

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 19713 of Isabelle Thabault, pursuant to 11 DCMR Subtitle Y § 302, from the decision made on January 16, 2018, by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to refuse to revoke Building Permit No. B1712578, to construct a front addition to an existing one-family dwelling in the R-2 Zone at premises 3840 Legation Street, N.W. (Square 1857, Lot 49).

HEARING DATES: April 4, 2018; May 16, 2018; and June 20, 2018
DECISION DATE: June 20, 2018

ORDER DENYING APPEAL

On January 17, 2018, Isabelle Thabault (the “**Appellant**”) filed this appeal with the Board of Zoning Adjustment (the “**Board**”) to challenge the decision of the Zoning Administrator (“**ZA**”) of the Department of Consumer and Regulatory Affairs (“**DCRA**”) not to revoke a building permit allowing the construction of an addition and interior alteration to a principal dwelling unit at 3340 Legation Street, N.W. (Square 1857, Lot 49) (the “**Subject Property**”). Following a public hearing, the Board voted to **DENY** the appeal and to **AFFIRM** the determination of the ZA.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memorandum dated February 14, 2018, the Office of Zoning (“**OZ**”) provided a Notice of Appeal and Public Hearing to DCRA, specifically to the ZA; the D.C. Office of Planning (“**OP**”); Advisory Neighborhood Commission (“**ANC**”) 3G, the ANC within which the Subject Property is located; the Single Member District Commissioner for 3G06; the Councilmember for Ward 3; the Council Chair and At-Large Councilmembers; the owners of the Subject Property; and the Appellant. Notice was published in the *D.C. Register* on February 23, 2018. (65 DCR 1852.)

Party Status. Consistent with Subtitle Y § 501.1, the parties to this proceeding are the Appellant, DCRA, Daniel Liebman and Elisabeth Davis (the “**Property Owners**”), and ANC 3G. There were no requests for intervenor status.

Appellant’s Case. Appellant challenged the refusal of the ZA to revoke Building Permit No. B1712578 (the “**Permit**”) from the Property Owners. The Permit authorized the construction of an addition and interior alteration to the principal dwelling unit at 3340 Legation Street, N.W. (Square 1857, Lot 49). Appellant alleged that the Permit was issued in violation of Subtitle B § 315.1(c) of the Zoning Regulations of 2016 because the Subject Property is an interior lot,

attached on one side to Appellant's dwelling, and the Permit would allow construction to extend the front façade of the Subject Property beyond the front façade of Appellant's dwelling. In January 2018, after issuance of the Permit, the Zoning Commission ("ZC") approved a text amendment (the "**Text Amendment**") that clarified the language of Subtitle B § 315.1(c) to state that a proposed building façade or structure facing a street lot line shall, "in the case of an interior-lot attached or semi-detached building, not be further forward or further back than the building façade of one of the immediately adjoining buildings." (ZC Order No. 08-06N.) Appellant also contended that the ZA had knowledge that the original language of Subtitle B § 315.1(c) intended to reflect this amended language to include semi-detached buildings, supported the Text Amendment to clarify the language, and should have retroactively applied the amended regulation to revoke the Permit. (Exhibit 22.)

DCRA. DCRA urged the Board to deny the appeal, asserting that the ZA correctly reviewed the Permit using the definition of an "attached building" contained within Subtitle B § 100.2 of the Zoning Regulations, as required by Subtitle A § 301.4. DCRA also asserted that the ZA correctly determined that the Text Amendment did not apply retroactively to the Permit, which was issued a month before the technical correction of the language was introduced in ZC Case No. 08-06N. (Exhibit 25.)

The Property Owners. The Property Owners urged the Board to deny the appeal, asserting that the Appellant did not meet the burden of proof because the ZA's interpretation of Subtitle B § 315.1(c) was reasonable based on the definition of "attached building" as included in Subtitle B § 100.2 of the Zoning Regulations. The Property Owners also asserted that the subsequent Text Amendment to Subtitle B § 315.1(c) is evidence that the original language of Subtitle B § 315.1(c) did not include semi-detached buildings at the time the Permit was issued. They contended that even if the ZA knew or agreed that the regulation intended to include semi-detached buildings, the Permit should be subject only to the actual language of the regulation and cannot be subject to regulations adopted four months after the issuance of a permit. (Exhibit 24.)

ANC 3G. The affected ANC did not submit a report stating any issues or concerns or otherwise participate in the proceeding.

FINDINGS OF FACT

1. The Property that is the subject of this appeal is a principal dwelling unit located at 3840 Legation Street, N.W. in the R-2 Zone.
2. The Property is improved with a semi-detached building (the "**Building**"), attached on the east side to Appellant's residence at 3838 Legation Street, N.W. There is an alley on the west side of the Property, and the only building attached to the Building is on the east side.
3. On November 9, 2017, DCRA issued Building Permit No. B1712578 to the Property Owners, authorizing the construction of an addition and interior alteration to the Building.

The project consists of a two-story addition on the front of the property that includes a covered front porch, which extends the same distance as the front porch of Appellant's house, and the extension of the second-story front wall above the front porch. This second-story expansion will project approximately 12 feet further forward than the second-story front façade of Appellant's dwelling. (Exhibit 5.)

4. At the time the Permit was issued, Subtitle B § 315.1(c) of the Zoning Regulations required that "[t]he building façade of an interior lot attached building shall not be further forward or further back than the building façade of one of the immediately adjoining buildings."
5. At the time the Permit was issued, Subtitle B § 100.2 of the Zoning Regulations defined the term "attached building" as "a building that abuts or shares walls on both side lot lines with other buildings on adjoining lots."
6. The term "semi-detached" is defined in Subtitle B § 100.2 as "a building that abuts or shares one (1) wall, on a side lot line, with another building on an adjoining lot and where the remaining sides of the building are surrounded by open areas or street lot lines."
7. At the time the Permit was issued, Subtitle B § 315.1(c) included no reference to semi-detached buildings, as defined in Subtitle B § 100.2.
8. Subtitle B § 100.1(g) of the Zoning Regulations states that "[w]ords not defined in this section shall have the meanings given in Webster's Unabridged Dictionary."
9. Subtitle A § 301.4 states that "any construction authorized by a permit may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued."
10. On November 27, 2017, the Property Owners began construction on the addition.
11. On November 28, 2017, Appellant contacted DCRA to ask the agency to revoke the Permit on the grounds that the addition would violate Subtitle B § 315.1(c) of the Zoning Regulations because the Permit authorized construction to extend the front façade of the Building beyond the front façade of Appellant's dwelling. (Exhibit 41A.)
12. On December 8, 2017, OP filed with the ZC a technical correction to amend Subtitle B § 315.1(c) to read, "The building façade of an interior lot attached *to another* building shall not be further forward or further back than the building façade of one of the immediately adjoining buildings." (*Emphasis added*). OP's request for technical correction also stated, "OP has coordinated with the Office of the Zoning Administrator on this issue and they have confirmed their support for this clarification of what is understood to be the intent of the front setback rule of measurement and regulation." (Exhibit 22.)

13. On December 22, 2017, the ZC published a Notice of Proposed Rulemaking in the D.C. Register for the Text Amendment. (ZC Order No. 08-06N.)
14. On January 16, 2018, the ZA responded to Appellant in an email stating that Subtitle B § 315.1(c) does not apply to the Subject Property as the Building is not an “attached building” as set forth in that section, and, as such, the Building Permit will not be revoked and construction will be allowed to continue. (Exhibit 5.)
15. On January 17, 2018, Appellant filed the instant appeal to the Board and served the appeal on the ZA and the Property Owners. (Exhibit 4.)
16. On January 29, 2018, the ZC took final action to approve the Text Amendment. The Notice of Final Rulemaking states that the amendments shall become final and effective upon publication in the *D.C. Register* on March 2, 2018. (ZC Order No. 08-06N.)
17. The Text Amendment contains no provision that would compel the ZA to apply the revised text to prior building permit applications.

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.).)

The burden of proof is on the appellant to justify the granting of the appeal. (11-X DCMR § 1101.2.) In meeting its burden of proof, the appellant must show that the decision of the ZA was clearly erroneous or inconsistent with the Zoning Regulations. *See Sheridan-Kalorama Neighborhood Council v. D.C. Bd. of Zoning Adjustment*, 411 A.2d 959, 961 (D.C. 1979). The Board must give great deference to the decision of the ZA when the ZA acts reasonably in interpreting the Zoning Regulations. *See id.*

Decision on Appeal

The administrative decision in this case is the refusal of the ZA to revoke the Permit authorizing construction of an addition and interior alteration to a single family dwelling at 3340 Legation Street, N.W. Appellant brings this case on the grounds that the ZA erred in not revoking the Permit because the Permit allows the Building to extend past the façade of Appellant’s dwelling.

The Property Owners oppose the appeal and argue that a decision to not revoke a building permit is not an appealable decision. (Exhibit 24.) The Board disagrees with this argument. According to Subtitle Y § 302.1, any person aggrieved or affected by “an order, requirement, decision, determination, or *refusal* made by an administrative officer or body. . . in the administration or enforcement of the Zoning Regulations may file a timely zoning appeal with the Board.”

(*Emphasis added.*) The building permit is ordinarily the document that reflects a zoning decision about whether a proposed structure, as described in the permit application, conforms to the zoning regulations. *See Appeal No. 18980 of Concerned Citizens of Argonne Place* (2016), quoting *Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 364, 367 (D.C. 2008); *see also Schonberger v. D.C. Bd. of Zoning Adjustment*, 940 A.2d 159 (2008). However, in light of the pending changes to the Zoning Regulations at issue in the Permit, the email from the ZA can be appealed because it made a new determination, in writing, that the Text Amendment will not apply to the Permit and the Permit will not be revoked. Further, the ZA's refusal to revoke the Permit in this case was not an exercise of the ZA's discretion in the enforcement of the regulations, but rather a determination that no error was committed. (*See Appeal No. 18256 of ANC 1C* (2012) (Board held that "enforcement of the Zoning Regulations is a discretionary function left to the discretion of the ZA" and dismissed appeal alleging failure by ZA to take enforcement action where appellant failed to show any error by the ZA in the administration of the Zoning Regulations)).

Merits of the Appeal

There are two issues on appeal: first, whether the Building is an attached building and thus subject to the limitations of Subtitle B § 315.1(c), and second, whether the Text Amendment should have been applied retroactively to revoke the Permit.

On the first issue, Subtitle B § 315.1(c) states that the building façade of an interior lot attached building shall not be further forward or further back than the building façade of one of the immediately adjoining buildings. Appellant argues that the ZA's refusal to revoke the Building Permit is in violation of Subtitle B § 315.1(c) because the Building is an attached building, as it shares a party wall with Appellant's property. (Exhibit 22.)

The Property Owners and DCRA argue that the Building does not meet the definition of an attached building because it is not attached on both sides. (Exhibits 24 and 25.)

According to Subtitle B § 100.2, an "attached building" is a building that abuts or shares walls on both side lot lines with other buildings on adjoining lots. The Board agrees with the ZA that the Building does not meet the definition set forth in the section because it shares only one side lot line with an adjacent building, and therefore meets the definition of a semi-detached building. At the time the Permit was issued, the language of Subtitle B § 315.1 included only attached buildings, not semi-detached buildings.

The Board is not persuaded by Appellant's argument that the Building should be considered "attached" based on the dictionary definition of the word. Subtitle B § 100.1(g) of the Zoning Regulations states that only words not defined in the section shall have dictionary meanings. Here, where the term is defined in the Zoning Regulations, alternative methods of statutory construction are irrelevant. Thus, the Board concludes that the ZA's determination on this point was reasonable and should be sustained.

On the second issue, Appellant argues that the Text Amendment demonstrates the intent of the Zoning Commission to have originally included semi-detached buildings in the restrictions of Subtitle B § 315.1(c). Citing language in the petition for technical correction by OP, Appellant contends that the ZA supported the Text Amendment because it correctly reflected the intent of the regulation. Thus, Appellant argues that the decision not to revoke the Permit was erroneous and the Permit should be reviewed in light of the meaning of the provision advanced by the Text Amendment. (Exhibit 22.)

In response, the Property Owners and DCRA argue that a permit is subject only to the regulations in place at the time of issuance and cannot be retroactively reviewed in light of new or amended Zoning Regulations. (Exhibits 24 and 25.) The Board concurs and concludes that the ZA's decision to not revoke the Permit was reasonable on that basis. According to Subtitle A § 301.4, any construction authorized by a permit may be carried to completion pursuant to the provisions of this title in effect on the date the permit is issued. . . ." The Permit was issued on November 7, 2017, and the revisions to the language of Subtitle B § 315.1(c) were not in effect until the Notice of Final Rulemaking for the Text Amendment was published in March 2018. Thus, the ZA acted reasonably in not retroactively revoking the permit based on changes to the Zoning Regulations.

The Board is not persuaded by Appellant's argument that, because the ZA had knowledge of the impending Text Amendment and agreed with OP that the intent of Subtitle B § 315.1(c) was to include both attached and semi-detached buildings, the ZA should have revoked the Permit for violation of the regulations. The Board concludes that it is within the province of the ZA to make a reasonable decision based on the language of the Zoning Regulations at the time of the decision, not based on the language that the ZA or Appellant believe should have been included in the Zoning Regulations.

DECISION

Based on the record before the Board, as well as the findings of fact and conclusions of law herein, the Board concludes that Appellant has not satisfied the burden of proof in her claims of error in the ZA's decision not to revoke Building Permit No. B1712578 allowing the construction of an addition to the semi-detached building at 3340 Legation Street, N.W. (Square 1857, Lot 49). Accordingly, it is therefore **ORDERED** that the **APPEAL** is **DENIED** and the ZA's determination is **SUSTAINED**.

VOTE: 4-0-1 (Carlton E. Hart, Lesylleé M. White, Lorna L. John, and Anthony J. Hood to DENY; Frederick L. Hill not participating).

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

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

BZA APPEAL NO. 19713
PAGE NO. 7

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: September 5, 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.