

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17538 of Advisory Neighborhood Commission 3C and Woodley Park Community Association, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permits No. 86798 and 67758, on May 26, 2006, allowing the construction of a new building/underground parking garage. Appellant alleges that the authorized construction is in violation of several sections of 11 DCMR, including subsections 330.5, 2301, and 2500. The subject property is located in the R-5-B and R-5-D districts at premises 2660 Woodley Road N.W. (Square 2132, Lot 832).

HEARING DATE: December 12, 2006

DECISION DATE: February 6, 2007

DECISION AND ORDER

This appeal was submitted July 14, 2006 by Advisory Neighborhood Commission (“ANC”) 3C and the Woodley Park Community Association, which appealed from the administrative decision of the Zoning Administrator, made May 12, 2006, to issue permits allowing the construction of a new underground parking garage and related sheeting and shoring at the Wardman Park Marriott Hotel at 2660 Woodley Road N.W. (Square 2132, Lot 832). According to the Appellants, the Zoning Administrator erred in deciding that construction of a parking garage on property used as a hotel in a Residence zone was consistent with the Zoning Regulations.

Following a public hearing, the Board voted at its public meeting on February 6, 2007 to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated July 17, 2006, the Office of Zoning provided notice of the appeal to the Office of Planning, the Department of Consumer and Regulatory Affairs (“DCRA”), ANC 3C, and Single Member District/ANC 3C02. Pursuant to 11 DCMR § 3112.14, on October 2, 2006 the Office of Zoning mailed letters or memoranda providing notice of the hearing to ANC 3C and the Woodley Park Community Association; to the general manager of the Wardman Park

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Marriott Hotel and to Wardman Park Residential LLC, on behalf of the owners of the subject property; and to the Zoning Administrator. Notice was also published in the D.C. Register on October 6, 2006 (53 DCR 7975).

Party Status. The parties in this proceeding were the Appellants and the JBG Companies d/b/a Wardman Hotel LLC/JBG Associates LLC (“JBG”), the record owner of the property that was the subject of the appeal. There were no additional requests for party status.

Appellant’s Case. The appeal challenged the issuance of two permits for a new garage under construction on property used as a hotel in a Residence zone. The Appellants argued that the Zoning Administrator erred in deciding that construction of the garage was consistent with the Zoning Regulations on grounds that (i) the construction would violate “special grandfathering zoning rules that apply to hotels in residential zones” as well as the prohibition in the Zoning Regulations against construction of a parking garage in the front yard of a property, and (ii) the Zoning Administrator lacked assurance that all plans submitted for the subject property cumulatively complied with zoning requirements. The Appellants alleged that the hotel was subject to special restrictions imposed by § 350.4(d) that prohibit construction of new hotel buildings or an increase in the area of commercial aspects of hotels in residential districts, and that the garage would violate the Zoning Regulations as an accessory building not located in the rear yard or within the main building on the subject property, as required by §§ 2301 and 2500.

According to the Appellants, the garage was an accessory building, separate from the hotel building, and thus was not permitted in the front yard of the property. The Appellants also argued that construction of the garage – as a separate building not in existence as a hotel in 1980 – was not permitted under the Zoning Regulations. The Appellants asserted that § 350.4(d) authorized “only certain types of construction projects on a grandfathered hotel” – that is, a hotel could be repaired, renovated, remodeled, or structurally altered – and that any other project was prohibited. According to the Appellants, the garage project was prohibited because it did not constitute a repair, renovation, remodeling, or structural alteration.

Zoning Administrator. The Department of Consumer and Regulatory Affairs argued that the appeal should be dismissed as untimely because the appeal was filed more than 60 days after the issuance of the building permit that was the subject of the appeal, the Appellants did not demonstrate any exceptional circumstances out of their control that impaired their ability to file the appeal, and an extension would prejudice the parties.

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In response, the Appellants argued that the appeal was timely filed within 60 days of the time the Appellants had knowledge of the issuance of the permit, at an ANC meeting held three days after the permit was issued. The Appellants stated that notice of issued permits by means of the *D.C. Register* or by email from DCRA was often delayed or difficult to read.

