

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Appeal No. 14661 of William J. Brown, Philip J. Brown, and B & W Management, Inc., pursuant to 11 DCMR 3105.1 and 3200, from the decision of the Zoning Administrator dated April 27, 1987, to the effect that the developer did not violate Conditions No. 3 and 13 of Zoning Commission Order No. 453 regarding the color of brick facade and window trim, and the type of glass used in an approved planned unit development in the CR District at premises 1250 - 24th Street, N.W., (Square 24, Lot 834).

HEARING DATES: September 16, and December 2, 1987  
DECISION DATE: January 6, 1988

FINDINGS OF FACT:

1. This appeal concerns the construction of a building to be occupied by retail and office uses on lot 834, in Square 24, of premises 1250 24th Street, N.W. In Zoning Commission Case No. 84-19C, in Order No. 453, the Zoning Commission approved the construction of the building as a Planned Unit Development ("PUD").

2. Appellants appeal from the decision of the Acting Zoning Administrator, dated April 27, 1987, that the color of window glass, color of brick, and color of window trim do not violate condition No. 13 of Zoning Commission Order No. 453.

3. Z.C. Order No. 453 became final and effective on May 3, 1985. Zoning Commission Order No. 474, which became final and effective on October 18, 1985, "clarified" Order No. 453 in a manner that is not material to this appeal.

4. Condition No. 13 of Order No. 453 reads as follows:

Minor architectural modifications may be made to the plans, such as architectural treatment of windows and the architectural treatment of the front entrance. The shade of the brick and facade glass shall be as shown on Exhibit No. 65A.

5. Appellants contend that by examination of Exhibit No. 65A, it becomes evident that: (1) the brick is required to be red or brown; (2) the glass is required to be clear;

and (3) the window trim is required to be green. Appellants submit further that all of this is clearly evident.

6. Appellants contend that the brick on the east facade of the structure has been painted off-white or grey; the glass is clear; and the window trim is white or off-white.

7. With respect to the issues that this appeal presents, Zoning Commission Order No. 453 is not as self-sufficient in terms of clarity as would be reasonably and practically required for its effective administration by the Zoning Administrator. In particular, the Order does not state in so many words the intended color of the brick or windows; nor does it state any requirement for the window trim; nor does it identify color or material samples by reference to a brand name or manufacturer, and identifying number.

8. The word "shade" is the only descriptive word that appears in Condition No. 13 in reference to the "color" of the brick and facade glass. "Shade" is defined and commonly understood to refer to relative lightness or darkness, not to a differentiation among colors.

9. 1250 Twenty-Fourth Street Associates Limited Partnership, intervenor in support of the ruling of the Zoning Administrator, has a 99-year ground lease for the site, and is a general partner in a partnership that holds a 37.57 percent fee interest in the site.

10. Intervenor filed a motion to dismiss the appeal on the following grounds: (1) the appeal was untimely filed; and (2) the appeal is barred by the doctrines of laches, waiver, and estoppel. Because of the complexity of the facts on which intervenor relied to establish a basis for the motion to dismiss, the Board determined to reserve a ruling on the motion until after the hearing on the merits of the appeal.

11. Appellants moved to disqualify the firm of Wilkes, Artis, Hedrick and Lane from the representation of intervenor, on the ground that an employee of the firm, Steven E. Sher, is disqualified from working on the matter, and that this disqualification extends to the entire firm.

12. Mr. Sher served as Executive Director of the Zoning Secretariat when Z.C. Case No. 84-19C was pending. He resigned effective August 31, 1985. The position of Executive Director has not been designated as covered by 18 U.S.C 207(d).

13. Mr. Sher is not an attorney.

14. Since August 31, 1985, Mr. Sher has not discussed Zoning Commission Case No. 84-19C with any officer of the District of Columbia Government.

15. On December 31, 1985, the District of Columbia Department of Consumer and Regulatory Affairs issued Building Permit No. B311808, authorizing construction of the PUD.

16. In a series of administrative decisions about the issues that are before the Board in this appeal, the Zoning Administrator ruled as set forth in Findings of Fact numbered 17 through 21.

