GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 19708 of Berkley Smallwood, pursuant to 11 DCMR Subtitle Y § 302, from a determination made on November 28, 2017, by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to refuse further processing of Building Permit No. B1801942 to allow the renovation of a flat in the RF-1 District at premises 3652 Park Place, N.W. (Square 3034, Lot 202).

HEARING DATES: May 2 and May 30, 2018
DECISION DATE: May 30, 2018

ORDER DENYING APPEAL

This appeal was submitted on January 8, 2018, by Berkley Smallwood (the "Appellant") to challenge the decision of the Zoning Administrator not to undertake further processing of a building permit that would have allowed certain interior alterations to a two-family attached dwelling in the RF-1 zone at 3652 Park Place, N.W. (Square 3034, Lot 202). Following a public hearing, the Board of Zoning Adjustment ("BZA" or "Board") voted to deny the appeal and to affirm the determination of the Zoning Administrator.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda and letters dated February 7, 2018, the Office of Zoning provided notice of the appeal and of the public hearing to the Appellant; the Zoning Administrator, at the Department of Consumer and Regulatory Affairs ("DCRA"); the Office of Planning; Advisory Neighborhood Commission ("ANC") 1A, the ANC in which the subject property is located; Single Member District/ANC 1A08; the Office of Advisory Neighborhood Commissions; the Councilmember for Ward 1, the ward in which the subject property is located; the Chairman and the four at-large members of the D.C. Council; and the owners of all property within 200 feet of the subject property. Notice was published in the *D.C. Register* on February 9, 2018. (65 DCR 1434.)

Party Status. The Appellant, DCRA, and ANC 1A were automatically parties in this proceeding. There were no requests for intervenor status.

Appellant's Case. The Appellant challenged the decision of the Zoning Administrator not to continue to process an application for a building permit that would have allowed the Appellant to

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"finish the basement" of the building at the subject property with two additional bedrooms and a bathroom. According to the Appellant, there was no intent to add a third dwelling unit in the building, and therefore the third electrical panel and air conditioning unit[1] already installed in the building should not have to be removed "as these items are necessary to comfortably heat and air condition the basement area which cannot adequately be heated and air-conditioned by means of the equipment on the floor above." The Appellant contended that the electrical panel and HVAC unit "were already approved" under a prior building permit and certificate of occupancy (Exhibit 2.) The Appellant also argued that the presence of the electrical panel and HVAC unit did not convert the lower level into a separate dwelling unit because the lower level could not "qualify as 'a dwelling unit'" in the absence of a kitchen and facilities for eating and cooking in that space. (Exhibit 14.)

DCRA. The Department of Consumer and Regulatory Affairs urged the Board to deny the appeal, asserting that the Zoning Administrator had correctly reviewed the Appellant's application for a building permit and requested the removal of the third electrical meter and air conditioning unit at the subject property pursuant to the requirements of Subtitle U § 301.1(b) of the Zoning Regulations.[2]

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 3652 Park Place, N.W. (Square 3034, Lot 202). The property is owned by the Appellant.

2. The subject property is improved with a building originally used as a principal dwelling.

3. The subject property is now zoned RF-1 and was formerly zoned R-4. In each case, a two-family flat is permitted as a matter of right, while an apartment house is not permitted except by special exception. (*See* 11 DCMR §§ 330.5, 336; 11-E DCMR § 302.1, 11-U DCMR § 301.1.)

4. In May 2014, the Appellant submitted an application to DCRA for a permit to authorize certain interior renovations to the building. Based on the architectural drawings submitted with the application, a Zoning Technician at DCRA commented that "the proposed floor layout depicts a 3-unit apartment building instead of a 2-family flat. Submit corrections to reflect a 2-family flat or seek relief from BZA for a 3-unit apartment building in R-4." (Exhibit 36, p. 8.)

5. On July 3, 2014, DCRA reviewed revised plans submitted by the Appellant that reflected interior renovations to convert a one-family dwelling to a flat. (Exhibit 36, p. 10.)

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[1] The air conditioning unit was referred to by the parties in this proceeding variously as an air conditioning unit or a heating, ventilation, and air conditioning ("HVAC") unit.

[2] Subtitle U § 301.1(b) states that uses permitted as a matter of right in the RF-1 zone include residential flats with a maximum of two principal dwelling units.

6. On January 6, 2015, Building Permit No. B1405599 was issued to the Appellant for the subject property to authorize work described as: "3 floors, interior alterations at all levels including new kitchen and bathrooms, new lighting and mechanical. Building Exterior: new windows, new entry doors and siding at rear." The permit described the existing use of the property as "single family," and the proposed use as "flat (two family)." (Exhibit 36, p. 12.) A second extension of that permit was issued on June 27, 2016, as Building Permit No. B1609878. (Exhibit 7.)

7. A certificate of occupancy, Permit No. CO1702670, was issued July 14, 2017, to authorize use of the subject property as a "two family flat – 2 units with one parking space." (Exhibit 8.)

8. On November 7, 2017, the Appellant applied for a new building permit (No. B1801531) to authorize work described as "[a]lteration and repair of in-law suite. Ground level – 1 story interior alteration including new kitchen and bathroom." The existing and proposed use of the subject property was described as "two-family flat." (Exhibit 36, p. 14.) The Appellant subsequently canceled this permit application.

9. By application received November 16, 2017, the Appellant again applied for a building permit (No. B1801942). The permit type was described as "alteration and repair," with the description of work stated as "[i]nterior alteration of ground level including two new bedrooms and bathroom. Pour concrete over existing concrete pad." The existing and proposed uses of the property were again both described as "Two-Family Flat" (Exhibit 5; Exhibit 36, p. 16.)

10. The Appellant did not submit a copy of the plans associated with the permit application filed November 16, 2017, into the record of this appeal. DCRA indicated that the Appellant had not provided a copy of the plans to DCRA since the "Appellant did a 'walk-through' and retained the plans, instead of uploading the plans online." (Exhibit 36.)

11. By email sent by a program analyst in the Office of the Zoning Administrator at DCRA to the Appellant on November 21, 2017, DCRA asked the Appellant "to provide an affidavit stating that the lowest level of the building will not be converted into a third unit in the future … [and] that if there is a desire to convert the use of the building from a flat into an apartment house (3 units or more), … relief would be required from the Board of Zoning Adjustment (BZA)." (Exhibit 9.) Citing concerns about "the association of a third electrical and A/C unit at the property to [apartment house] use" and stating that additional information "would assist the Zoning Administrator and other DCRA officials in understanding what has transpired and may transpire at the property," the email from DCRA informed the Appellant that "[i]t would be helpful for you to address how the third electrical meter and A/C unit are connected to the current (flat) use or any future use (i.e. conversion to an apartment house) at the property." (Exhibit 9.)

12. The Appellant provided an affidavit stating that, with respect to the subject property, "the lowest level of the building will not be converted into a third unit in the future" and

acknowledging that "if there is a desire to convert the use of the building from a flat into an apartment house (3 units or more), … relief would be required from the Board of Zoning Adjustment (BZA)." (Exhibit 6.) The affidavit also stated that an architect "drafted the design of the house" and the "house was built out" with "the third electrical meter and HVAC unit," where the architect "specified the third HVAC unit for the basement which corresponds to the third electrical panel" because "the [a]rchitect did not want the Owner/Tenant to have to heat and cool that floor if it wasn't being utilized." (Exhibit 6.) According to the Appellant, the third panel and HVAC unit were approved and inspected under Building Permit No. B1609878. (Exhibit 6.)

13. By email sent by the DCRA program analyst to the Appellant on November 28, 2017 (the "November 28 email"), DCRA informed the Appellant that the Zoning Administrator had completed his review of the permit application but was "unable to grant approval allowing further processing of building permit B1801942 …." The Zoning Administrator asked the Appellant "to amend the affidavit to include … [a] disclosure statement to [prospective] buyers that the authorized use of the property is a flat (two units) and the lowest level cannot be used as a separate dwelling unit [without] approval from the Board of Zoning Adjustment …. Additionally, the lowest level must maintain its internal connection to the floor above and is considered a floor on that unit and there can be no installation of a kitchen or utility (electric, gas, etc.) connection for a kitchen." (Exhibit 3.)

14. The November 28 email conveyed the Zoning Administrator's request that the Appellant "obtain a revised certificate of occupancy (COO) with language to specify the use of the building as a flat with the first floor and lowest level serving as one unit, with an internal connection between those floors. The COO must also state that no kitchen or utility connection for a kitchen can be installed in the lowest level." (Exhibit 3.)

15. The November 28 email also conveyed that "the Zoning Administrator is asking for the removal of the third electric meter and HVAC" with subsequent "confirmation from Pepco that those items have been removed." (Exhibit 3.)

16. According to the November 28 email, the Zoning Administrator would "reconsider granting approval [of the requested building permit] once the above requests have been satisfied." (Exhibit 3.)

17. On February 14, 2018, while review of the November 26, 2017 permit application was still pending, the Office of the Zoning Administrator convened a meeting with the Appellant to offer two options intended to alleviate any concerns at DCRA that the building at the subject property would be converted into three dwelling units. The options were: (1) the Appellant must record a covenant prohibiting the conversion of the lowest level of the building into a separate dwelling unit; or (2) the Appellant must apply for and obtain a special exception from the Board to allow creation of a three-unit dwelling. The Appellant's attorney informed DCRA on May 2, 2018, that the Appellant was not willing to sign a covenant provided by the Office of the Zoning Administrator. (Exhibit 36.)

18. On May 4, 2018, the Zoning Administrator rejected the building permit application submitted by the Appellant on November 16, 2017, with a comment: "The proposed changes to the basement level contain such elements so as to constitute a separate and third dwelling unit in the building, which would require BZA relief. Such relief has not been granted and the Office of the Zoning Administrator cannot approve [the permit application]." (Exhibit 36, p. 18.)

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.).) 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.).)

The Appellant challenged the decision of the Zoning Administrator not to undertake further processing of the Appellant's application for a building permit, which would have allowed certain interior alterations to a two-family attached dwelling in the RF-1 zone, unless the Appellant removed the third electric meter and air conditioning unit previously installed at the property. Based on the findings of fact, the Board was not persuaded by the Appellant that any error occurred in the Zoning Administrator's decision. The Zoning Administrator acted appropriately to ensure that the Appellant's property would not be converted into a three-unit building without zoning approval, including offering the Appellant a reasonable alternative to removal of the equipment – by recording a covenant – which the Appellant declined to pursue. The Board concludes that the Zoning Administrator acted reasonably in taking steps to prevent conversion of the Appellant's property into a three-unit apartment house, which is not permitted as a matter of right in the RF-1 zone.

The Appellant framed the appeal as a challenge to the Zoning Administrator's decision to require removal of a third electric meter and air conditioning unit already installed at the property.[3] According to the Appellant, that equipment was not intended to accommodate a third unit in the building, but was needed to serve the lower level unit in the flat, such that the basement unit would not have to be heated or cooled unless it was being utilized. However, the Appellant acknowledged that the equipment serving the basement level was initially installed for the purpose of creating a dwelling unit there. (*See* BZA Public Hearing Transcript of May 30, 2018 ("Tr.") at 273.) DCRA

[3] The Appellant's initial filings refer to the equipment as an "electrical panel" but do not challenge or otherwise address the Zoning Administrator's designation of the equipment as "the third electric *meter*" (Exhibits 2, 11; emphasis added.) The Appellant's affidavit, submitted to DCRA at the request of the Zoning Administrator, refers to both an "electric meter" and an "electric panel." (Exhibit 6.) A submission by the Appellant's attorney contends that "[t]here is no basis for the Zoning Administrator's request that the third electrical meter and HVAC on the lower level be removed" but does not dispute that the meter at issue is in fact a meter. (*See* Exhibit 14; *see also* Exhibit 38.) The relevant emails from DCRA, and DCRA's submissions in this proceeding, consistently refer to the equipment as an electric meter. (*See* Exhibits 3, 9, 37.)

