

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18108 of Advisory Neighborhood Commission 3C, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made November 19, 2009, to approve the subdivision of two lots in the R-1-B District at premises 2910 Garfield Street, N.W. (Square 2113, Lot 828).¹

HEARING DATE: October 5, 2010
DECISION DATES: October 26 and November 2, 2010

ORDER DENYING APPEAL

This appeal was submitted to the Board of Zoning Adjustment (“Board” or “BZA”) on June 3, 2010 by Advisory Neighborhood Commission (“ANC”) 3C, the ANC whose boundaries encompass the property that is the subject of the appeal, along with several individuals living in the vicinity of the subject property (collectively, the “Appellants”).² The appeal challenges a decision made by the Zoning Administrator (“ZA”) on November 19, 2009 to approve the subdivision of one lot into two lots in the R-1-B District at 2910 Garfield Street, N.W. (Square 2113, Lot 828), on the ground that the ZA had improperly applied the discretion permitted under § 407.1 of the Zoning Regulations in allowing the creation of a lot not meeting the applicable minimum area requirement without making a determination that the subdivision would not impair the intent of otherwise applicable regulations. Following a public hearing, the Board voted to deny the appeal.

¹ The caption of this appeal has been revised to reflect the subject property, known before the subdivision at issue as 2910 Garfield Street, N.W. (Lot 828 in Square 2113). The caption used in the advertisement referred to lots owned by some of the appellants, which were listed as the “addresses of the affected premises” on the appeal form, rather than the subject property.

² According to the Appellants’ preliminary statement, the appeal was brought by ANC 3C, Richard DeKaser and Rebecca Rhames, Margaret Ernst and Frederick Jenney, Sarosh Sattar, and the Woodley Park Community Association. However, the Woodley Park Community Association submitted nothing to the record indicating its participation in the appeal, nor did a representative of the association appear at the public hearing. Accordingly, the Board recognized the ANC and the named individuals as appellants in this case.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated June 9, 2010, the Office of Zoning (“OZ”) provided notice of the appeal to the Office of Planning (“OP”); the ZA, at the Department of Consumer and Regulatory Affairs (“DCRA”); ZP 29th Place LLC, the owner of the subject property; the Councilmember for Ward 3; ANC 3C, an appellant and also the ANC in which the subject property is located; Single Member District/ANC 3C03; and Richard DeKaser, an individual appellant authorized to represent the ANC. Pursuant to 11 DCMR § 3112.14, on July 9, 2010, OZ mailed letters providing notice of the hearing to Richard DeKaser on behalf of the Appellants, ANC 3C, the ZA, and ZP 29th Place LLC. Notice was also published in the *D.C. Register* on August 27, 2010 (57 DCR 7893).

Party Status. The Appellants, DCRA, and ZP 29th Place LLC, as the owner of the subject property (“Owner”), were automatically parties in this proceeding. There were no other requests for party status.

Appellants’ Case. The Appellants presented testimony from Margaret Ernst, Sarosh Sattar, and George Oberlander, an urban planner. The Appellants argued that a minor deviation under § 407 is not permitted as a matter of right but may be granted only if the ZA makes a determination that the deviation will not “impair the purpose of the otherwise applicable regulations,” considering the consistency of the proposed deviation with the purposes of the Zoning Regulations and with the Comprehensive Plan. The Appellants allege that, in this case, the ZA did not conduct the type of factual analysis required by § 407, and would have been required to deny the requested deviation if that analysis had been undertaken, because the resulting subdivision would have significant negative impacts on the surrounding neighborhood, including increased density, higher demand for parking, and environmental impacts such as the removal of old-growth trees, construction of retaining walls, and topographic changes.

DCRA’s case. DCRA presented evidence and testimony by Matthew LeGrant, the ZA and an expert in zoning matters. According to DCRA, the appeal should be dismissed because the decision at issue constituted a proper use of the ZA’s discretion under § 407.1 and did not violate any other provision of the Zoning Regulations.

Owner’s case. The Owner asserted that “the Zoning Administrator operated within his clearly delineated authority” and did not err in approving the subdivision of the subject property into two lots using the two percent flexibility for minimum lot area permitted under § 407.1. The Owners noted that the Zoning Regulations do not require a site inspection or any written explanation by the ZA of why the approved lot area flexibility would not impair the purpose of the regulations; according to the Owners, “[i]t is sufficient that the Zoning Administrator considered the request for the minor lot area deviation and approved such request and included the additional note on the Plat indicating such review.” (Exhibit 19.)

FINDINGS OF FACT

1. The subject property of this appeal was known, before the subdivision at issue, as 2910 Garfield Street, N.W. (Square 2113, Lot 828). The property was improved with a detached one-family dwelling, which was razed on October 4, 2010.
2. The property is located at the corner of Garfield Street and 29th Place, and, prior to subdivision, had a lot area of 9,946 square feet. The property is zoned R-1-B, which requires a minimum lot area of 5,000 square feet. (*See* 11 DCMR § 401.3.) The subject property is not subject to any overlay district.
3. An application to subdivide the property was submitted in 2009. The proposed subdivision was to create a new Lot A with an area of 5,045 square feet and a new Lot B with an area of 4,901 square feet. The ZA was asked to approve the subdivision pursuant to the “minor deviation” provisions of § 407.1 of the Zoning Regulations.
4. Pursuant to § 407.1, the ZA may permit up to two deviations from certain area and linear requirements, subject to limits on the percentage of deviation from the requirements, so long as the deviation is “deemed by the Zoning Administrator not to impair the purpose of the otherwise applicable regulations.” With respect to lot area, the ZA may permit a deviation of two percent.³
5. By letter to counsel for the then-owner of the subject property, dated November 19, 2009, the ZA confirmed that the proposed configuration of Lots A and B satisfied the elements of § 407.1 since the requested deviation from minimum lot area (i) required a deviation of less than two percent of the applicable area requirement, (ii) was the only deviation requested, and (iii) would not impair the purpose of the otherwise applicable Zoning Regulations. The letter indicated that the configuration of Lots A and B was approved.

³ The subsection in its entirety is as follows:

407.1 The Zoning Administrator is authorized to permit a deviation not to exceed two percent (2%) of the area requirements of §§ 401 and 403 (minimum lot dimensions and maximum percentage of lot occupancy); and a deviation not to exceed ten percent (10%) of the linear requirements of §§ 404 and 405 (minimum rear yard and minimum side yard requirements); and a deviation from the requirements of § 406 (minimum court dimensions), not to exceed either two percent (2%) of the area standard or ten percent (10%) of the width standard; provided, that:

- (a) A building shall be allowed to deviate from the requirements of no more than two (2) of the sections identified in this subsection; and
- (b) The deviation or deviations shall be deemed by the Zoning Administrator not to impair the purpose of the otherwise applicable regulations.

BZA APPEAL NO. 18108

PAGE NO. 4

6. On February 23, 2010, a subdivision plat was recorded that reflected the creation of Lots 134 and 135 on Square 2113. Lot 134 (2858 29th Place, N.W.) has an area of 4,908 square feet, reflecting a deviation of 92 square feet, or 1.8%, from the minimum lot area of 5,000 square feet generally required in the R-1-B District.⁴ Lot 135 (2854 29th Place, N.W.) has an area of 5,039 square feet.
7. The ZA determined that approval of the requested deviation would not impair the purpose of the Zoning Regulations based on his evaluation of the deviation in light of its impact on other regulations applicable in the R-1-B Zone District, including the purpose of the zone⁵ and development standards such as setbacks and specifications about lot size.
8. Factors considered by the ZA in approving the requested deviation included:
 - (a) The proposed configuration of the resulting lots, and what type of building sites would be created;
 - (b) The fact that the subdivision would create one compliant lot as well as one lot that would have an area smaller than the required minimum;
 - (c) The location of the smaller lot on the corner of two public streets, each 60 feet wide, where a 15-foot building restriction line along both streets would operate as a setback, so that any buildings on the new lots would likely be at least 75 feet away from existing residences across either street;
 - (d) The orientation of the lots to front on 29th Place, so that the rear yard setback would ensure that the new buildings would be located at least 25 feet from the closest abutting residences, a distance greater than the setback of the house formerly on the site; and
 - (e) The degree of the deviation, which at 92 square feet or 1.8% was less than the two-percent maximum permitted under the Zoning Regulations and did not constitute a significant deviation.

