

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17438-A of Braden P. and Conner W. Herman, pursuant to 11 DCMR 3104.1 for a special exception to allow a two-story addition to a row dwelling under section 223, not meeting the percentage of lot occupancy or court width provisions of §§ 403 and 406 at premises 628 East Capitol Street, NE (Square 868, Lot 805) in the R-4 District.

HEARING DATES: February 28, 2006, May 16, 2006, and September 5, 2006

DECISION DATE: October 3, 2006

**DATE OF DECISION ON
MOTION FOR**

RECONSIDERATION: May 1, 2007

ORDER DENYING RECONSIDERATION

On April 10, 2007, Madison and Solveig McCulloch (the McCullochs¹) submitted a motion for reconsideration of the Board of Zoning Adjustment's (Board) March 29, 2007 order, which granted a special exception to Braden P. and Conner W. Herman (the Applicant) (Exhibit 49). The special exception allowed the Applicant to build a two-story addition not meeting the lot occupancy or court width requirements under the Zoning Regulations. The McCullochs alleged specific errors in the Board's order pursuant to 11 DCMR § 3126.4 and requested that the Board reconsider its decision. On April 19, 2007, the Applicant filed its response to the motion. *See*, 11 DCMR § 3126. As an initial matter, the Applicant argued that the motion was untimely filed. At a decision meeting on May 1, 2007, the Board found that the motion was not untimely and also voted to deny the motion on its merits.

The Timeliness Issue

The motion for reconsideration was timely filed. The Order stating the Board's decision was issued and served by first class mail on the parties on March 29, 2007 pursuant to 11 DCMR § 3125. Although § 3126.2 requires that a motion for reconsideration "be filed with the Director within ten (10) days from the date of issuance of a final written order by the Board", § 3110.3 provides that "[w]henver a party ... is required to do some act within a prescribed period after the service of a notice or other paper, and the paper or notice is served upon the party by mail, three (3) days shall be added to the prescribed period." Therefore, the McCullochs had 13 days

¹ The McCullochs occupy the adjacent property at 626 East Capitol Street, NE. They participated in the Board proceedings as a party in opposition and were represented by counsel.

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after March 29, 2007² to file a motion for reconsideration. The 13th day after March 29th was April 11, 2007. The motion for reconsideration was received on April 10th by the Office of Zoning in a facsimile transmission sent by the McCullochs, who were then in France. Thus, the motion was filed within the specified time period.

The Alleged Errors

The Board has reviewed the alleged errors raised by the McCullochs. For reasons that will be explained below, the Board finds that no errors were committed and therefore denies the motion for reconsideration.

1. The McCullochs allege that the Board erred when it qualified the Applicant's mechanical engineer as an expert in "residential design and lighting" and when it accepted the Applicant's "Daylighting Impact Study" as an expert study. They also allege that their expert, Matthew Tantari, was "eminently qualified as an expert architect".

The Board had ample basis for qualifying Michael Babcock as an expert in residential design and lighting. Mr. Babcock testified that his firm, EMO Energy Solutions, provided comprehensive services to clients, including "daylighting design" services (T. p. 97). He also testified that he had done extensive work in the District (T. p. 99). While most of his experience was institutional/commercial and not residential, Mr. Babcock testified that the methodology for residential daylighting studies was the same (T. p. 97-98).

The Board does not dispute that Mr. Tantari was a well qualified expert. Nevertheless, the Board was not persuaded by his testimony, and concluded that the project would not unduly impact on the McCullochs' light and air.

2. The McCullochs allege that the Board erred when it disallowed cross examination regarding the computer program used by the Applicant's expert.

The Board does not agree that cross-examination was unduly restricted. In fact, the record shows that counsel for the McCullochs conducted extensive cross-examination regarding the Applicant's daylighting study, including the software and methodology employed, (See, T. p. 160 – 176).

3. The McCullochs allege that the Board's order is deficient because it does not specify the building material that was assumed in the daylighting study or the material that will be used on the west facing walls.

The Board is not required to specify building materials in its final decision and order. The Regulations only require the Applicant to build in accordance with the submitted plans.

