

Appeal No. 19155 of Advisory Neighborhood Commission 3C and 2926 Neighborhood and Safety Coalition, pursuant to 11 DCMR Section 3100 and 3101, from a decision of the Zoning Administrator, dated August 13, 2015, to issue a building permit (No. B1511364) for a 10-space accessory parking area at the rear of the apartment building located in the R-2 District at 2926 Porter Street, NW (Square 2068, Lot 95).

HEARING DATE: January 12, 2016

DECISION DATE: March 1, 2016

ORDER DENYING APPEAL

INTRODUCTION

Advisory Neighborhood Commission 3C and the 2926 Neighborhood and Safety Coalition filed this appeal with the Board of Zoning Adjustment (“Board”) on October 2, 2015. The appeal challenges the decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs (“DCRA”) to approve the issuance of a building permit for the addition of ten accessory parking spaces in the rear yard of the 23-unit condominium apartment building at 2926 Porter Street, NW (the “Property”).

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing.

Party Status. ANC 3C and the 2926 Neighborhood and Safety Coalition (the “Appellants”) and Adams-Porter LLC, owner of the Property (the “Property Owner”), were automatically parties in this proceeding. There were no other requests for party status.

Appellants’ Case. The Appellants’ testimony was given by Glen Zwicker, representing the 2926 Neighborhood and Safety Coalition, and by Nancy MacWood of ANC 3C. The Appellants’ assertions can be summarized as follows:

- a. The Zoning Regulations prohibit additional accessory parking for the existing condominium apartment house, because it is a nonconforming use in the R-2 District, built before the current Zoning Regulations were adopted in 1958.
- b. Because the Schedule of Requirements for Parking Spaces in 11 DCMR, Section 2101 does not list a minimum required number of parking spaces for an apartment house in the R-2 Zone, additional parking spaces are prohibited.
- c. Because the existing pre-1958 apartment house use of the Property is a nonconforming use, then based upon 11 DCMR, Sections 2000.2, 2000.3, and 2000.6, changing the use of the Property from a nonconforming apartment house with three parking spaces to a nonconforming apartment house with 13 parking spaces represents a prohibited enlargement /expansion/extension, and a prohibited change from one nonconforming use to another.

- d. Matter-of-right accessory parking in the R-2 zone is limited by 11 DCMR, Sections 301.1(b) and 202.7 to one parking space plus two car-sharing spaces, but only for a one-family detached dwelling. Because these sections do not mention parking for an apartment house in the R-2 zone as a permitted accessory use, the accessory parking that is the subject of this appeal is prohibited.
- e. The Zoning Administrator incorrectly relied upon 11 DCMR, Section 2101.3, which allows “the establishment of parking spaces accessory to buildings for which no required parking spaces are specified in Section 2101.1”, claiming that Section 2101.3 only relates to required parking spaces.

DCRA. The Department of Consumer and Regulatory Affairs appeared through Matthew LeGrant, Zoning Administrator and Maximilian Tondro, Assistant General Counsel of DCRA. They testified that:

- a. The parking at issue is not an expansion of the nonconforming apartment house use, but rather is a permitted accessory use in the R-2 District under 11 DCMR Sections 300.2 and 301.1(c). The fact that the apartment building is a nonconforming use is not germane to the parking issue.
- b. The ten accessory parking spaces do not alter the nonconforming rear yard, and are not prohibited in the rear yard.
- c. 11 DCMR Section 301.1(b) applies only to car-sharing spaces, which are not the same as accessory parking spaces to serve the principal use on the property. Section 202.7 deals only with one-family dwellings, and does not apply to this situation.
- d. 11 DCMR Section 300.2 states that the parking regulations in Chapter 21 apply in the R-2 District, and 11 DCMR Sections 2101.2 and 2101.3 therefore also apply in the R-2 District. The list of parking requirements in Section 2101.1 are minimums, and not maximums. Sections 2101.2 and 2101.3 allow a property owner to provide more parking than the minimum required in Section 2101.1, even if no parking is required at all in Section 2101.1, provided that the parking is not located between a building restriction line and the front lot line, or between the façade of the building and the street line, as provided in Section 2116.4.
- e. The Office of the Zoning Administrator has previously approved additional accessory parking for other nonconforming uses as “a very common occurrence”.