was reasonably concerned about the presence of equipment serving only the basement because it could facilitate the potential creation of a third unit at some point in the future. Certain attributes of the building, such as a separate entrance to the lower level, also suggested that the building could be considered suitable for conversion into a three-unit building. The building was initially a one-family dwelling and was converted to a two-family flat by the Appellant. The Appellant previously applied for permits that would have allowed three units in the building, and subsequent applications suggest that an eventual conversion to three units might still be contemplated. In May 2014, the Appellant sought a permit "to construct a mother-in-law suite in the basement," and in November 2017, the Appellant submitted and then canceled an application for a new building permit for the "[a]lteration and repair of in-law suite … including new kitchen and bathroom." The Appellant acknowledged that District of Columbia officials "had received numerous complaints that [the Appellant] was constructing an illegal third unit" at the subject property after obtaining a building permit to allow conversion of the original one-family dwelling into a two-unit flat. (Exhibit 2.)

The Zoning Administrator testified that DCRA would have been willing to issue the requested building permit, without insisting on the removal of the equipment serving only the basement, if the Appellant had recorded a covenant stating the intent of the Appellant, as the owner of the property, not to use the basement level as a separate dwelling unit. The Zoning Administrator testified that, in response to instances of unauthorized conversions of other properties into multi-unit buildings, DCRA recently began using covenants "to help manage situations in which … the lower level of a building has elements … of a dwelling" and property owners are willing to sign a covenant stating their intention not to create separate dwelling units in the lower levels. (Tr. at 249.) In this instance, the Zoning Administrator testified that DCRA offered to provide the Appellant with a covenant template free of charge and that the template could have been modified to achieve the Appellant's goal of retaining the electric and air conditioning equipment without compromising the purpose of avoiding the potential creation of an unauthorized third dwelling unit at the property. (*see* Tr. at 249-250, 264).

The Board notes the Appellant's objection that the covenant should not have been required because it would have contained essentially the same declarations that the Appellant had already made in the affidavit submitted at DCRA's request. However, unlike the affidavit, the covenant would have been recorded in the property records, thereby providing an enforcement mechanism as well as notice of the restriction on the use of the building as a flat to any prospective buyers and subsequent owners of the property.

The Appellant argued that the lower level of the building could not be considered a dwelling unit because it lacked kitchen facilities. According to the Appellant, the zoning definition of a "dwelling unit" requires a kitchen, or cooking facilities or equipment for cooking. For zoning purposes, a "dwelling unit" is defined as: "One (1) or more habitable rooms comprising complete independent living facilities for one (1) or more persons, and including within those rooms permanent provisions for living, sleeping, eating, cooking, and sanitation. A dwelling unit is intended for a single household." (Subtitle B § 100.2.) The zoning definition of "dwelling unit" does not mention kitchens but merely "provisions for … cooking." The Appellant did not demonstrate that the installation of any "provisions for … cooking," such as a microwave oven or

other small appliances suitable for cooking, would not be possible in the basement level of the Appellant's building.

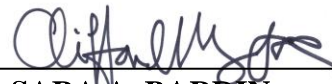
The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)).) In this case, the affected ANC, ANC 1A, did not submit a report stating any issues or concerns or otherwise participate in the proceeding.

Based on the findings of fact and conclusions of law, the Board concludes that the Appellant has not satisfied the burden of proof in his claims of error in the decision of the Zoning Administrator not to undertake further processing of a building permit (No. B1801942) that would have allowed certain interior alterations to a two-family attached dwelling in the RF-1 zone at 3652 Park Place, N.W. (Square 3034, Lot 202).

Accordingly, it is therefore **ORDERED** that the **APPEAL** is **DENIED** and the Zoning Administrator's determination is **SUSTAINED.**

VOTE: 5-0-0 (Frederick L. Hill, Peter A. Shapiro, Lesylleé M. White, Lorna L. John, and Carlton E. Hart to DENY).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

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

FINAL DATE OF ORDER: March 18, 2019

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.