⁴ The Owner notes that the ZA's letter of November 19, 2009 states that the smaller lot would have an area of 4,901 square feet, although the subdivision plat recorded February 23, 2010 indicates that the lot's area is 4,908 square feet. The Board credits the Owner's statement that slight discrepancies between measured and recorded lot dimensions are not uncommon, and notes that a lot area of 4,901 square feet also falls within the two-percent deviation in lot area permitted under § 407.

⁵ The Zoning Regulations state that the R-1 Zone "is designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be developed for those purposes" (11 DCMR § 200.1), with the intention "to stabilize the residential areas and to promote a suitable environment for family life." (11 DCMR § 200.2.)

BZA APPEAL NO. 18108

PAGE NO. 5

9. The ZA did not make a site visit to the subject property but considered photographs, including aerial photographs, and maps, including some showing topographical features of the site.
10. Properties in the immediate vicinity of the subject property are relatively large lots improved with two-story one-family detached dwellings. The area is hilly and contains numerous trees. The surrounding area also contains rowhouses, in an R-3 Zone across 29th Place, and apartment buildings, in a nearby area zoned R-5-A.
11. The owner of the subject property has obtained building permits to construct a one-family detached dwelling on each new lot.
12. The Appellants first learned of the subdivision around April 15, 2010, when a neighborhood resident saw promotional materials about two new houses planned for the site. The Appellants filed a timely appeal on June 3, 2010.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), 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.)

Based on the findings of fact, the Board was not persuaded by the Appellants that an error occurred in the decision of the ZA, pursuant to § 407.1, to approve a minor deviation in minimum lot area so as to allow creation of a lot that does not meet the applicable minimum lot area requirement at the subject property. The Board concurs with DCRA that, in creating § 407.1, the Zoning Commission for the District of Columbia (“Zoning Commission”) gave the ZA authority to permit minor deviations from certain provisions of the Zoning Regulations so as to alleviate the need to seek *de minimus* zoning relief from the Board. The Appellants failed to show that the ZA acted unreasonably or in an arbitrary or capricious manner, abused his discretion, or otherwise committed an error in approving the requested minor deviation in this case.

In 1998, the Zoning Commission addressed the question of “whether the Zoning Administrator should be authorized to allow very minor, ‘de minimus’ deviations from the area standards of the zone districts.” *See* Z.C. Case No. 97-2/94-6, Z.C. Order No. 840 (March 13, 1998) (“Order No. 840”). The “overall goal” of the text amendments considered in that case was “to provide a degree of flexibility ... while retaining essential controls related to effects on neighboring properties and neighborhood character.” (Order No. 840 at 1.) The purpose of a proposed “flexibility rule,” which “would authorize the Zoning Administrator to allow ‘de minimus’

BZA APPEAL NO. 18108

PAGE NO. 6

deviations from the area standards of the residential zone districts,” would be “to eliminate a few variance cases that now go to the BZA for public hearing on a deviation that is extremely minor.” (Order No. 840 at 4.)

Section 407, *inter alia*, authorizes the ZA to permit a deviation not to exceed two percent of the lot area requirement of § 401 so long as a building is not permitted to deviate from the requirements of more than two relevant sections and so long as the permitted deviation is deemed by the ZA not to impair the purpose of the otherwise applicable regulations. The Zoning Commission did not specify what factors the ZA must consider when deciding whether a given deviation would impair the purpose of otherwise applicable regulations; rather, by indicating that “the deviation ... *shall be deemed by the Zoning Administrator* not to impair the purpose” (emphasis added), the Commission left that determination to the discretion of the ZA in implementing the Zoning Regulations governing a particular property.

The Appellants argue that the application of § 407.1 requires a two-part standard – not merely a quantitative or numerical exercise to calculate a permitted deviation but also a qualitative analysis regarding whether a deviation would impair the purpose of the otherwise applicable regulations. According to the Appellants, “it must be clear that the Zoning Administrator is not allowed to approve a ‘minor deviation’ simply because it meets the numerical test of section 407 – as that would make the ‘impair the purpose of the otherwise applicable regulations’ test irrelevant in the regulation.” (Exhibit 18.)

The Board agrees and finds that the ZA undertook both a quantitative and qualitative analysis. In this case, the ZA’s analysis encompassed a “numerical test” of § 407 – that is, the ZA determined that no more than two deviations were requested (in fact one deviation was requested), and that the deviation was less than two percent of the applicable area requirement (the shortfall of 92 square feet constitutes 1.8% of the 5,000-square-foot minimum requirement) – but also an analysis of whether the deviation would impair the purpose of otherwise applicable regulations. As described in Findings of Fact Nos. 7 and 8, the ZA considered several “qualitative” factors in his analysis, including the purpose of the R-1-B Zone; other applicable zoning requirements such as side yard and rear yard requirements; the configuration and locations of the two new lots relative to each other, to existing residences, and to the street; the types of building lots to be created, including the existence of a building restriction line; the degree of deviation; and the fact that the proposed subdivision would create one conforming lot as well as one with a slightly substandard area.

The Board was not persuaded that the ZA erred in not considering various extrinsic factors that the Appellants asserted were relevant, such as the “character of the neighborhood,” the potential need for excavation, the size of existing lots and residences in the vicinity, or the removal of trees. These factors are not dependent on approval of the deviation or the resulting subdivision. The character of the neighborhood is described generally through the purpose provisions that relate to this District, which the ZA considered. The Zoning Regulations do not govern excavation activities and although there are some areas where tree cutting is regulated by zoning,

this property is not located in one of them.

Instead, the ZA focused on the Zoning Regulations that directly pertained to the R-1-B Zone and found that none would be impaired. The Board agrees and finds that the two lots created by the subdivision are capable of use consistent with the R-1-B Zone, as lots that are developed with one-family detached dwellings must satisfy all applicable requirements relating to use, side and rear yards, lot occupancy, height, and parking. (The R-1-B Zone does not prescribe a limit on floor area ratio for one-family dwellings.) The Board concurs with DCRA that “it is unclear how it could be said in good faith that this project impairs the purpose of the Zoning Regulations” (Exhibit 20), noting that the ZA generally concluded that the purpose of the Zoning Regulations was satisfied if the subdivision met all other requirements for a zone district.

The Appellants argued that a qualitative analysis of the subdivision would demonstrate that the deviation could not have been undertaken without impairing the purpose of otherwise applicable regulations, particularly §§ 101.1, 101.2, and 200 of the Zoning Regulations. As noted, the Board has already concluded that the ZA undertook such a qualitative analysis and the Board believes that he correctly identified the pertinent regulations and properly analyzed the impact of the deviation on their intended purposes. The regulations Appellants cite are general statements about the nature of the Zoning Regulations in general and of the R-1 District in particular.

For example, § 101.1 indicates that all of the “provisions of this title” are the minimum standards adopted for public health, safety, morals, convenience, order, prosperity, and general welfare, while § 101.2 sets forth the considerations that the “regulations in Title 11” are designed to address. When the Zoning Commission adopted § 407, it made the deviations permitted by that section part of the minimum standards described in § 101.1 and was obliged to review the considerations listed § 101.2 before doing so. All of the sections cited by the Appellants were thus considered by the Zoning Commission in Z.C. Case No. 97-2/94-6; in adopting new § 407 in Order No. 840, and resulted in the Zoning Commission’s conclusion that “its decision to approve the text amendments set forth [in Order No. 840] is in the best interest of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act and is not inconsistent with the Comprehensive Plan for the National Capital.” (Order No. 840 at 9.)

Nor was the Board persuaded by the Appellants that the ZA should have considered certain goals of the Comprehensive Plan in his analysis under § 407.1(b). Subsection 407.1 (b) simply does not require the ZA to look to any other source other than the Zoning Regulations and in fact the ZA would have erred if he had denied the deviation solely based upon his perception of an inconsistency with a Comprehensive Plan policy. For example, the Court of Appeals in *Tenley and Cleveland Park Emergency Committee*, 550 A.2d 331 (1988) held that the ZA could not refuse to grant a building permit for a structure that, though consistent with current zoning, would have been disallowed under the zoning category recommended by the newly adopted Comprehensive Plan. The decision concluded that the Comprehensive Plan is not self executing and therefore:

BZA APPEAL NO. 18108

PAGE NO. 8

The BZA and the ZA have no power to implement the Comprehensive Plan. The BZA's enabling statute explicitly states that it “shall not have the power to amend any [zoning] regulation or map.” D.C. Code § 5-424(e) (1981); *see Rose Lees Hardy Home & School v. District of Columbia Bd. of Zoning Adjustment*, 343 A.2d 564, 566 (D.C. 1975); *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972). The Zoning Administrator is limited to enforcing and certifying occupancy regulations. 11 DCMR § 3200 (1987); Reorg. Order No. 55, Pt. III F, 1 D.C. Code § 185 (1973).

