GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17468-A of Endalkachew Tesfaye, pursuant to 11 DCMR §§ 3100 and 3101, from a decision by the Zoning Administrator to deny the issuance of a Certificate of Occupancy for a 6 unit apartment building. The subject property is located in the R-4 District at premises 1124 E Street, N.E. (Square 984, Lot 44).

HEARING DATE: **June 27, 2006**
DECISION DATE: **July 11, 2006**

DECISION AND ORDER

This case is derived from BZA Appeal No. 1768 an earlier appeal involving the renovation of an apartment house located at 1124 E St., N.E. (the "Project"). In the earlier appeal, ANC 6A claimed that electrical, fire, mechanical and plumbing permits were wrongfully issued for the Project, on grounds that the Project violated the minimum lot area requirement for apartment houses converted from another structure in the R-4 Zone District as stated in § 401.3, and several parking requirements. Endalkachew Tesfaye, as the owner of the property, was automatically a party in that appeal. Mr. Tesfaye, through counsel, argued that the appeal was untimely, that it was barred by the doctrine of collateral estoppel and that the issuance of the permits was in accordance with the zoning regulations.

After ANC 6A filed its appeal, but prior to the scheduled hearing, the Zoning Administrator refused to issue a Certificate of Occupancy for the Project on the basis of noncompliance with § 401.3. The refusal was not based on the parking space deficiencies also alleged in the ANC appeal.

On May 9, 2006, counsel for Mr. Tesfaye filed a "cross-appeal" of the Zoning Administrator's decision to deny the Certificate of Occupancy, claiming that the ZA's reliance on § 401.3 was erroneous. Since the ZA's decision was not based on the alleged parking violations, Mr. Tesfaye did not allege error on that basis. The same pleading also requested the Board to dismiss the ANC appeal as untimely.

At its public meeting of May 16, 2006, the Board dismissed the ANC appeal on grounds of untimeliness,[1] accepted the filing of the "cross-appeal" as a new proceeding ("the appeal"), and scheduled a hearing on the appeal for June 27, 2006. In scheduling the hearing, the Board specifically allowed sufficient time for the ANC representative to

[1]The written order for BZA Appeal No. 17468 will follow the issuance of this order.

bring the cross appeal for consideration at a publicly noticed ANC meeting and time for the ANC to file a pre-hearing brief.[2] Since the instant appeal did not concern the adequacy of the parking spaces provided, the dismissal of the ANC appeal removed that issue from the Board's consideration.

At the public decision meeting held on July 11, 2006, the Board voted to grant the appeal. The factual and legal bases for the Board's decision follow.

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The parties to this proceeding are Endalkachew Tesfaye, the Department of Consumer and Regulatory Affairs ("DCRA") and Advisory Neighborhood Commission 6A ("ANC"). Mr. Tesfaye is the appellant. DCRA is the appellee. The ANC is an automatic party.

Notice of Hearing. As the cross-appeal was the outgrowth of the appeal, the Board determined that strict compliance with the hearing notice requirements of 11 DCMR § 3112.14 was not necessary for this appeal.[2] Notice of hearing for the earlier appeal was provided to the parties. The Office of Zoning advertised the hearing notice in the *D.C. Register* at 53 D.C. Reg. 2183 (March 24, 2006). At its decision meeting for the earlier appeal held May 16, 2006, the Board provided notice to the parties, and the public in attendance, that it would hold a hearing on the new appeal on June 27, 2006. As stated above, the hearing was scheduled at a date that provided the ANC sufficient time to consider the cross-appeal at a publicly noticed ANC meeting. Finally, the Office of Zoning posted notice of the appeal on its schedule on the Office of Zoning website.

Motion for Continuance. DCRA sought a continuance of the June 27, 2006 hearing because its witness, Zoning Administrator Bill Crews, originally requested by the Board to appear at the hearing, was unavailable on that date. Despite the ANC's preference that DCRA provide the Zoning Administrator as its witness, the Board determined that the Deputy Zoning Administrator, who was available to testify on behalf of the Zoning Administrator's office was qualified to address the issues in the case, and that further delay would not be in the interest of any of the parties. DCRA did not object to proceeding in that manner. Accordingly, the Board, by consensus, denied the request.

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[2] Subsection 3100.5 provides:

> Except for §§ 3100 through 3105, 3121.5 and 3125.4, the Board may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

The standard for waiver is easily met here, since the parties and lot area issue were the same in both appeals, full notice was given as to the earlier appeal, and the Board announced the hearing date in the presence of the parties and the members of the public in attendance at the decision meeting for the ANC appeal

Motion to Exclude Testimony and Strike Report of Toyed Bello from the Record. In support of his appeal, Mr. Tesfaye offered former Zoning Administrator Toye Bello as an expert witness and sought to submit a report authored by Mr. Bello into evidence. DCRA moved to exclude the testimony and strike the report. DCRA claimed that allowing Mr. Bello's testimony and report into the record violated the Board's rule prohibiting former District employees from representing other persons before the Board in matters in which they had substantial responsibility while employed by the District. 11 DCMR § 3106.6. The Board denied DCRA's motion because Mr. Bello's report and testimony would not constitute representation. Mr. Bello served only as an expert witness, and Mr. Tesfaye was represented in this appeal by separate legal counsel.

FINDINGS OF FACT

1. The property is located at 1124 E Street, N.E. (Square 984, Lot 44) ("Subject Property").

2. The Subject Property is zoned R-4 and has a lot area of 1,710 square feet.

3. The Subject Property has been used as a 3-unit apartment house since at least 1951 and had a certificate of occupancy for an apartment house use on May, 12 1958, the effective date of the current version of the Zoning Regulations.

4. The matter of right provisions for the R-4 District do not permit new apartment houses, but allow, "the conversion of a building or other structure existing before May 12, 1958, to an apartment house as limited by… [§] 401.3." 11 DCMR § 330.5 (c).

5. Subsection 401.3 lists, for each residence zone, lot area requirements by structure type.

6. For the R-4 District, § 401.3 lists separate requirements for row dwellings and flats, single-family semi-detached dwellings, and "conversion to apartment house."

7. The lot area requirement for a structure converted to apartment house is 900 feet per unit.

8. On February 2, 2005, the Department of Consumer and Regulatory Affairs issued Building Permit B469531 to the appellant.

9. Building Permit B469531 authorized, "[i]nterior renovation and new electrical mechanical and plumbing" for an apartment house with 6 units and 2 parking spaces.

10. Prior to the issuance of the building permit, the subject property had 570 square feet of lot area for each of its 3 units.

11. As a result of the completed renovations, the subject property had 285 square feet of lot area for each of its 6 units.

12. On February 26, 2006, Mr. Tesfaye applied for a Certificate of Occupancy for the completed Project.

13. In a letter dated March 22, 2006, the Zoning Administrator disapproved Mr. Tesfaye's application for a Certificate of Occupancy on grounds that the renovations violated § 401.3 of the Zoning Regulations. The Zoning Administrator determined that the apartment house was a nonconforming use and stated in relevant part:

> 11 DCMR Section 2000.3 requires that all uses and structures incompatible with permitted uses or structures shall be regulated strictly and permitted only under rigid controls. 11 DCMR Section 401.3 requires that in an R-4 [D]istrict, existing buildings can be used as apartment buildings only if the lot size allows 900 square feet per unit. In order for you to expand the number of units to 6, you would need a minimum lot size of 5,400 square feet.

CONCLUSIONS OF LAW

An appeal may be taken by any person aggrieved by, or District agency affected by, any decision of a District official in the administration or enforcement of the Zoning Regulations. Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799); D.C. Official Code § 6-641.07(f) (2001 ed.),

The Zoning Administrator denied issuance of the Certificate of Occupancy because the Project did not conform to the minimum lot area requirements of §401.3 of the Zoning Regulations. Subsection 401.3 establishes the minimum lot dimensions for properties in residence districts by type of structure permitted. As to the R-4 Districts, the regulation provides:

ZONE DISTRICT AND STRUCTURE	MINIMUM LOT AREA (square feet)	MINIMUM WIDTH OF LOT (feet)
R-4		
Row dwelling and flat	1,800	18
One-family semi-detached dwelling	3,000	30
Conversion to apartment house	900/apartment or bachelor apartment	None prescribed

The Appellant alleged that the Zoning Administrator erred in denying the certificate of occupancy on two grounds:

1) §401 is not applicable to the facts in this matter; and 2) DCRA is barred from denying the certificate of occupancy on grounds of the equitable doctrine of collateral estoppel.

