

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 15096 of Andrew K. Stevenson on behalf of Advisory Neighborhood Commission 3G, et al, pursuant to 11 DCMR 3200.2 and 3105.1, from the decision of Joseph Bottner, Zoning Administrator, made on September 21, 1987 and March 27, 1989, to the effect that the buildings on the premises comply with the D.C. Zoning Regulations in an R-5-C District at premises 5227 and 5229 Connecticut Avenue, N.W., (Square 1874, Lot 62).

HEARING DATE: September 13, 1989
DECISION DATE: October 4, 1989

FINDINGS OF FACT:

1. The property that is the subject of this appeal is located on the east side of Connecticut Avenue, between Chevy Chase Parkway and Jenifer Street, and is known as premises 5227 and 5229 Connecticut Avenue, N.W. It is zoned R-5-C.

2. The property is improved with a fourteen-unit apartment building. The configuration of the apartment building provides eight apartment units in that portion of the building fronting on Connecticut Avenue, and known as Phase I of the development, and two wings, containing three units each, to the rear of the site and known as Phase II of the development.

3. Phase II of the development commenced pursuant to Building Permit No. B-325561, dated November 4, 1987. The approved building permit allowed construction of the two three-unit wings at the rear of the property with three enclosed passageways connecting the new wings to the existing Phase I building and to each other.

4. Construction of the project began in June, 1988. In early 1989, the Zoning Administrator inspected the property and found that the construction was not in conformance with the plans approved under Building Permit No. B-325561. A stop work order was issued on February 24, 1989.

5. In March, 1989, the developer applied for a revision to Building Permit No. B-325561. The revision proposed to reconfigure proposed doorways and windows, eliminate the three enclosed passageways originally approved, and construct three "communicating canopies." Building Permit No. B-338164, approving the revisions to the originally approved plans, was issued on March 28, 1989, and the stop work order was lifted.

6. The appeal was filed on April 19, 1989, to challenge the Zoning Administrator's approval of Building Permit Nos. B-325561 and B-338164.

7. The owner of Phase II of the development, through counsel, intervened as a party pursuant to 11 DCMR 3399.1.

8. By letter dated July 27, 1989, the appellants requested the Board to stay the issuance of the Certificate of Occupancy and to revoke the building permit until a hearing on the merits of the appeal. By letter dated September 1, 1989, counsel for the intervenors opposed the request for stay. The Board denied the request at its public meeting of September 6, 1989, noting that the case had been granted an expedited hearing and was scheduled to be heard on September 13, 1989.

9. As a preliminary matter at the public hearing of September 13, 1989, counsel for the intervenors moved for dismissal of the appeal based on the assertion that the appeal was not timely filed and, therefore, the Board lacks jurisdiction to hear the appeal.

10. In support of the motion to dismiss, the appellants argued as follows:

- a. The appeal was filed on April 19, 1989, approximately one and one-half years after the issuance of Building Permit No. B-325561. Construction of the project began in June of 1988 and was substantially completed by December 1988. All work on the project proceeded in full view of the public, therefore the appellants are chargeable with actual notice no later than December 1988 when the project was closed in and under roof.
- b. The D.C. Court of Appeals has held that the question of timeliness is jurisdictional and if an appeal is not timely filed, the Board is without power to consider it.
- c. The Board has held that the time for filing an appeal commences when the appellants are chargeable with notice or knowledge of the decision.
- d. The Board has generally found that appeals filed seven to nine months after the appealable action are untimely as set forth in BZA Appeal Numbers 13967, 11872, 11158 and 12142.
- e. The building permits issued in 1987 and 1989 are intertwined in that the 1989 permit functions as a revision to, not a revocation of, the 1987 permit.

11. The appellants opposed the motion to dismiss, based on the following:

- a. The appellants could not reasonably have filed the appeal

before March 27, 1989, because the proposed "communicating canopies" were not approved by the Zoning Administrator until that date. The originally approved "connecting hallways" differ in structure and concept from the revised plans approved in 1989.

- b. The appeal was filed on April 19, 1990, approximately three weeks after the issuance of Permit No. B-338164, and is therefore timely.

12. The Board ruled that the portion of the appeal relative to the issuance of Building Permit No. B-325561, dated November 4, 1987, was untimely and, therefore, the Board does not have the jurisdiction to rule on that decision. The Board did not make a determination at the public hearing on the issue of timeliness with respect to the issuance of Building Permit No. B-338164, dated March 28, 1989.

