Permit to allow the new 10-space parking area.
7. The Property is less than one block from the Cleveland Park Red Line Metro Rail Station, less than one block from multiple major Metro Bus route stops, and less than two blocks from a large Capital Bikeshare station.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to “hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal” made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.). *See also* 11 DCMR § 3100.2.) Appeals to the Board “may be taken by any person aggrieved, or organization authorized to represent that person, ... affected by any decision of an administrative officer...granting or withholding a certificate of occupancy ... based in whole or part upon any zoning regulations or map” adopted pursuant to the Zoning Act. (D.C. Official Code § 6- 641.07(f) (2008 Repl.). *See also* 11 DCMR § 3200.2.) In an appeal, the Board may “reverse or affirm, wholly or partly; or

may modify the order, requirement, decision, determination, or refusal appealed from; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken.” (11 DCMR § 3100.4.)

In this case, the Appellants argued that the Zoning Administrator exceeded his authority and erred in approving the Permit and the establishment of a new 10-space parking area for an apartment building located in an R-2 single-family dwelling district, particularly in light of multiple nonconformities already existing at the Property. The Appellants contended that the Permit should have been denied by the Zoning Administrator and that the installation of a new parking area at the Property requires one or more use variances, area variances and/or other zoning relief (none of which have been sought or granted). The DCRA and Developer argued that the addition of a new 10-space parking area at the nonconforming Property was allowed as a matter of right under the Zoning Regulations and that the Zoning Administrator therefore did not err in issuing the Permit.

The Board concludes that there is no basis in the Zoning Regulations for the addition of the new 10-space parking area as a matter of right, under the facts and circumstances relevant to the Property. As a result, the Board concurs with the Appellants and concludes that the Permit should have been denied. The Appellants also argued that specific provisions in the Zoning Regulations relating to nonconformities specifically prohibit the addition of the new parking area at the Property under the facts and circumstances, and the Board also concurs with the Appellants in this regard as a second independent basis for concluding that the Permit should have been denied. The position taken by the DCRA and Developer conflicts with the plain language, purpose, intent and structure of the Zoning Regulations and they have provided no binding authority justifying the issuance of the Permit either in the Zoning Regulations or applicable case law.

Matter of Right Uses and Matter of Right Accessory Uses in R-2 Districts

The Board finds no explicit reference in the Zoning Regulations to apartment buildings located in R-2 districts or parking at apartment buildings located in R-2 districts. To the contrary, the Zoning Regulations do explicitly reference single-family homes in R-2 districts (§§ 300.1 and 300.3(c)) and the Zoning Regulations also explicitly reference parking for such single-family homes in R-2 districts (§§ 202.7 and 2101.1). There being no explicit reference to apartment buildings in R-2 districts or parking at apartment buildings in R-2 districts, the DCRA and Developer argued that other provisions of the Zoning Regulations should be interpreted beyond their explicit language. The DCRA and Developer contended that the new 10-space parking area at the Property should be allowed as a matter of right accessory use to the nonconforming principal use of an apartment building.

There are two applicable lists of “matter of right” uses for properties in R-2 districts (§§ 300.3 and 201). Neither of those lists references apartment buildings or parking at apartment buildings as uses which are permitted as a matter of right.

Regarding accessory uses, the Appellants argued that the Zoning Regulations do not provide for new unlimited matter of right accessory parking at a nonconforming apartment building in an R-2 district. The DCRA and the Developer principally referenced three sections of the Zoning Regulations that the DCRA and Developer contended should be construed to allow new unlimited matter of right accessory parking at a nonconforming apartment building in an R-2 district: § 301.1, § 2101.3 and § 300.2. The Board concurs with the Appellants and does not interpret any of the Zoning Regulations cited by the DCRA and Developer as allowing the new 10-space parking area at the Property, absent one or more variances and/or other zoning relief.

§ 301.1, titled “Accessory Uses and Buildings (R-2)”, is the provision regarding accessory uses in R-2 districts. It states that “The following accessory uses or accessory buildings incidental to uses permitted for R-2 Districts in Sections 300 through 319 shall be permitted in R-2 Districts:” and then lists (a) any accessory use permitted in R-1 districts under § 202; (b) car-sharing spaces, defined as spaces for vehicles available to multiple users who are required to join a membership organization for periodic paid use of the car (e.g., Zipcar or Car2Go); and (c) “Other accessory uses, buildings, or structures customarily incidental to the uses permitted in R-2 districts under this chapter” (meaning Chapter 3). (11 DCMR §§ 301.1(a), 301.1(b) and 301.1(c))

As quoted above, the language applicable to all of § 301.1 and its subsections specifically refers to uses “incidental to uses permitted for R-2 Districts in Sections 300-319”. The Board concludes that an apartment building such as the Property is not a use permitted for R-2 districts in §§ 300-319. The Property, as a 23-unit multi-family apartment building, is only allowed to exist in the R-2 district because it is a nonconforming use allowed under § 2000, having been constructed prior to 1958. Of course, § 2000 is not within §§ 300-319 as required by the language in § 301.1, nor are there any provisions within §§ 300-319 which refer to § 2000 nonconforming uses. As a result, the Board finds no basis under any part of § 301 to affirm the issuance of the Permit pursuant to such section. Furthermore, § 301.1(c) refers to uses “incidental to the uses permitted in R-2 districts under this chapter”. The words “under this chapter” mean Chapter 3 under 11 DCMR. Again, an apartment building such as the Property is not a use permitted in an R-2 district under Chapter 3. The Property is allowed to exist in the R-2 district under § 2000, which is a part of Chapter 20, not Chapter 3. Both the Developer’s pre-hearing submission and the DCRA’s pre-hearing submission omitted the crucial language described above when quoting and paraphrasing from § 301.1, and each failed to provide any relevant rebuttal to questioning on these items at the hearing. The Board is obligated to assess the entire § 301 provision, not just parts of it selectively taken out of context.

§ 2101.3 is the next section cited by the DCRA and the Developer in support of their assertion that the addition of the 10-space parking area is permitted as a matter of right at the Property. It states: “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; provided that each case complies with all other applicable provisions of this chapter and chapter 23.” (11 DCMR § 2101.3) There is a significant difference between not prohibiting something and explicitly creating or permitting it as a matter of right. The Appellants did not argue that § 2101.3 prohibits the proposed new accessory parking at the Property. Rather, the Appellants argued and the Board concurs that there is nothing in § 2101.3 which affirmatively creates a basis to add the new 10-space parking area as a matter of right at

this nonconforming apartment building located in an R-2 district. If § 2101.3 were intended to create unfettered matter of right accessory parking even for the circumstances that are presented at the Property, § 2101.3 would have included explicit language creating that unfettered right rather than the actual language that appears.

Importantly, when the word “section” is used in § 2101.3, it is only referring to § 2101 and its subsections. Therefore, § 2101.3 must not be interpreted to mean that nothing in all of the Zoning Regulations prohibits additional 10-space accessory parking at the Property. The Developer’s own paid expert consultant admitted at the hearing that other sections of the Zoning Regulations could apply to override the very limited language of § 2101.3.¹ As noted in this Order, the Appellants identified other sections of the Zoning Regulations that prohibit the new 10-space parking, and they are addressed below.

By citing § 2101.3 as the basis for creating new additional matter of right accessory parking at the Property, the DCRA and Developer effectively suggest that the Board both ignore words that actually do appear in § 2101.3 and add other words which actually do not appear in § 2101.3. Both this Board and the Zoning Commission have long held that zoning interpretations must be based on the plain language of the Zoning Regulations (*See, e.g.*, Appeal No. 14384 of the North Cleveland Park Citizens’ Association (October 10, 1986); PUD Order No. 03-05C (January 12, 2004)). The Board therefore concludes that § 2101.3 does not itself provide a basis for adding a new 10-space parking area at the Property as a matter of right, particularly given the Board’s assessment of the other more directly applicable Zoning Regulations referenced in this Order.

§ 300.2 is the last principal section of the Zoning Regulations listed by the DCRA and Developer. However, the reference to § 300.2 effectively repeats the same unpersuasive argument they make as it relates to § 2101.3, while also ignoring the other directly relevant provisions noted in this Order. § 300.2 states: “Except as provided in chapters 21 through 25 of this title, in an R-2 district, no building or premises shall be used and no building shall be erected or altered that is arranged, intended, or designed to be used except for one or more of the uses listed in Sections 301-319.” (11 DCMR § 300.2) The DCRA and Developer focused only on the first part of that sentence because it would refer back to § 2101.3, and because the other sections referenced (§ 301-319) clearly do not identify apartment buildings or parking at apartment buildings in R-2 districts. As described above, neither § 2101.3 nor anything else in Chapters 21 through Chapter 25 establish the addition of new accessory parking as a matter of right at a nonconforming apartment building in an R-2 district. Furthermore, the immediately following sentence (§ 300.3) is clear in listing “matter of right” uses in R-2 districts, and the immediately following section (§ 301) lists accessory uses permitted in R-2 districts – neither permits the new 10-space parking at the Property for reasons discussed herein. In summary, § 300.2 is merely a general statement about uses that cross-references other provisions in the Zoning Regulations, none of which contemplate or permit apartment buildings in R-2 districts or unlimited matter of right accessory parking at nonconforming apartment buildings in R-2 districts.

