

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17502 of Jonathan Gottlieb pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA) to issue Building Permit No. 84942, dated January 17, 2006, for the alteration, repair, and addition to an existing residence at 4641 Dexter Street, N.W., in the WH/R-1-A District (Square 1381, Lot 6).

HEARING DATES: July 18, 2006 and September 26, 2006

DECISION DATE: September 26, 2006

DECISION AND ORDER

This appeal was filed on March 17, 2006 with the Board of Zoning Adjustment (the Board) challenging DCRA's decision to issue a building permit. At DCRA's request, the Board continued the initial public hearing that had been set for July 18, 2006. Prior to the new hearing date on September 26, 2006, the property owner moved to dismiss the appeal, claiming that the Notice of Appeal and its attachments did not state a claim upon which relief could be granted. Elaborating, the owner urged dismissal because "no facts" were stated for the Board to evaluate. DCRA joined in the owner's motion. After giving the Appellant an opportunity to identify the errors he believed were made and the facts upon which his claims of error were based, the Board granted the motion to dismiss. A full discussion of the facts and law supporting this conclusion follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on July 18, 2006. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 3D (the ANC in which the subject property is located), the property owner, and DCRA.

Parties

The Appellant in this case is Jonathan Gottlieb (Appellant). Mr. Gottlieb resides at 4610 Dexter Street, NW, across the street from the subject property.

The Appellee, DCRA, was represented by Doris Parker-Woolridge, Esq. The owner of the

subject property, Decker Development Co. (the owner), was automatically a party under 11 DCMR § 3199.1 and was represented by the law firm of Holland & Knight LLP.

ANC 3D, as the affected ANC, was also automatically a party in this appeal, and was represented at the public hearing by Alma Gates. In a resolution dated July 10, 2007, the ANC voted to support the appeal. The resolution was issued after a regularly scheduled monthly meeting with a quorum present (Exhibit 15). Among other things, the ANC stated that DCRA's decision allows "the rebuild of an existing dwelling and the new construction of a second dwelling", and a "sizable addition" that is "equal to or greater in scale and mass than the size of the original house". The ANC also voted to "request a stop work order" for all construction, "given the absence of any documentation and/or plans" for the construction. At the hearing on September 26, 2006, however, Ms. Gates supported the motion to dismiss the appeal stating, in essence, that the appeal did not belong before the Board because it only alleged construction irregularities.

FINDINGS OF FACT

1. The subject property is a single-family dwelling located at 4641 Dexter Street, NW, in the R-1-A District in the Wesley Heights Overlay (WH) Overlay.
2. The owner applied to DCRA for a building permit on or about July 14, 2005. The application proposed to do alterations and repairs, and an addition to the dwelling.
3. DCRA granted the application and issued Building Permit No. 84942 ("the permit") on or about January 17, 2006, after the application was reviewed by DCRA's Zoning Administrator, Bill Crews. The Zoning Administrator's review indicated that the proposed project complied with zoning regulations for the WH Overlay and R-1-A zone where the property was located.
4. About two months later, on March 17, 2006, Appellant filed an appeal (Exhibit 1) and "Statement in Support of Appeal" ("Statement") (Exhibit 2), detailing the basis of his claims.
5. Appellant alleged that the permit "purported to authorize [the owner] to gut and rebuild an existing house and...build a second house of greater size" at the property (Exhibit 2, p. 2).
6. The Statement also alleges that DCRA's decision to issue the permit "violates numerous provisions of the Zoning Regulations of the District of Columbia and other regulations and laws" (Exhibit 2, p. 1). It cited specific violations of the Zoning Regulations, including provisions of the WH Overlay, and provisions relating to lot

occupancy, side yards, rear yards, and building height (see, Exhibit 2, Section VI. “The Errors in the Administrative Decision”), but did not explain the factual or legal basis for these assertions.

7. DCRA filed a motion to continue the hearing that was initially scheduled for July 18, 2006 due to the unavailability of counsel.

8. Appellant opposed the postponement and also claimed that DCRA had failed to provide him with necessary information.

9. The Board continued the public hearing to September 26, 2006, and directed DCRA to provide Appellant with all documents in its permit file. In addition, the owner’s counsel offered to provide its documentation.