² When an action triggers a period in which a party is to act, the date of the action is not counted. 11 DCMR § 3110.2.

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(See, 11 DCMR Section 3125.7, which states that approval of an application includes approval of the plans submitted with the application, unless the Board orders otherwise.) While 11 DCMR Section 223.4 provides that the Board may specify building materials to protect adjacent and nearby properties, the McCullochs did not seek such a condition and the record does not support its imposition. The Applicant's revised "Scheme B" plans were entered into the record during the public hearing (Exhibit 40). The plans did not specify a building material. However, during the hearing the Applicant proffered to use white painted brick as a way to maximize reflected light. In response to questioning during cross-examination, Mr. Babcock noted that the daylighting study also assumed a white painted brick material, consistent with the proposed design (T. p. 162). The McCullochs did not argue that this building material was necessary to protect their property nor did they express a preference with respect to the building material. Accordingly, there was insufficient evidence in the record to impose a condition regarding the building material.

4. The McCullochs allege that the Board's order "should state specifically" that frosted glass or "similar glass" will be used on the two new windows that are proposed.

The Board is not required to state the type of glass that will be installed. The Applicant specified in the plans that he will install frosted glass, and the addition must be built in accordance with the plans.

5. The McCullochs allege that the Board's order is deficient because it erroneously states that the rear yard is 78 feet deep when it is only 48 feet deep.

The rear yard is 78 feet deep. It appears that the McCullochs miscalculated and reduced the rear yard dimension by the length of the carriage house (30 feet). However, 11 DCMR § 199.1 defines a rear yard as the "mean horizontal distance between the rear line of a building and the rear lot line." An accessory building does not end the rear yard, but is located "in a rear yard," 11 DCMR § 2500.2.

6. The McCullochs claim that the Board erred because it stated that several houses in the area have narrow "unusable" courtyards (Findings of Fact 18 and 19). They also state that the Board failed to consider their design proposal to have "one double wide courtyard" serving both properties.

The McCullochs misstate both of these Findings. The Board never found that the narrow single courtyards in the area were "unusable". Quite the opposite, the Board found that single courtyards were typically used to allow more natural light in townhouse neighborhoods. Nor did the Board fail to consider the double courtyard which was proposed by the McCullochs. The Board specifically addressed the McCullochs' position within Findings of Fact #18 and #19.

In Finding of Fact #18, the Board found that the five foot court that would be created is "standard" and "typical". As set forth therein, this finding was based upon testimony from the Applicant's land use expert, Nathan Gross (See, T. p. 135-136). Mr. Gross explained that it was

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a challenge to get natural light into the interior rooms of townhouses. Continuing, he stated that the typical way to do so was to create a narrow single court at the side/rear of two abutting townhouses, which would allow for windows on the side walls of the abutting houses. To demonstrate this practice, Mr. Gross submitted a map of Square 868 (where the property is located). This map shows more than fifteen instances of deep, narrow courtyards which are similar to the court which would be created by the proposed addition (Exhibit 44).

With respect to Finding of Fact #19, the Board considered the McCullochs' suggestion that the addition be designed so as to create a "double" court. However, the Board was persuaded by the Applicant that a double court "would offer little value" because it would result in inferior use of both interior and exterior space at the subject property. The Board also found that the existing court is adequate for both properties. The McCullochs have offered no convincing evidence in this motion for reconsideration to support a conclusion that the Board erred in this assessment or that a double court would be necessary to mitigate adverse impacts upon neighboring properties.

In conclusion, the McCullochs have not identified any legal or factual errors, or any other basis upon which the Board should reconsider its decision in this case. For these reasons, it is hereby **ORDERED** that the Motion for Reconsideration is **DENIED**.

VOTE: 3-0-2 (Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann II to deny;
Marc D. Loud not participating; Gregory N. Jeffries, necessarily absent)

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: AUG 10 2007

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND 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.

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As Director of the Office of Zoning, I hereby certify and attest that on **AUGUST 10, 2007**, 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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TWR