Because this Board finds that the Zoning Administrator erred in applying §401 to the facts of this case, it is not necessary for the Board to reach the issue of collateral estoppel.

In essence, the Zoning Administrator read too broadly the words in §401.3. As set forth specifically in the above chart, in an R-4 District, the 900 square foot rule applies to *conversions* to apartment buildings, not to all "existing buildings" to be used as apartment buildings. For there to have been a conversion to an apartment building, the existing building must have been something other than an apartment building.

The evidence produced in the record shows that the building is and has been an apartment house since at least 1951, and had a certificate of occupancy for use as an apartment house prior to the enactment of the Zoning Regulations. Accordingly, there was no conversion to an apartment house and the lot area restrictions of §401.3 do not apply.

This interpretation is directly in accord with Zoning Commission Order 211 (March 9, 1978), which amended the lot area requirement for the R-4 district to apply not only to conversions from single family dwellings or flats, but also to buildings which are multiple dwellings; as an example, the Zoning Commission cited rooming houses to apartments. The Zoning Commission made this change because it noted that under the previous regulation the 900 square foot of lot area was not being applied for a change from one type of multiple dwelling to another. The Zoning Commission found that the existing regulations, as written, were being interpreted correctly and therefore changed the regulations to capture conversions from multiple dwellings to apartment houses [3]
Based on the above and on the logical reading of the words on their face, the Board concludes that for there to be a *conversion* to an apartment house, and for §401.3 to thereby apply, the existing building must be something other than an apartment house.

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[3] *See* BZA decision *Appeal of Martin Lobel*, BZA Order No. 12434 (Dec. 5, 1977) decided three months earlier, to which the Zoning Commission appears to allude. In that case the Board upheld the conversion of a rooming house, constructed prior to May 12, 1958, into an apartment house in the R-4 District, notwithstanding its noncompliance with the lot area restriction. The Board concluded that "the subject matter of the appeal was not a "'conversion' to a multiple dwelling, but a change of use of a multiple dwelling to a different type of multiple dwelling." BZA Order No. 12434 at 6. The regulation appears to have been amended to address this situation.

The facts of this case definitively show that the existing building is and has been an apartment house since before the enactment of the Zoning Regulations. Accordingly, the Zoning Administrator erred in his application of §401.3 to the facts in this case and in thereby denying the certificate of occupancy.

Great Weight to ANC 6A

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised by the affected ANC. To give great weight the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's written issues and concerns. *Neighbors United for a Safer Community v. District of Columbia Board of Zoning Adjustment,* 647 A2d. 793, 798 (D.C. 1994).

ANC 6A did not submit a report for the Board's consideration for this appeal, but did submit a written statement in its dismissed appeal. Given the unusual procedural aspect of this case, the Board will treat that statement as though it were ANC 6A's written report for this appeal and address those concerns that relate specifically to the cross-appeal.

In its statement, the ANC 6A argued that the Project was a conversion to either a multiple dwelling or to an apartment house, and must therefore comply with minimum lot area requirements set forth in §330.5(c) and §401.3. Both these provisions address conversion to an apartment house. As set forth above, the Board has found that no conversion to an apartment house occurred because the building has been an apartment house since at least 1951 and continues to be one. Accordingly, these provisions are not applicable to the facts in this case. As the rationale for the Zoning Administrator's denial of the certificate of occupancy was §401.3, the Board need not address the remainder of the ANC's concerns set forth in its statement.

Conclusion

For the reasons stated above, the Board concludes that the Zoning Administrator erred in denying the Certificate of Occupancy in this case.

It is therefore **ORDERED** that the appeal is **GRANTED**:

VOTE: **4-1-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann II to grant the appeal, Carol J. Mitten to deny the appeal by absentee ballot).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has, approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: NOV 15 2006

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.