¹ When asked by the Appellants’ representative at the hearing whether it would be possible for a section other than §2101.3 to prohibit the new parking at the Property, the Developer’s consultant responded that “It would be, but I’m not familiar that there is any such section.” The Appellants’ representative then reminded the Board that such other sections had been previously identified by the Appellants. (Tr., p. 73)

Based on the foregoing, the Board concludes that the addition of the 10-space parking area at the Property is not permitted as a matter of right and the Permit therefore should have been denied. In order for the Board to grant this appeal, it was not necessary for the Appellants to also show that the new parking spaces were directly prohibited by the Zoning Regulations. Nevertheless, the Board concurs with the Appellants that the provisions of the Zoning Regulations addressing nonconformities do in fact directly prohibit the addition of the new 10-space parking area, separate from the arguments outlined above.

Nonconformities at the Property

First, the use of the building on the Property is nonconforming to the R-2 district because it is a multi-family apartment building operating in an R-2 district. Second, the Appellants highlighted the fact (shown in the Property map) that the rear yard at the Property does not meet the minimum size requirements of the Zoning Regulations. The rear yard specifically does not meet the minimum 20-foot depth requirement in § 404 for buildings in R-2 districts. The Appellants argued, and the Board agrees, that the use of a portion of the land at the Property to house the rear portion of the apartment building rather than a compliant 20-foot deep rear yard represents a nonconforming use of that land at the Property. Third, the Appellants contended that an additional nonconforming use of land at the Property relates to the use of the eastern side yard for parking three cars. Although the Appellants did not challenge the continued use of the eastern side yard for parking those three cars, they argued that for reasons described in this Order, accessory parking for three cars at an apartment building in an R-2 district is not permitted as a matter of right. Rather, the parking for three cars on the eastern side of the building has been allowed to continue under § 2000.4 as a nonconforming use of the land for parking which would not otherwise be permitted under the current Zoning Regulations absent one or more variances and/or other zoning relief. In summary, the Appellants argued that there exists one nonconforming use of a structure at the Property and two nonconforming uses of land at the Property.

The Zoning Regulations are explicit regarding the treatment of nonconformities. Although existing nonconforming uses are allowed to continue pursuant to § 2000.4, the Zoning Regulations are clear with respect to modifications to nonconforming uses. § 2000.2 states that “It is the intent of this title that nonconformities may not be enlarged upon, expanded, or extended, nor may they be used as a basis for adding other structures or uses prohibited elsewhere in the same district.” § 2000.3 adds that “It is necessary and consistent with the establishment of the separate districts under this title that all uses and structures incompatible with permitted uses or structures shall be regulated strictly and permitted only under rigid controls.” § 2000.6 further states that “A nonconforming use of land or of land with structures incidental to the use of the land shall neither be extended in land area nor changed to any use except a use permitted in the district in which the property is located.”

Regarding the nonconforming use of the Property’s land as it relates to its rear yard depth, the installation of 10 new parking spaces at a heightened grade as part of the Property’s redevelopment represents a change/enlargement/expansion/extension of the nonconformity of the shallow yard. The Appellants stated and showed that, prior to the redevelopment of the Property which led to the Permit, approximately half of the otherwise required 20-foot rear yard depth was

being used for significant green space sunken several feet below alley level, with the other half being used to house the rear portion of the apartment building. Following the redevelopment, the yard previously used as green space has been raised up several feet from its prior sunken position and the new 10-car parking area has been added where the prior green space existed. As a result, if the Permit for the new parking is sustained, the nonconforming use of the land in the rear yard of the Property will be changed/enlarged/expanded/extended from one nonconforming use to two nonconforming uses that are not permitted as a matter of right in an R-2 district (i.e., the original use of the land for housing a nonconforming apartment building, plus the new proposed use of the land for 10-space parking at an apartment building in an R-2 district without variances and/or other zoning relief). Although the nonconforming use of a portion of the rear yard for housing a portion of the apartment building is allowed to continue as a nonconforming use of the land pursuant to § 2000, changing the nonconforming use of the rear yard to also house a new 10-space parking area is prohibited by §§ 2000.2, 2000.3 and 2000.6.