10. After the July 18, 2006 hearing, on or about July 21, 2006, the owner provided a full-size set of stamped-approved drawings to the Appellant. The owner also filed the drawings with the Board, along with several reduced copies of the site plan (Exhibit 19).

11. DCRA provided copies of the permit file and drawings to Appellant and the ANC during early August, 2006 (Exhibits 18 and 19). The record is unclear whether Appellant received the DCRA documents on August 3, 2006 (Exhibit 19) or August 7, 2006 (Exhibit 18). However, Appellant acknowledged that he received copies of the permit plans before the September 26th hearing date (September 26, 2006 Transcript of Public Hearing, hereafter “T.”, p. 77).

12. On or about September 20, 2006, the owner filed a motion to dismiss the appeal. The owner asserted that Appellant failed to state a claim upon which relief could be granted. Alternatively, the owner asserted that the appeal should be denied because the authorized work complied with the Zoning Regulations (Exhibit 17).

13. DCRA joined in the owner’s motion, and adopted the owner’s arguments.

14. At the time of the re-scheduled hearing on September 26, 2006, the Appellant requested a continuance because documentation had not been provided regarding DCRA’s “wall check” and other post-construction inspections (T. p. 70, 71).

15. Appellant also argued that the parties were attempting to “work a settlement out” (T. p. 60), it was not within the public interest to proceed with the hearing (T. p. 74), and the Board should continue the case out of common courtesy (T. 111).

16. The owner opposed the request to postpone, and maintained that Appellant never contacted him about the request (T. p. 61).

17. DCRA also requested a continuance because the Zoning Administrator received a subpoena compelling his appearance in Superior Court during the same time as the hearing was scheduled (T. p. 88).

18. In response to Board questioning, DCRA confirmed its position supporting the motion to dismiss, but asked that the Board defer its ruling on the motion on grounds that DCRA was willing to work with Appellant to resolve these issues outside the proceedings. (T. p. 90, 92)

20. After discussion on the record, the Board found there was no basis for the continuance. The Board established that DCRA had provided Appellant with all the documents upon which it had relied in issuing the permit and that Appellant had sufficient documentation to proceed with the hearing. Further, because the motion to dismiss involved a legal issue, and because DCRA's counsel was present at the hearing, the Board was able to dispose of the motion without further participation by the Zoning Administrator. Accordingly, the Board denied the request for the continuance.

21. The Board then took up the motion to dismiss and offered the Appellant an opportunity to proffer the facts that would support his contention that the building permit was issued in violation of the zoning regulation he cited, but the Appellant was unable to do so.

22. Specifically, when the Chairman asked Appellant to identify the specific error(s) alleged, Appellant stated: (a) the proposed project exceeds the 30 percent maximum lot occupancy that is permitted in the Overlay, and (b) the proposed project exceeds the 40 percent maximum FAR that is permitted in the Overlay (T. p. 77). Appellant did not supply or proffer any zoning calculations showing that the proposed work exceeded the lot occupancy or FAR limits. When asked for the specific lot occupancy measurement, Appellant responded that he "did not know" (T. p. 78).

25. Appellant also raised non-zoning issues; for example: concerns relating to stormwater management, and lead hazard control. In addition, Appellant contended that the project, as-built, differed from the approved plans, such as an as-built side yard that he claimed measured only four feet nine inches where the Zoning Regulations require a minimum of eight feet (T. p. 128).

CONCLUSIONS OF LAW

Denial of Continuance

The Board concludes that there was no basis to continue the September 26 hearing and that neither Appellant nor any of the other parties were prejudiced by the denial of the continuance. Appellant argued that he could not proceed on the second hearing date because he lacked sufficient information regarding DCRA's inspections and wall check. However, these details relate to construction compliance and have nothing to do with whether DCRA erred when it conducted its zoning review. Thus, even had Appellant been given more time by the Board, it would have only been more time to gather irrelevant information.

Nor was it in the public interest to continue this matter, even if DCRA was amenable to further discussion with the Appellant. The owner was opposed to the request and prepared to resolve the issues concerning the legality of the new construction. Because the BZA determined that all of the relevant facts were available to the Appellant, no legitimate interest would have been served by further delay in considering the motion to dismiss which addressed only the articulation of an alleged error.