The Department of Consumer and Regulatory Affairs also argued that the appeal should be denied on the ground that construction of the garage was not prohibited by § 305.4, because the garage will be a below-grade alteration of the existing building, not a stand-alone building or an addition. According to the Zoning Administrator, the subject property contains a single building used as a hotel, with a parking garage under construction in the front lawn area, which will be returned to its former status after construction was completed. The Zoning Administrator testified that the new parking garage would not be a stand-alone building because it will be constructed below grade with only *de minimus* life-safety features above grade; two exit/egress stairways will be above grade, while four air intakes will be less than four feet above grade. The Zoning Administrator stated that the parking garage would not be an accessory building but was an alteration of the existing building, noting that the garage will be underground, will have a connection to the existing building, and will not affect lot occupancy on the site.

According to the Zoning Administrator, provisions in the Zoning Regulations pertaining to the placement of parking garages in rear yards apply only to separate buildings. The Zoning Administrator testified that the lack of an above-grade connection between the garage and the hotel did not invalidate the conclusion that the garage and hotel would be part of one building, because the above-grade connection requirement was applicable only to two above-grade structures.

Intervenor. The Intervenor provided testimony from a representative of the JBG Companies, the owner of the property; an expert in architecture; and an expert in zoning regulations. The Intervenor argued that the Appellants' assertions were inconsistent with prior interpretations of the Zoning Regulations by the Board and by the Zoning Administrator. The Intervenor contended that (i) the garage was not an accessory building, because an accessory building, unlike the garage, is not connected to another building; (ii) the new garage will not constitute a separate building in the front yard of the hotel, because the garage will be located below grade and will not count toward gross square footage of the site; (iii) the garage will provide a storage area for required parking for the hotel, and thus will constitute an area devoted to service use and not a function room, exhibit space, or commercial adjunct.

FINDINGS OF FACT

1. The subject property is located at 2660 Woodley Road, N.W. (Square 2132, Lot 832) in the Woodley Park section of Northwest Washington. The irregularly shaped parcel has a land area of approximately 16 acres and has street frontage along Woodley Road, Connecticut Avenue, 24th Street, and Calvert Street.
2. The property is currently improved with a single building used as a hotel, known as the Marriott Wardman Park Hotel. Portions of the building known as the Center Tower and Park Tower are located in the southern section of the site, while the portion known as the Wardman Tower is located in the eastern section.
3. As part of a redevelopment project, the owner of the property undertook the construction of a new parking garage along the Woodley Road frontage in a previously undeveloped area north of the Center Tower portion of the hotel. As planned, the garage will replace an existing surface lot elsewhere on the subject property to satisfy the parking requirement for the hotel under Chapter 21 of the Zoning Regulations; the surface lot will be redeveloped separately. The parking garage will be located below grade except for life-safety features, including two exit/egress stairways and four air intakes. The parking garage will be connected to the hotel by an underground corridor at the P-2 level.
4. Construction of the garage will not result in an increase in the gross floor area of the hotel, or in the total area within the hotel devoted to function rooms, exhibit space, or commercial adjuncts. The parking garage will serve as a storage area for required parking to serve the existing hotel. The below-grade portions of the garage will not affect the lot occupancy of the site.
5. Most of the subject property is located in the R-5-B zone district. The southern portion is zoned R-5-D.
6. The hotel was in existence as of May 16, 1980.
7. A hotel in existence as of that date is permitted as a matter of right in the R-5-B and R-5-D zones. However, the gross floor area of the hotel may not be increased, and the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased. An existing hotel may be repaired, renovated, remodeled, or structurally altered. 11 DCMR 350.4(d).

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8. A “building” is defined in the Zoning Regulations as “a structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or chattel.” When separated from the ground up or from the lowest floor up, each portion is generally deemed a separate building. The existence of communication between separate portions of a structure below the main floor is not construed as making the structure one building. 11 DCMR § 199. Conversely, the existence of such communication at or above the main floor permits unifies the separate portions of a structure into a single building.
9. An “accessory building” is defined as “a subordinate building located on the same lot as the main building, the use of which is incidental to the use of the main building.” 11 DCMR § 199.
10. The definition of “hotel” requires that all areas within a hotel must be included in one of five categories: (a) commercial adjuncts – retail and service establishments customarily incidental and subordinate to hotel use; (b) exhibit space – floor area primarily designed for the display and storage of exhibits for conferences, trade fairs, and similar group events; (c) function room – rooms used primarily to accommodate gatherings of hotel guests and visitors; (d) guestroom areas – floor area devoted to guestrooms or suites; or (e) service areas – floor area devoted to mechanical services and storage supportive of the hotel as a total entity. 11 DCMR § 199.
11. On November 17, 2005, the property owner applied for a permit to construct three underground levels of parking, containing approximately 250 parking spaces. Building Permit No. 86798 authorizing the garage construction was issued Friday, May 12, 2006. In January 2006 the property owner applied for a permit to do sheeting and shoring in connection with the construction of the parking garage. Permit No. 67758, authorizing sheeting and shoring, was issued May 26, 2006.
12. On May 15, 2006, the Monday following the issuance of Permit No. 86798, the Zoning Administrator issued a memorandum to the chair and single member district commissioner for ANC 3C on the development project at the Wardman Park JBG Hotel. In that memorandum he stated that after considering the ANC’s concerns, he had determined that construction of the underground parking structure was allowed as a matter of right for the reasons set forth in the memorandum. The Zoning Administrator also appeared at the ANC public meeting that evening and notified the ANC and the community that the permit had been issued.

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13. At a public meeting on June 19, 2006, with a quorum present, ANC 3C voted 6-0 to approve a resolution disagreeing with the legal conclusions of the Zoning Administrator that the property owner could proceed as a matter of right. The ANC resolved to appeal the issuance of permits for construction on the subject property.
14. ANC 3C and Woodley Park Community Association filed its appeal July 14, 2006, 63 days after the issuance of Building Permit 86798, authorizing construction of the underground garage, and 60 days after the ANC and Woodley Park Community Association had notice of the issuance of the permit.

CONCLUSIONS OF LAW

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration the Zoning Regulations. 11 DCMR §§ 3100.2, 3200.2. In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. 11 DCMR § 3100.4.

Motion to Dismiss

At the hearing, DCRA orally moved to dismiss the appeal on grounds that the appeal was untimely filed as it was filed 63 days after the building permit authorizing the construction of the underground garage was issued.

The District of Columbia Court of Appeals has held that “[t]he timely filing of an appeal with the Board is mandatory and jurisdictional.” *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C., 1994.) If an appeal is not timely filed, the Board lacks jurisdiction to consider it. *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C., 2001). Accordingly, the Board must consider the jurisdictional question of timeliness prior to a consideration of the merits.

The Board’s Rules of Practice and Procedure governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Subsection 3112.2 (a) requires that all appeals be filed within 60 days after the date the person filing the appeal had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier. This 60-day time limit may be extended only if the appellant shows that: (1) “There are exceptional circumstances that are outside the appellant’s control and could not be reasonably anticipated that substantially impaired the

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appellant's ability to file an appeal to the Board; and (2)The extension of time will not prejudice the parties to the appeal." 11 DCMR 3112.2(d).

In this case, the facts are clear and undisputed as to when the building permit was issued and when the appellants had notice of the issuance of the permit. The permit was issued on Friday, May 12, 2006. Appellants learned of the issuance of the permit the following business day, Monday, May 15, 2006, when the Zoning Administrator issued a memorandum to the ANC alerting them to the fact and then addressed the ANC and the community on this issue at an ANC meeting that evening. The appeal was filed within 60 days of May 15, 2006, the date the ANC learned that the permit had been issued. There is no evidence in the record to conclude that the appellants should have reasonably known of the issuance of the permit prior to that date. Therefore the Board concludes that the filing of the appeal was timely, consistent with the requirements of 11 DCMR § 3112.2(a).

The Merits

I. The underground parking garage is not an accessory building but an extension of the existing building.

Appellants allege that the new garage will be an accessory building that will be improperly located in the front yard of the property. The Board credits the testimony of the Zoning Administrator that the new garage will not constitute a new building, separate from the existing building, because the garage will be constructed below grade and will be connected to the hotel with a hallway. The garage will lack a roof and therefore does not meet the definition of "building" in the Zoning Regulations. Because the garage will not be a building, it cannot be an accessory building. Rather, the new parking garage will constitute an underground addition to the existing hotel building.

Appellants argue that the parking structure and the existing hotel do not constitute one building because the communication between the garage and the hotel, i.e. the hallway, is underground. Their allegation is premised on the reference in the definition of "building" to communication between separate portions of a structure below the main floor, as not being construed as making the structures one building. The Board concurs with the Zoning Administrator that the above-grade connection requirement applies only to two or more above-grade buildings. The definition of building states in relevant part: "**When separated from the ground up or from the lowest floor up**, each portion shall be deemed a separate building, except as provided elsewhere in this title (Emphasis added.). The lack of an above-grade connection between the garage and the hotel does not make the garage a separate building as defined in the Zoning Regulations. Moreover, because

the parking garage is below-grade, it is not located in a yard. Therefore, the underground parking garage with a hallway connection to the hotel – will constitute an addition to the existing building, and not a separate accessory building located in the front yard of the property.

II. The underground parking garage is not an expansion of a hotel in a Residence zone in contravention of § 350.4.

Appellants allege that the underground parking garage would violate 11 DCMR § 350.4 on grounds that the provision prohibits the construction of new hotel buildings; that the construction cannot be characterized as a repair, renovation, or alteration of an existing hotel; and the construction increases the total area within the hotel devoted to function rooms, exhibit space and commercial adjuncts.

Title 11 DCMR § 350.4 provides, in relevant part, that the following uses are permitted as a matter of right in an R-5 District:

(d) Hotel...in existence as of May 16, 1980...provided that the gross floor area of the hotel may not be increased and the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased. An existing hotel may be repaired, renovated, remodeled or structurally altered.

For the reasons set forth above, the underground garage is not a new building. The Board concurs with the Intervenor's assertion that the new garage will not cause an increase in the area at the hotel devoted to function rooms, exhibit space, or commercial adjuncts, but will serve as a storage area for required parking. Moreover, because it is underground, it will not increase the gross floor area of the hotel. Accordingly, the underground parking garage may be considered a structural alteration in accordance with § 350.4.

III. The Zoning Administrator's statement in a memorandum to the Appellants did not constitute an error in the administration of the Zoning Regulations.

Appellants allege that it was error in violation of § 350.4 and the Zoning Regulations in general, for the Zoning Administrator to indicate in his May 15, 2006, memorandum to the ANC, explaining his determination that the underground parking garage could proceed as a matter of right, a caveat that "the calculations provided by JBG were preliminary and that the Office of Zoning Administrator will have to ensure that all submitted plans cumulatively comply with the zoning requirements."

Appellants do not indicate how this statement violates either § 350.4 or the Zoning Regulations, in general, and the Board finds no merit to this claim.

For the reasons stated above, the Board concludes that the Appellant has not satisfied the burden of proof with respect to its claim of error in the administrative decision of the Zoning Administrator to issue Building Permits No. 86798 and 67758, on May 26, 2006, allowing the construction of a new underground parking garage for a hotel in the R-5-B and R-5-D districts at 2660 Woodley Road N.W. (Square 2132, Lot 832).

Accordingly, it is hereby **ORDERED** that

a. The motion to dismiss the appeal as untimely is **DENIED**.

VOTE: 3-2-0 (Geoffrey H. Griffis, Ruthanne G. Miller, and John A. Mann II to deny the motion to dismiss; Curtis L. Etherly, Jr. and John G. Parsons to grant the motion).

Vote taken on December 12, 2006

b. The Appeal is **DENIED**.

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and John G. Parsons voting to deny the appeal)

Vote taken on February 6, 2007

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

Each concurring Board member approved the issuance of this order.

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JAN 03 2008

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11

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DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

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As Director of the Office of Zoning, I hereby certify and attest that on **JANUARY 3, 2008**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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