Regarding the existing use of the Property's land for parking three cars on the eastern side of the building, an addition of another 10-space parking area on the land is an enlargement/expansion/extension of such nonconforming use of the portion of the land which has until now been used for parking only three cars. Although the parking for three cars is allowed to continue as a nonconforming use of the land pursuant to § 2000, changing the use of the land to provide parking for a total of 13 cars is prohibited by §§ 2000.2, 2000.3 and 2000.6.

Rules of Interpretation and Additional Considerations

None of the DCRA, the Developer nor the Appellants provided any binding legal authority which presents the same facts relevant to this appeal.² The parties and the Board have relied on the language in the various sections of the Zoning Regulations described herein. Although the Board does not believe that there is any ambiguity in such sections of the Zoning Regulations, if there were any ambiguity, confusion, inconsistency or need for interpretation, all of the rules of interpretation set forth in the Zoning Regulations support a determination in favor of the Appellants and the conclusion that the Permit should have been denied.

§ 101.2 states that "The regulations in this title and the Zoning Maps are designed with consideration of the: (a) Character of the respective districts; (b) Suitability of each district for the uses permitted in each district under this title; and (c) Encouragement of the stability of districts and of land values in those districts." Similarly, § 300.1 adds that "The R-2 District consists of those areas that have been developed with one-family, semi-detached dwellings, and is designed to protect them from invasion by denser types of residential development." A new 10-space parking area at the Property would violate all three tenets listed in § 101.2, and the explicit intent of the R-2 district set out in § 300.1.

§ 101.1 adds that "In their interpretation and application, the provisions of this title shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to: (a) Provide adequate light and air; (b) Prevent undue concentration of population and the overcrowding of land; and (c) Provide

² When asked by the Board if there were other cases presenting the same facts as this appeal, the Zoning Administrator responded, "I don't recall a specific case offhand." (Tr., p. 58)

distribution of population, business and industry, and use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and cultural opportunities; and that will tend to further economy and efficiency in the supply of public services.” The Board concludes that the proposed removal of significant green space in favor of 10 new parking spaces crowded into an already shallow yard abutting a small alley is not consistent with § 101.1.

§§ 2000.2 and 2000.3. As noted above, the interpretative guidelines in the Zoning Regulations regarding nonconformities also must be read in support of the appeal. In particular, the guidance provided by §§ 2000.2 and 2000.3 lead the Board to conclude that the nonconforming apartment building and the nonconforming uses of land at the Property are required to be regulated strictly and limited to their pre-existing uses absent additional zoning relief, which has not been sought by the Developer.

§ 202.7. Although the Board is not deciding in this Order whether the Zoning Regulations provide for a specific maximum number of accessory parking spaces at buildings in R-2 districts generally, the Appellants noted that § 202.7 does place at least one specific limit. § 202.7 applies to R-2 districts by virtue of the operation of § 301.1(a), and § 202.7 clearly limits parking to one space or two car-sharing spaces, plus the amount of parking required by § 2101.1 (generally, one parking space). It is a parking maximum applicable to certain single-family homes in R-2 districts. The Board concludes that it would be an unreasonable interpretation of the Zoning Regulations to be more permissive in relation to the addition of parking spaces at the Property, which is not a conforming use in an R-2 district, when compared to the restriction placed on single-family homes which actually are conforming uses in the R-2 districts. At the hearing, the Zoning Administrator admitted his confusion with respect to § 202.7.³ Similarly, the DCRA’s pre-hearing submission, the Developer’s pre-hearing submission, and the Developer’s consultant’s pre-hearing affidavit all erroneously ignored the existence of § 202.7 and/or failed to understand its relevance to the issues under appeal.

§ 214.1. The DCRA’s pre-hearing submission also referred to § 214.1 (and § 302.1 in order to apply §214.1 to an R-2 district), but those sections of the Zoning Regulations are not relevant to the issues at hand. They relate to special exceptions approved by the Board for parking on a lot other than a lot on which a principal R-1 use is permitted. Here, the Property is not being used for a permitted principal R-1 use, the proposed parking is not on a separate lot, and no special exception has been requested by the Developer or approved by the Board.