Property Owner. The Property Owner testified through counsel, and through Steven Sher, who was accepted by the Board as an expert witness in the application of the Zoning Regulations in the District of Columbia, and made the following points:

- a. There is only one nonconforming use on the Property, and that is the condominium apartment house use. The accessory parking is not a nonconforming use of the Property. 11 DCMR Section 2002 allows a nonconforming use to remain in place in whatever zone it is located, and to continue to exist forever. The parking spaces at issue are accessory to that use, and accessory parking is permitted for this nonconforming use as a matter of right.

- b. The addition of 10 accessory parking spaces on the site is not an expansion or enlargement of the nonconforming apartment house use, nor has the addition of 10 on-site accessory parking spaces changed the nonconforming apartment house use to another nonconforming use.
- c. 11 DCMR, Sections 301.1(c) and 300.2 allow accessory parking as a matter of right in the R-2 District. 11 DCMR, Section 2101.1 sets forth the minimum amount of required accessory parking. Section 2101.3 allows a property owner to provide accessory parking, even if no parking is required for a particular use, and even for a nonconforming use. 11 DCMR, Sections 300.2, 301.1(c) and 2101.3, when read together, show that accessory parking is permitted as a matter of right in the R-2 district for any use, and that parking spaces can be provided even when they are not required.
- d. The Zoning Regulations do not impose a maximum limitation on the number of accessory parking spaces for any use in the R-2 zone.
- e. The provision of the ten additional accessory parking spaces in the rear and side yard of the building on the Property is consistent with the Zoning Regulations.
- f. The Appellants' interpretations are unfounded and without merit, and ignore the plain meaning of the regulations. The Appellants' interpretation is contrary to what the regulations provide. No fair reading of the plain language of the Zoning Regulations supports the Appellants' position. They cite no case law, no prior interpretations, and no other examples or precedent to support their view of the regulations. They have not carried their burden of proof to demonstrate that the Zoning Administrator's interpretation was erroneous.
- g. There are a number of other examples of apartment houses in the R-2 District in this neighborhood with accessory parking for multiple vehicles. There is no record in the Office of Zoning database for any type of zoning relief from the Board to allow the accessory parking for those apartment houses.
- h. The Property Owner purchased this apartment house through the Tenant Opportunity to Purchase Act (TOPA), and gave the tenants the opportunity to purchase their units in the condominium conversion, which many of them did. As of the filing date of this appeal, half of the parking spaces under consideration in this appeal were already sold to condominium unit owners in the building.

FINDINGS OF FACT

- 1. The Property which is the subject of this Appeal includes a nonconforming 23-unit condominium apartment building, with 13 accessory parking spaces, 10 of which are the subject of this Appeal.
- 2. On August 13, 2015, the Zoning Administrator approved the issuance of Building Permit No. B 1511364 ("Permit") for the 10 accessory parking spaces in the rear yard of the

Property. The Property also has three previously-existing accessory parking spaces in the side yard. The accessory parking spaces are shown on Ex. 16C of the record.