13. The appellants allege that the "communicating canopies", as approved by Building Permit No. B-338164 are not sufficient to render the existing eight-unit building and the six newly constructed units a single building. In support of that allegation, the appellants argued as follows:

- a. The two newly-constructed "wings" can not be considered as part of the existing building nor as an addition to the existing building, because the three structures have independent foundations and support walls, and lack any common structural elements, external walls, or internal circulation.
- b. The "communicating canopies" are external, unenclosed, superficial add-ons that provide no more than a tenuous and insubstantial physical linkage between the structures and serve no structural or functional purpose. The two-foot wide second-story level canopies over the entry-ways to the two new wings are too high and narrow to provide protection from the elements. In addition, the canopies could easily be removed without physical damage to the structures or functions of the development.
- c. The two newly-constructed "wings" represent the development of six single-family row dwellings by virtue of their vertical orientation, separate entries, and lack of common interior halls or stairwells. In addition, the six new units have been described as "townhomes" or "townhouses" in the developer's marketing brochures and multiple listing service description.
- d. The six new units have front entrances on a back court

accessed by a public alley to the east of the site. None of the entrances to the new units abut a street, front yard or front court.

- e. The development provides a total of six parking spaces on the site.
- f. The new development represents the construction of two new structures containing six single family town houses on the same lot as an existing apartment building.
- g. The Advisory Neighborhood Commission has not been afforded the "great weight" to which it is entitled.

14. The appellants argue that the circumstances of the project as set forth in Finding of Fact No. 13 allow the developer of the project to circumvent the provisions of the Zoning Regulations. 11 DCMR 2100 and 2101 require that parking for the project be provided at the rate of one parking space for each single family dwelling and one parking space for each three apartment units. The appellants argue that the developer is obligated to provide a minimum of nine on-site parking spaces to serve the development. Only six on-site parking spaces are provided. In addition, the appellants argue that the developers have not complied with the provisions of 11 DCMR 410, which allows a group of buildings to be erected and deemed a single building pursuant to review by the Board and compliance with several specific criteria set forth in 11 DCMR 410.2 through 410.11.

15. The Zoning Administrator testified that review of the plans filed by the developer on June 18, 1987, indicated compliance with the Zoning Regulations. The proposed connecting hallways were adequate to qualify the project as a single building as defined in 11 DCMR 199. The winged additions were approved as an addition to an existing multi-family dwelling. As such, the resulting development constitutes a fourteen-unit apartment building. Five parking spaces are required for a fourteen-unit apartment building pursuant to 11 DCMR 2101. The developer has provided six on-site parking spaces for the subject development.

16. The Zoning Administrator testified that the provisions of 11 DCMR 410 were not applicable in the instant case because the project was deemed to be a single building by virtue of the connecting hallways. Section 410 requires special exception approval to allow the construction of a "group of one-family dwellings, flats, or apartment houses or a combination of these buildings, with division walls from the ground up or the lowest floor" to be considered as a single structure and is not applicable to the subject project. In addition, Section 410 is discretionary and does not apply where several portions of a structure are connected to form a single building for zoning purposes.

17. In response to several telephone inquiries, the Zoning Administrator made a personal inspection of the property on February 24, 1989. As a result of that inspection, the Zoning Administrator determined that construction on the site differed from the originally approved plans with respect to the provision and location of doorways, as well as modifications by the Office of Technical Review for construction code purposes. Accordingly, a stop work order was issued on February 24, 1989.

18. The Zoning Administrator testified that the issuance of the stop work order did not result in the automatic revocation of the existing building permit. At the point of the issuance of the stop work order, the developer had the option of bringing the construction into compliance with the approved plans, or the developer could submit revised plans to the Zoning Division for review.

19. On March 17, 1989, the developer filed an application for building permit and revised plans with the Zoning Division for review. The revised plans included extensive modifications to the configuration and design of the connecting hallways. After review, the Zoning Administrator determined that the roofed connections, as revised, were adequate to maintain the status of the project as a single building in compliance with the Zoning Regulations; that the provision of six on-site parking spaces exceeded the number of parking spaces required; and that no special exception or variance relief was required. Accordingly, the stop work order issued on February 24, 1989, was lifted and Building Permit No. B-338164 was issued on March 28, 1989, specifically authorizing "Revision to Permit No. B-325561 to connecting hallways as per plans. No change to basic units as permitted and constructed. No mechanical work." The Zoning Administrator further testified that the 1989 permit did not supercede the 1987 permit, and that the effective building controls for the project would be a combination of the permit originally approved in 1987 and the modifications to those plans approved in 1989.

20. The Zoning Administrator testified that the advertisement of the six units at the rear of the site as "townhouses" was not consistent with his determination that the project be classified as a multi-family dwelling or apartment building. However, based on the existing provisions of the Zoning Regulations, the on-going practice of the Zoning Division in interpreting such connections as constituting a single building, and prior Board decisions whereby roofed area passageways have been deemed sufficient to constitute a single structure, it is the opinion of the Zoning Administrator that the project consists of a single structure, containing 14 dwelling units, and as such, complies with all the applicable provisions of the Zoning Regulations.

21. Counsel for the intervenors moved that the appeal be

dismissed in that the principal of laches bars the Board from considering the subject case. The theory of laches is made up of two elements: 1) the omission to assert rights for an unreasonable length of time; 2) under circumstances prejudicial to the party asserting laches. In support of the motion, counsel argued as follows:

- a). Appellants had actual notice of the project when construction commenced in June 1988, but no later than December, 1988, when Phase II was substantially complete.
- b). Appellants sought to assert their claims through other means while the developer proceeded with construction. The developer had expended approximately \$700,000 between the commencement of the project and April 15, 1989.

22. At its public meeting of October 4, 1989, the Board ruled that the appeal as it relates to the decision of the Zoning Administrator in March 28, 1989 was filed approximately three weeks after the issuance of Permit No. B-338164 and was therefore filed in a timely manner. The Board ruled that the motion to dismiss the application on the grounds of timeliness and laches relative to that portion of the appeal be denied.

23. The intervenor opposed the granting of the appeal on its merits and supported the determinations of the Zoning Administrator. Counsel for the intervenors introduced into the record several prior Board Orders for variance relief, which also involved covered connections similar to those in this case, evidencing that the Board and the Zoning Administrator have previously recognized such connections as an appropriate means to connect one portion of a building to another in order to create a single building for zoning purposes. The major difference between the subject case and those cited by the intervenor is that the subject project complies with all of the applicable zoning requirements and, therefore, did not require Board of Zoning Adjustment review for variance or special exception relief.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing Findings of Fact and the evidence of record, the Board concludes that the decision of the Zoning Administrator must be upheld. The Board concludes that the Zoning Administrator based his decision on the plans submitted by the developer as set forth in Finding of Fact Nos. 15 and 19. The criteria against which the Zoning Administrator judged the plans were based on the definitions and provisions contained in the existing Zoning Regulations. The interpretation of the provisions of the Zoning Regulations deemed applicable in this case are consistent with previous decisions by the Zoning Division in

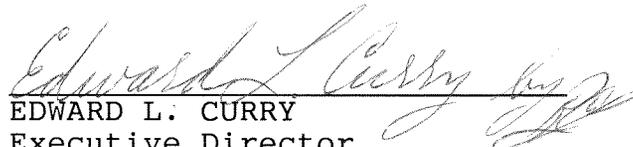
similar instances. The Zoning Administrator's interpretation is consistent with several past Board of Zoning Adjustment decisions that have determined that similar roofed areaways were sufficient connections to render a project a single building as defined in the Zoning Regulations. There is no probative evidence that the originally approved plans or the revisions thereto do not comply with the technical aspects of the Zoning Regulations. The redesign and reconfiguration of the roofed connections did not change the fact of their existence. The Zoning Administrator's determination that the project constituted a single, multi-family dwelling, requiring a minimum of five on-site parking spaces, and not subject to Section 410 review in 1987 was not negated by the developers' request for modifications to those plans in 1989.

The appellants have not presented evidence that indicates any error on the part of the Zoning Administrator in making his decision to issue the building permit for the project and subsequent modifications thereto. The appellants' dissatisfaction with the configuration and design of the roofed connections does not render such connections improper for purposes of establishing the project as a single building as defined by the Zoning Regulations. The Board concludes that the Zoning Administrator properly determined that the subject project constitutes a single structure and that as such the project complies with the provision of Section 2101 and further, that the provisions of Section 410 are not applicable in this case. The Board notes that ANC 3G did not file a written submission setting forth its issues and concerns relative to the subject appeal but participated as an appellant in the proceedings. The Board notes that in this instance, the ANC shares the responsibility of meeting the burden of proof as set forth in Section 3324.2. Accordingly it is hereby ORDERED that the appeal is DENIED and the decision of the Zoning Administrator is UPHeld.

VOTE: 5-0 (William F. McIntosh, Charles R. Norris, Paula L. Jewell and Carrie L. Thornhill to deny; Lloyd Smith to deny by proxy).

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

ATTESTED BY:


EDWARD L. CURRY
Executive Director

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FINAL DATE OF ORDER: FEB 22 1991

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

15096Order/SS/BHS

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPEAL NO. 15096

As Executive Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that a letter has been mailed to all parties, dated FEB 22 1991 and mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and to is listed below:

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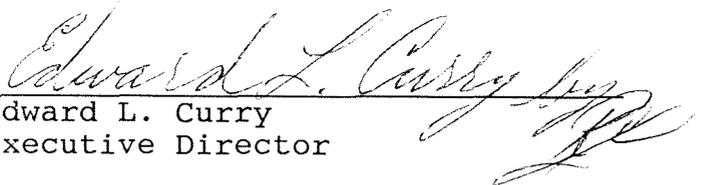
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Edward L. Curry
Executive Director

DATE: FEB 22 1991

Attes.8/BHS