As demonstrated by the significant crowding that would be created by the new 10-space parking and the unanimous opposition to the new 10-space parking area from surrounding neighbors and the ANC on safety, nuisance and other grounds, the effects of the new 10-space parking would be deleterious to the entire neighborhood. While the Property is entitled to maintain its three existing parking spaces, the Board concludes that it is not the intent of the single-family home R-2 district in which the Property resides to allow for this “grandfathered” nonconforming

³ When the Zoning Administrator was asked by the Board at the hearing whether the limit on single-family home parking included in § 202.7 and applicable to R-2 districts by the operation of § 301.1(a) could be sending a message that there shouldn’t be large parking areas in R-2 districts, the Zoning Administrator did not deny such interpretation. He said, “If it is sending a message it’s an unclear message to me.” (Tr., p. 59)

apartment building to quadruple its total number of parking spaces as a matter of right nearly 100 years after its construction. As the ANC noted in its testimony at the hearing, the Developer could apply for a variance or other zoning relief if it seeks to increase parking at the Property,⁴ though the Board has made no determination as to whether any such relief should be approved and the Developer would need to satisfy the significant burdens applicable to any such relief in further public proceedings.

The Developer provided evidence and testimony at the hearing that other homes and apartment buildings in the area of the Property contain parking in or near their rear yards. However, such evidence and testimony are not relevant to the issues in the appeal. The parking at such other properties in the area is not in question, and the Developer did not identify any authority sustaining any similar expansion of existing parking at a nonconforming apartment building with a nonconforming yard in an R-2 district. Importantly, the Property itself already contains three parking spaces, those three parking spaces have not been challenged by the Appellants, and those three parking spaces are not being disallowed by the Board pursuant to this Order. As a result, following this decision of the Board, the Developer's Property will be in no different position than the other properties which the Developer has identified.

The Developer engaged a paid expert consultant associated with the same law firm representing the Developer, but the consultant's testimony was not convincing. The consultant's pre-hearing written affidavit contained factual errors in at least two respects by stating that there was only one nonconforming use of the Property (overlooking the non-compliant rear yard and the three existing eastern parking spaces) and by stating that there are no parking maximums in the Zoning Regulations (overlooking the maximum imposed by § 202.7, which is directly relevant to this appeal as noted above). The consultant's cursory affidavit analysis was otherwise not persuasive for the reasons stated in this Order.

Oral statements made by the Developer's consultant at the hearing in fact supported the Appellants arguments in two distinct ways: first, the consultant acknowledged that the provisions of the Zoning Regulations regarding required parking (§ 2101) must be read together with the provisions of the Zoning Regulations regarding accessory uses in R-2 districts (§ 301);⁵ and second, the consultant agreed that provisions of the Zoning Regulations could in fact prohibit the establishment of an unlimited number of accessory parking spaces at a property despite the language in § 2101.3.⁶ In addition, at the hearing, a Board member presented the consultant with a hypothetical set of circumstances as they might relate to parking at the Property. The consultant was asked whether new parking might be required if an addition were proposed to a nonconforming apartment building in an R-2 district. (Tr., p. 75-77) The Board notes that any such hypothetical addition generally would be subject to a variance proceeding or other zoning relief (*see* § 2000), and no variance or other zoning relief has been sought in this case. As a result, the hypothetical itself is not particularly instructive because it assumes away the precise reason for this appeal. Furthermore, no additional parking is required for a building constructed prior to 1958 (such as the Property) unless an addition is added which increases the intensity of

⁴ Tr., p. 80

⁵ "You have to comply with all of those requirements as well as the requirements of Section 301 for accessory parking spaces on a lot which has the principle [sic] use on it." (Tr., p. 72)

⁶ See footnote 1 above

the use of the building by more than 25% of the aggregate (§ 2100.7), and even if such increase in intensity is above 25%, the only new required parking spaces relate to the addition and not the entire building (§ 2100.6).

The consultant and the DCRA and Developer repeatedly argued in general terms that accessory parking is allowed at the Property, without specifically rebutting the Appellants' arguments. The Appellants and Board agree that some accessory parking is allowed at the Property: the three existing accessory parking spaces on the eastern side of the building which are not being challenged. However, the consultant testified that the addition of an unlimited amount of additional accessory parking spaces should be allowed as a matter of right, even at nonconforming properties exhibiting the characteristics of this Property. The Board finds that conclusion erroneous for the reasons described in this Order, and the consultant's statements contrary to the intent and plain language of the Zoning Regulations. Under the consultant's logic and testimony, if the Board were to sustain the Permit and deny this appeal, the Board would be establishing a precedent for the dramatic increase of matter-of-right parking and density at nonconforming properties across the District of Columbia. The Board does not agree that the Zoning Regulations should be universally expanded in such manner.