Tenley and Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment, 550 A.2d 331, 341 n.22 (D.C. 1988).

The Board notes that the ZA testified that although he might consider the Comprehensive Plan in a situation when the Zoning Regulations did not provide sufficient guidance, it was not necessary in the instant case or in other requests for a deviation pertaining to a subdivision. However, the circumstances under which the ZA should consult the Comprehensive Plan are not governed by the Zoning Regulations, and therefore a failure of the ZA to do so is not a proper subject of an appeal to the BZA. This Board's jurisdiction is limited to hearing appeals of “decision ... based ... upon any zoning regulation.” Thus, the Board has refused to hear appeals alleging violation of the United States Constitution, the Zoning Act, and the Fair Housing Act. *See Appeal No. 18154 of Capitol Hill Restoration Society*, 58 DCR 3655 (2011); *Appeal No. 17504 of JMM Corporation*, 54 DCR 9871 (2007); *Appeal of Peter Choharis*, BZA No. 03-0001, 51 DCR 8210 (2004).

The Board therefore finds that the ZA did not violate § 407 of the Zoning Regulation in not considering the Comprehensive Plan or general provisions of the Zoning Regulations, such as §§ 101.1 and 101.2, in his analysis of the proposed deviation pertaining to the subject property.

The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)). In this case, ANC 3C is one of the Appellants.⁶ For the reasons discussed above, the Board concludes that the ANC has not offered persuasive advice that would cause the Board to conclude that the appeal should be granted.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellants have not satisfied the burden of proof with respect to the claim of error in the decision made by the ZA on November 19, 2009 to approve the subdivision of one lot into two lots in the R-1-B District at 2910 Garfield Street, N.W. (Square 2113, Lot 828) by applying the minor flexibility

⁶ By letter dated May 26, 2010, ANC 3C indicated that, at a publicly noticed meeting with a quorum present, the ANC voted 9-0 to support the appeal being filed by Richard DeKaser and Rebecca Rhames.

BZA APPEAL NO. 18108

PAGE NO. 9

permitted under § 407.1 of the Zoning Regulations in allowing the creation of a lot not meeting the applicable minimum area requirement. Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**.

VOTE: 4-0-1 (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle, and Anthony J. Hood (by absentee vote) to Deny the appeal; one Board member (vacant) not participating)

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

A majority of the Board members approved the issuance of this order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: JUL - 5 2011

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. 18108

As Director of the Office of Zoning, I hereby certify and attest that on July 5, 2011, 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 who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

Cornish F. Hitchcock, Esq.
Hitchcock Law Firm PLLC
1200 G Street, N.W., Suite 800
Washington, D.C. 20005

Richard DeKaser
2914 Garfield Street, N.W.
Washington, D.C. 20008

Chairperson
Advisory Neighborhood Commission 3C
4025 Brandywine Street, N.W.
Washington, D.C. 20016

Single Member District Commissioner 3C03
Advisory Neighborhood Commission 3C
2802 27th Street, N.W.
Washington, D.C. 20008

Matthew LeGrant, Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
1100 4th Street, S.W., Room 3100
Washington, D.C. 20024

John T. Epting, Esq.
Jeffrey C. Utz, Esq.
Goulston & Storrs PC
2001 K Street, N.W., 11th Floor
Washington, D.C. 20006-1020

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov

BZA APPEAL NO. 18108
PAGE NO. 2

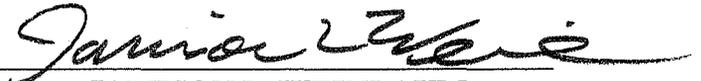
ZP 29th Place LLC
6603 Glenbrook Road
Chevy Chase, Maryland 20815

Mary H. Cheh, Councilmember
Ward 3
1350 Pennsylvania Avenue, N.W., Suite 108
Washington, D.C. 20004

Jay Surabian, Esq.
Assistant Attorney General
Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024

Melinda Bolling, Esq.
General Counsel
Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024

ATTESTED BY:



JAMISON L. WEINBAUM
Director, Office of Zoning