17. On March 28, 1986, the Zoning Administrator, James J. Fahey, ruled that Condition No. 13 of Z.C. Order No. 453 applied to the color of the brick and glass, as shown in Exhibit No. 65A, and not to other facade components, for example, mullions and precast.

18. On July 14, 1986, Mr. Fahey determined that a paint sample, that is a paint chip, Exhibit No. 35 in this record, and identified as a mix of Pratt and Lambert R0189W (Feather Gray II), Pratt and Lambert R0183W, (Chalk Gray I), and Pratt and Lambert R0188A (Sicilian Umber II), matched Ex. No. 65A.

19. In November, 1986, the Deputy Zoning Administrator determined that glass then being installed in the front bow section had a greenish tint, and conformed to Ex. 65A.

20. On March 18, 1987, a zoning inspector determined that the color of glass and color of paint being used to repaint the PUD complied with Condition No. 13.

21. On April 20, 1987, the Acting Zoning Administrator, together with appellants and counsel for appellants, inspected the PUD site. On April 27, 1987, the Acting Zoning Administrator wrote counsel for appellants that, based on his inspection: the building matched Exhibit 65A; the color of paint conformed to that approved by the Zoning Administrator in July, 1986; and the appearance of the glass of the "bow window" area matched Ex. No. 65A.

22. As the Acting Zoning Administrator pointedly testified at the hearing, "Exhibit 65A, without any reference to a named color for both the brick and glass left the Zoning Administrator to determine to the best of his ability the color brick and glass to be used."

23. Because Order No. 453 lacked specificity as to the color of brick, window trim, or glass, the Zoning Administrator had the responsibility and authority to determine what the Zoning Commission intended to require.

Expert testimony at the hearing cannot supply a specificity that goes beyond that which the Zoning Commission required.

24. In light of the direction provided in Z.C. Order No. 453, together with the consideration of reasonable sources of clarifying information, the Zoning Administrator and Acting Zoning Administrator made reasonable administrative decisions.

25. This appeal was filed on June 19, 1987.

CONCLUSIONS OF LAW:

1. The firm of Wilkes, Artis, Hedrick and Lane is not disqualified from participating in this appeal. The disciplinary rules that apply to attorneys do not apply to Mr. Sher. For that reason, Mr. Sher need not be formally screened from contact with the attorneys of the firm who represent intervenor. Nor does 18 U.S.C. 207 require such screening. To the contrary, that provision allows a former employee who has not been designated under 18 U.S.C. 207(d) to provide "in house" assistance in connection with representation. Mr. Sher has not acted in any way that is proscribed by 18 U.S.C. 207, insofar as it applies to him.

2. The decision of the Zoning Administrator on April 27, 1988, that the ongoing painting of the building, and the glass, conformed to Zoning Commission Order No. 453, is an appealable decision.

3. As to the April 27, 1987 decision, the appeal is not untimely, and the motion to dismiss is denied, insofar as it relates to challenging the jurisdiction of the Board.

4. Because the Board has concluded to affirm the administrative decision on the merits, it need not render the affirmative defenses of waiver, laches, and estoppel, and the Board will not address those issues in this decision.

5. Zoning Commission Order No. 453 does not specify either the shade or color of window trim.

6. The test before the Board is not whether the administrative decision before it is the one that the Board would have made in the first instance, but whether there was a reasonable basis for the decision.

7. The decision of the Zoning Administrator on April 27, 1987 is a reasonable interpretation of the meaning of Condition No. 13 of Zoning Commission Order No. 453. To the extent that there is legitimate room for disagreement about this issue, the fault lies in the terms of Order No. 453,

and not in the administrative decision that is before the Board, nor in the earlier administrative decisions.

Accordingly, it is ORDERED that the appeal is DENIED and the decision of the Zoning Administrator is UPHeld.

VOTE: 4-0 (Charles R. Norris, Paula L. Jewell, and William F. McIntosh to deny and uphold; Carrie L. Thornhill to deny and uphold by proxy).

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

ATTESTED BY:

  
EDWARD L. CURRY  
Executive Director

FINAL DATE OF ORDER:

MAY 18 1989

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."

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