The Developer also argued that apartment residents at the Property would be affected if the appeal were granted, but the Board finds this argument unpersuasive and not germane to the appeal. First, the Developer had the opportunity to apply for a permit for increased parking at the Property as early as 2012 or 2013 when they purchased the Property, years before they completed their redevelopment project and marketed the apartments. The Developer knew that the neighbors and ANC opposed the increased parking and would likely challenge any related permits, but the Developer nevertheless waited until August 12, 2015 to apply for the parking permit. Secondly, the Developer knew that the Permit was subject to appeal within 60 days of its issuance. Again, the Developer could have applied for the parking permit and either allowed the 60 days to pass or this appeal to be resolved before marketing any of the apartments. Third, any residents of the building who had rights to a parking space prior to the redevelopment could have been offered/sold rights to the same parking space after the redevelopment. Since there were three parking spaces before the redevelopment and there are three unchallenged parking spaces after the redevelopment, the Developer could have ensured that any prior resident who had a parking space and was staying in the apartment building could keep their parking space. In light of the foregoing, the Appellants and the Board are not responsible for the marketing strategies elected by the Developer, the promises made by the Developer to the residents are not a factor in the analysis of whether the new parking is permitted, and any consequences of mistaken promises made by the Developer to the residents would need to be resolved solely between the Developer and such residents.

The Board has accorded "great weight" to issues and concerns raised by the affected ANC (D.C. Official Code § 1-309.10(d)). The Board credits the ANC's two separate unanimous resolutions on the matters addressed by the appeal, the ANC's written submissions to the Board as an Appellant, and the ANC's testimony at the hearing as an Appellant. For the reasons discussed herein, in granting this appeal, the Board concurs with the ANC that the Permit should not have been issued and that the new 10-space parking area should not have been approved by the Zoning Administrator.

Independent Bases for Granting Appeal

The Appellants identified three separate independent arguments discussed above and listed below in contending that the Permit for the new 10-space parking area was issued in error. The Board concurs with each of the three arguments raised by the Appellants. Nevertheless, in order to grant the appeal, it was only necessary for the Board to concur with any one of the following bases for reversing the decision of the Zoning Administrator. It was not necessary for the Board to concur with the Appellants on each of the three arguments discussed above.

1. The addition of 10 new parking spaces is not allowed as a matter of right for this Property, which is a nonconforming multi-family apartment building located in an R-2 district. Rather, one or more variances or other zoning relief would be required, and none have been sought.
2. The addition of 10 new parking spaces at this Property is prohibited without one or more variances or other zoning relief, because the addition of the 10 spaces is a change/enlargement/expansion/extension of one or more nonconforming uses of the land at the Property.
3. To the extent that the DCRA or Developer believes there is any novelty to the facts presented to the Board, or any doubt as to the interpretation of any section of the Zoning Regulations relating to this Property or the Permit, the specific rules of interpretation which are directly relevant to this appeal (§§ 101.1, 101.2, 300.1, 2000.2 and 2000.3) must be applied in favor of strict regulation of the Property and in favor of the appeal. Similarly, absent one or more variances or other zoning relief, the Zoning Regulations should not be interpreted to allow an increase of parking at this nonconforming apartment Property in the R-2 district above the amount of parking that would be allowed for a neighboring, conforming single-family home property. Lastly, three existing unchallenged parking spaces at the Property and established variance/zoning relief application procedures already provide accessory parking and a process for requesting modifications to it without overriding the plain meaning and best interpretation of the Zoning Regulations.

Based on the findings of fact and conclusions of law, the Board concludes that the Appellants have satisfied the burden of proof with respect to the claim of error in the decision of the Zoning Administrator that the new 10-space parking area is allowed as a matter of right at the Property. For the reasons discussed above, it is therefore **ORDERED** that the Zoning Administrator's determination is **REVERSED** and that that appeal is **GRANTED**.

VOTE: ☐

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

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

ATTESTED BY: _____

FINAL DATE OF ORDER: ☐

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

CERTIFICATE OF SERVICE

Re: BZA Appeal No. 19155

I hereby certify that a copy of the Appellants' Proposed Findings of Fact and Conclusions of Law was filed electronically with the Office of Zoning and was sent this 22nd day of February, 2016, to the following:

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