3. On October 2, 2015, the 2926 Neighborhood and Safety Coalition and ANC 3C (the “Appellants”) filed this appeal challenging the approval of the Permit.
4. On January 6, 2016, the Property Owner filed a Motion to Dismiss, for failure to state a claim upon which relief can be granted. (Ex. 16 and 16A through 16E). At the public hearing, counsel for the Property Owner asked that that pleading also be treated as a Request to Deny the Appeal. The Property Owner’s pleading also included several exhibits, including photographs showing examples of a number of other nonconforming apartment houses (Ex. 16B), as well as single family homes in the square adjacent to the Property (Ex. 16A1 through 16A3), that have accessory parking for multiple vehicles, in apparent violation of the Appellants’ reading of Sections 301.1(b) and 202.7 of the Zoning Regulations. The photographs at Exhibit 16A1, pages 9 and 10, show the rear of the property that matches the 3513 30th Street, NW address on the witness card (Ex. 19) of Mr. Zwicker, who is one of the two Appellant representatives in this case. Those photos show that the entire width and depth of that rear yard is devoted to multiple accessory parking spaces, which would violate the Appellants’ interpretation of the Zoning Regulations.
5. On January 11, 2016, DCRA filed its Prehearing Statement (Ex. 17).
6. The Board held a public hearing on this Appeal on January 12, 2016
7. Contrary to the Appellant’s assertions, the Board finds that neither Section 2002.2 nor Section 2002.6 prohibits the matter of right addition of 10 accessory parking spaces to the Property. 11 DCMR, Section 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.” The nonconformity on the Property (i.e., the apartment house use) has not been “enlarged, expanded or extended” by the addition of 10 matter of right accessory parking spaces. Similarly, the nonconforming apartment house use on the Property has not been “used as a basis for adding any other structures or uses prohibited elsewhere” in the R-2 zone. 11 DCMR, Section 2000.6 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”. The Property has not been “extended in land area” to accommodate the 10 additional accessory parking spaces, nor has the land and the apartment house use of the land been changed to another non-permitted use in the R-2 zone. Contrary to the Appellant’s assertions, the Board finds that neither Section 2002.2 nor Section 2002.6 prohibit the matter of right addition of 10 accessory parking spaces to the Property.
8. The Board finds that accessory parking for the nonconforming apartment house is permitted as a matter of right in the R-2 zone. 11 DCMR, Section 300.2 states that “Except as provided in Chapter 21 [the accessory parking chapter] through 25 of this title, in an R-2 District, no building or premises shall be used...that is arranged, intended or designed to be used except for one (1) or more of the uses listed in Sections 301 through 319”. Section 301.1(c) allows

as a matter of right “other uses ... customarily incidental to the uses permitted in R-2 Districts”. Section 2000.4 allows the nonconforming apartment house use on the Property to be “continued, operated, occupied and maintained” as a matter of right. Accordingly, the Board finds that Sections 300.2, 301.1(c) 2000.4 and 2101.3, when read together, allow accessory parking for the nonconforming apartment house in the R-2 zone as a matter of right.

9. The Board finds that the addition of matter of right accessory parking to the Property does not constitute an expansion of the nonconforming use. Because accessory parking in the R-2 zone is permitted as a matter of right per 11 DCMR, Sections 300.2 and 301.1(c), the accessory parking does not meet the definition of a nonconforming use in Section 199, nor is it a prohibited use in the R-2 zone. The Board finds that there is no provision anywhere in Chapter 20, or any other chapter or section of the Zoning Regulations, that states or suggests otherwise. Nor is there any statement anywhere in the Zoning Regulations that prohibits the addition of on-site matter of right accessory parking for nonconforming uses in the R-2 zone.
10. The Board finds that 11 DCMR Section 2101.3 explicitly provides that “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...” The Board finds that there is nothing in Section 2101.3 which supports the Appellants’ contention that this section applies only to required parking. In fact, Section 2101.3 states the exact opposite.
11. This Board has previously held that the Zoning Regulations do not provide an upper limit on the number of parking spaces that may be provided in this instance. In dismissing an appeal based on 11 DCMR, Section 2101.2 (which states that “Nothing contained in this section shall be construed to prohibit the establishment of accessory parking spaces in an amount that exceeds that required by Section 2101.1...”), this Board ruled that “The Zoning Regulations ... do not mandate parking maxima.” Appeal No. 17746 of Reed Cooke Neighborhood Association at p. 3 (January 12, 2009)(Appeal dismissed). The Board finds that because the accessory parking spaces in this instance are permitted as a matter of right by the Zoning Regulations, the Zoning Administrator has “committed no error” by approving them without the need for relief from this Board. See Appeal No. 17615 of William Harnett at p. 7 (May 2, 2008)(Appeal denied).

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) (2012) Repl.). *See also* 11 DCMR § 3100.2.) Appeals to the Board of Zoning Adjustment “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 claim that the ten accessory parking spaces authorized by the Building Permit are prohibited by the Zoning Regulations. DCRA and the Property Owner disagree, and contend that the accessory parking spaces are permitted as a matter of right. The Board is not persuaded by the Appellants’ claims. The Board concludes that 11 DCMR Sections 2000.4, 300.2, 301.1(c), and 2101.3 are dispositive in this case. A nonconforming apartment house use is permitted by 11 DCMR Section 2000.4 to continue in existence, regardless of what zone it is located in. Sections 300.2 and 301.1(c) allow accessory parking as a matter of right in the R-2 District. Section 2101.3 allows the establishment of accessory parking for buildings where no parking is otherwise required. The Zoning Administrator testified that he has approved additional accessory parking for nonconforming uses in a number of previous instances (“a very common occurrence”). The Property Owner’s expert zoning witness also testified that the ten accessory parking spaces at issue in this Appeal are permitted as a matter of right. The Appellants offered no expert testimony, nor did they cite any case law or prior rulings to support their interpretation.

As a practical matter, the Board believes that upholding the Appellants’ interpretation would also result in adverse effects on parking availability on the street in this neighborhood, as well as other neighborhoods throughout the District where there are nonconforming residential (and commercial) uses. By not allow accessory parking to be provided on the site of a nonconforming use as a matter of right when there is space to do so in a manner that otherwise conforms to the Zoning Regulations, residents, occupants and visitors of nonconforming use buildings would be forced to park on the street. The Board takes official notice of the fact that in many neighborhoods in the District such as this one, on-street parking is in great demand. In addition, under the Appellants’ interpretation, an applicant for an addition to a nonconforming use would not be required to include any accessory parking to serve that addition, regardless of the size of the addition, nor would they be allowed to do so, unless the applicant specifically requested and received some sort of additional zoning relief. The Appellants’ reading of the Zoning Regulations would produce an illogical result that is contrary to the Zoning Regulations. 11 DCMR, Section 101.1 states that the Zoning Regulations should be interpreted and applied in a manner that promotes “the public health, safety, morals, convenience, order, prosperity and general welfare”.

Although it is not necessary for the Board to raise on its own motion and rule on the issue of equitable estoppel as it applies to this fact pattern, because the Board concludes that the Appeal is without merit, the Board is nonetheless concerned that the elements of estoppel may exist in this situation, which would otherwise prevent the District from revoking the Building Permit. Specifically, the Property Owner acted in good faith; on the affirmative acts of the District (i.e. the issuance of the Building Permit); made expensive and permanent “improvements” in reliance thereon (i.e., sold five of the parking spaces to condominium unit owners in reliance on the Building Permit); and the equities strongly favor the Property Owner. See Appeal No. 18031-C of West End Citizens Association (December 8, 2014).

The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1.309.10(d) (2012 Repl.)).) In this case ANC 3C

adopted a resolution in support of the appeal challenging various aspects of the Zoning Administrator's determination. For the reasons discussed above, the Board does not agree with the ANC's contentions but concurs with the Zoning Administrator.

Based on the findings of the fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to the claim of error in the decision of the Zoning Administrator to issue the Building Permit authorizing the ten accessory parking spaces at 2926 Porter Street, N.W. Accordingly, it is therefore **ORDERED** that the Zoning Administrator's determination is **SUSTAINED**, and this Appeal is **DENIED**.

VOTE:

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

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

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR §3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO §3125.6. PURSUANT TO 11 DCMR §3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.