Motion to Dismiss

Pursuant to section 8 of the Zoning Act, the Board has jurisdiction to hear appeals alleging "error in any order, requirement, decision, determination, or refusal made by ... any [District] administrative officer or body in the carrying out or enforcement of" the Zoning Regulations. D.C. Official Code 6-641.07(g)(1) (2001).

No Board rule establishes a minimum degree of pleading specificity for notices of appeal. However, in order to proceed at hearing, the Board and the parties must know the basis of the errors alleged – an appellee to defend the appeal, any intervening parties to address the appeal and the Board to evaluate it. For that reason, the Instruction to the Notice of Appeal provides:

All Appellants are required to submit in specific detail each and every exception they have to the administrative decision. Details should state the allegations of error in the administrative decision – "why it was an error" and reference the relevant Sections of the Title 11 DCMR Zoning Regulations and/or Map. It shall be typewritten or printed and attached to Form 125 Appeal.

(Emphasis supplied).

The owner's motion argued that the Appellant never explained the "why" of the errors claimed.

This appeal was filed on March 17, 2007. In the Statement in Support of Appeal, the Appellant asserted only general allegations of error with no factual support or specificity. Despite the Board's continuance of the hearing once - from July 18, 2006 (which Appellant opposed) - and direction to DCRA to provide to Appellant all documents in its permit file, which it did, Appellant still could not articulate a factual error at this hearing. While an appellant may have some leeway to develop further its case for an error it alleges when initially filing an appeal, absent egregious withholding of information by DCRA, the Appellant must, at minimum, articulate at the hearing the error alleged.

At the September 26th hearing date, the Board directed the Appellant to explain the basis of his appeal. While the Appellant was able to identify the subject matter of the errors (lot occupancy and FAR), he could not explain in what respect the plans approved by the Zoning Administrator exceeded these limitations nor point to any errors in the methodology used or calculations made by the Zoning Administrator in concluding that the plans were compliant.

Less than two years ago, this Board dismissed *Appeal No. 17127 of Nebraska Avenue Neighborhood Association*, 52 DCR 5854 (2005) for similar reasons, stating:

[T]he Appellant failed to state its FAR- related claim with any degree of particularity, despite being afforded the opportunity to do so during two public hearings and/or by written submissions. In the interests of fairness and justice, and as a matter of law, the Board cannot countenance further proceedings on this issue when Appellant has failed to state a case that can be responded to by the Appellee and [the property owner], and considered by the Board.

Id. at 5860¹

Because these same principles apply here, and the Appellant failed to articulate an error of the Zoning Administrator in issuing the building permit, the Board dismisses this appeal with prejudice.

¹ The Board's dismissal of an appeal on these grounds is consistent with the rules and practice of the DC Superior Court. Rule 8 of the Superior Court Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief". Rule 12(b)(6) allows a motion "to dismiss for failure of the pleading to state a claim upon which relief can be granted."

ANC

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21), as amended; D.C. Official Code § 1-9.10(d) (3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's written recommendations. As explained above, ANC 3D voted to support the appeal. However, it became clear at the public hearing that the dispute did not concern a zoning error; and the ANC representative testified as such.

For reasons discussed above, the Board must deny the Appellant's motion to continue the public hearing. It is hereby **ORDERED** that the motion to continue the appeal is **DENIED**.

Vote taken on September 26, 2006

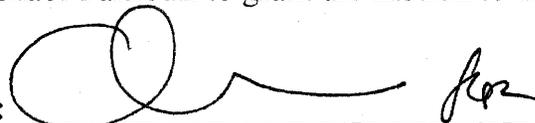
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Michael Turnbull to deny the motion to continue)

For reasons discussed above, the Board must grant the motion to dismiss the appeal. It is hereby **ORDERED** that the motion to dismiss the appeal is **GRANTED** based upon Appellant's failure to allege facts supporting a claim of zoning review error.

Vote taken on September 26, 2006

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Michael Turnbull to grant the motion to dismiss)

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: AUG 15 2007

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17502

As Director of the Office of Zoning, I hereby certify and attest that on **AUGUST 15, 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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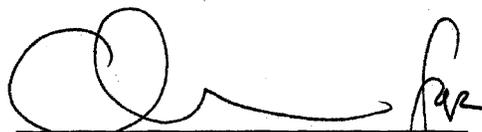
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ATTESTED BY:

A handwritten signature in black ink, appearing to read 'Jerrily R. Kress', written over a horizontal line.

JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR