

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18429 of Edward V. Hanlon, pursuant to 11 DCMR §§ 3100 and 3101, from a decision by the Zoning Administrator (ZA) of the Department of Consumer and Regulatory Affairs made April 10, 2012, to issue building permit No. B1206336 allowing the construction of a 3rd story roof deck, and a decision made June 5, 2012, to issue Building Permit No. B120969, which revised Permit No. 1206336, and allowed the relocation of an exterior stairwell connecting the existing 2nd story roof deck to the new 3rd story roof deck, all in the DC/R-4 District at premises 1530 Swann Street, N.W. (Square 191, Lot 76).

HEARING DATES: October 30, 2012, November 2, 2012, and December 4, 2012

DECISION DATE: February 12, 2013

ORDER DENYING APPEAL

This appeal was filed on June 11, 2012 by Edward V. Hanlon (the “Appellant”), challenging two building permits which, together, allow the construction of a two-story roof deck at 1530 Swann Street, N.W., located in the Dupont Circle Overlay Zone. The Appellant asserts the permits were unlawful for several reasons, including a claim that the roof deck cannot be built as a matter-of-right due to the resulting non-compliant height, non-compliant court width, and the need for relief under the non-conforming structure provisions of the Zoning Regulations. After a full hearing on the merits, the Board of Zoning Adjustment (“Board”) found that the Department of Consumer and Regulatory Affairs (“DCRA”) had not erred when it issued the roof deck permits. Thus, the Board found that the appeal should be denied. 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 October 30, 2012. In accordance with 11 DCMR §§3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, to Mr. Darren Binder, the owner of the property that is the subject of the appeal, the Advisory Neighborhood Commission (“ANC”) 2B, and to DCRA.

Parties

The Appellant in this case is Edward V. Hanlon. Mr. Hanlon lives across the street from the subject property at 1523 Swann Street, N.W. He is self-described as a consumer bankruptcy attorney who appeared on his own behalf throughout the proceedings.

As the owner of the subject property, Darren Binder is automatically a party under § 11 DCMR §3199.1, and will hereafter be referred to as Mr. Binder or the Owner. Mr. Binder was represented by the law firm of Sullivan & Barros, LLP, Martin P. Sullivan, Esq., throughout the proceedings.

DCRA appeared during the proceedings and was represented by Assistant Attorney General Jay Surabian.

Continuances and Procedural Matters

The property owner originally sought a continuance of the October 30, 2012 hearing (Exhibit 15), but withdrew that request on October 23, 2012. (Exhibit 19). However, due to inclement weather, the Mayor declared a state of emergency for October 29 and October 30 and all District of Columbia offices were closed on those dates. The hearing was rescheduled by the Office of Zoning to November 2, 2012 and notice was provided to all parties. The Appellant requested a continuance of the November 2 date, claiming, among other things that he needed additional time to respond to Motions to Dismiss that had recently been filed by the Owner. (Exhibit 27). After establishing a date that was mutually agreed upon by all parties, the Board continued the matter to December 4, 2012.

The December 4, 2012 Public Hearing

Preliminary Motions

Before the public hearing began, the Board ruled on the preliminary motions that were filed by the parties.

Appellant's Motion to allow late filings

On October 24, 2012, Appellant filed a motion requesting that the Board allow additional exhibits for the public hearing. (Exhibit 21.) Subsection 3112.10 of the Zoning Regulations requires that all submissions be filed no less than 14 days before the public hearing, which was then set for October 30. Appellant conceded that his proposed Exhibits 19 – 22 (photographs, diagrams, and a plat) were filed late and therefore requested that the Board waive this rule. However, as the hearing was continued from late October to early December, all parties had ample notice of the late filings and there was no prejudice in accepting them late. Therefore, the Board granted this motion and accepted Appellant's Exhibits 19 - 22.

Owner's Motion to Dismiss Portions of the Appeal on the Ground that Appellant is not an Aggrieved Party

The Board also considered the Owner's Motion to Dismiss on the Ground that Appellant is not an Aggrieved Party (Exhibit 37). Subsection 3112.1 requires that all persons filing an appeal with the Board be "aggrieved" by the particular alleged errors of the Zoning Administrator.

According to the Owner, because the Appellant was not so "aggrieved", he lacked standing to prosecute this appeal. The Owner argues that a general physical proximity to the property, by itself, is not sufficient. He asserts also that, except for the Appellant's alleged height violation, Appellant cannot even see the area of the alleged violation from his property; i.e., the alleged violations regarding the rear courts or the "second floor roof structure". (Motion, p.2.)

The Appellant opposes the Motion, claiming he can see the Owner's deck from every room in his home, and that he has lost all privacy in his own home. (Exhibit 47.)

The Board found that Appellant's claims provide standing for him to appeal the decision to issue the permit. The Court of Appeals has upheld the Board's finding of standing where an appellant was "directly and negatively affected" by a neighbor's retaining wall. *Economides v. District of Columbia Bd. of Zoning Adjustment* (D.C. 2008). Similarly, the Board finds here that Appellant's alleged claims of adverse impacts from (what he calls) a massive deck is sufficient to provide standing to appeal.

Owner's Motion to Dismiss the Appeal on the Grounds that Appellant Failed to Properly File the Appeal and Failed to State a Claim of Zoning Error

The above Motion (Exhibit 25) was also considered by the Board. The crux of this Motion is twofold: that Appellant's initial appeal form was fatally flawed for failure to meet basic filing requirements, and that despite multiple opportunities to do so, Appellant failed to reference any particular section of the Zoning Regulations from which a zoning error stemmed.

Again, the Appellant opposed the Motion (Exhibit 48), and the Board denied the Motion. With respect to Appellant's failure to properly file the appeal, the Board agrees that the initial filing did not identify the specific sections of the Zoning Regulations that had allegedly been violated. However, Appellant's narrative in the initial filing clearly identified the building permits that were challenged and also explained why they were challenged¹. Moreover, in a Supplemental Statement filed on November 1, 2012, Appellant enumerated specific sections of the Zoning Regulations that had been violated when DCRA issued the permits; for instance, §§ 400.1, 406.1 and 2001.3. As such, there was no failure on Appellant's part to state a claim of zoning error.

¹ Appellant's initial filings contained several irrelevant statements. However, that alone does not defeat his claims.

The Public Hearing

Scope of the Appeal

Having disposed of the preliminary Motions, the Board conducted a public hearing on the merits of the appeal. The Board found that certain claims raised by Appellant, i.e., (1) claims that the building permit approvals were inconsistent with historic preservation requirements, and (2) claims regarding a second exterior stairwell in the yard, were outside of this Board's jurisdiction.

In the case of the historic preservation requirements, the claims did not arise from alleged zoning errors, but fell within the purview of the District's Historic Preservation Act. The Board has no authority to hear an appeal that is not based to some degree upon an interpretation of a zoning regulation. *See Appeal No. 18239 of ANC 6A, 59 DCR 1655 (2011)*. Further, the Board has held specifically that historic preservation issues are not to be decided by the Board. *See, for instance, Appeal No. 17329 of Georgetown Residence Alliance (July 12, 2006)* (Board had no jurisdiction over claims arising under the Historic Preservation Act which required review by the Mayor before all or part of a historic landmark or contributing building was demolished).

In the case of the alleged violations relating to the *exterior* stairwell, these claims are irrelevant, as the exterior stairwell was not authorized by the challenged permits. The exterior stairwell existed before the two challenged permits were issued. Thus, these claims are outside the scope of the appeal and will not be considered by the Board.

Remaining claims – Merits of the Appeal

The Board heard argument and/or testimony from the parties as to the remaining claims constituting the merits of the appeal, i.e., whether the Zoning Administrator ("ZA") erred in his determinations regarding: (1) compliance with height requirements under § 400.1 of the Regulations, (2) compliance with court width requirements under § 406.1 of the Regulations, (3) compliance with non-conforming structure requirements under § 2001.3 of the Regulations, and (4) compliance with provisions of the Dupont Circle (DC) Overlay.

Closing of the Record

The Board closed the record at the end of the public hearing except to allow post-hearing memorandums by the parties. The Board received Proposed Findings of Fact and Conclusions of Law from the Appellant. (Exhibit 51.) Neither the Owner nor DCRA submitted post-hearing filings.

FINDINGS OF FACT

The Property

Location and zoning

1. The subject property is located at 1530 Swann Street, N.W., Square 191, Lot 76, in the R-4 zone district.
2. The property is within the Dupont Circle Overlay District, an area characterized by its “low scale”, “human scale streetscapes”, and “historic character”. (See, 11 DCMR § 1501.1.)

The existing building before issuance of the two challenged permits

3. The subject property was improved with a three-story row dwelling that was non-conforming as to lot size, lot width, and lot occupancy.²
4. The property was used as a two-family flat and had a cellar that is below grade.
5. The dwelling fronts onto Swann Street, N.W. and backs onto a public alley.

The exterior stairwell

6. There was an exterior stairwell in the rear yard of the property that provided access to the cellar.
7. This stairwell existed before the issuance of either of the building permits that are the subject of this appeal (hereafter “the challenged permits”). Therefore, this exterior stairwell was not authorized by either of the challenged permits.

The deck

8. The third story of the row dwelling was a partial story, which left a portion of the second story roof without coverage by the third floor of the dwelling.
9. A deck was located on that portion of the second story roof. The second floor roof deck existed before either of the challenged permits was issued.

The courts

10. Before the challenged permits were issued, there were also two courts³ at the rear of the property:

² The lot width is less than the required 18 feet; the lot area is less than the required 1,800 square feet, and the lot occupancy is more than the 60% maximum which is permitted in the zone. (See, 11 DCMR §§ 401 and 403.)

- (a) One court was located at the rear of the property, between the rear corner of the building and the property line, at the second and third story level of the building. At the ground level, this area was fully occupied by the first story of the building.
- (b) A second court existed at the rear of the partial third story of the building. This second court was not challenged by the Appellant⁴ and is not germane to this appeal. Therefore, for purposes of this decision, the term “court” refers to the court at the rear corner of the building that is described in subparagraph (a) above and which the Appellant claims is non-compliant.

The building permits and construction

- 11. On April 10, 2012, DCRA issued a building permit authorizing the Owner to “remodel [the] existing rear deck [on the second floor] as per [the] plans and plats”, and to construct a “new roof deck” at the third story level.
- 12. On June 5, 2012, DCRA issued a building permit authorizing the Owner to revise the April 10th permit, and to relocate a rear exterior stair pursuant to the submitted plans. The stairwell was to be relocated so that it would connect the existing second story roof deck to the new third story roof deck.
- 13. The new roof deck, as built, is not covered and does not create any new interior space.

The Appeal

- 14. Appellant lives across the street from the subject property at 1523 Swann Street, N.W., and has lived there for 17 years.
- 15. Appellant filed an appeal on June 11, 2012 challenging DCRA’s issuance of the two permits.
- 16. Appellant claims that by adding the second roof deck and connecting stairwell, the building is non-compliant with zoning requirements governing height, court width, nonconforming structures and requirements governing the Dupont Circle Overlay.

Alleged Height Violation

- 17. Appellant claims the height is at least 42.5 feet (Exhibit 36), more than the 40 foot maximum allowed in the zone under § 400.1 of the Zoning Regulations.

³ A court is defined in the Zoning Regulations as, “an unoccupied space, not a court niche, open to the sky, on the same lot with a building, which is bounded on two (2) or more sides by the exterior walls of the building or by two (2) or more exterior walls, lot lines, or yards. A court may also be bounded by a single curved wall of a building.” (See, 11 DCMR § 199.1.)

⁴ There is no dispute that this second court meets the 10 feet minimum width requirement provided in § 406.1 of the Zoning Regulations.

18. According to the ZA, after the construction of the roof deck, the height of the building, as depicted in the plans, is approximately 39 feet six inches at its tallest point. (Exhibit 24, p. 2, Tab C referencing plans at p. A-4.)
19. According to the ZA, Appellant used the wrong measuring point when he calculated the height. (Transcript, Public Hearing of December 4, 2012 (“Tr.”), p. 223.)⁵

Alleged Court Width Violation

20. A court is not required in any zone district. However, where a court is provided, it must meet minimum dimension requirements. (11 DCMR § 406.1.)
21. An open court, such as the one at the rear of the property, would be subject to the 10 foot minimum width requirement. (See, § 406.1.)
22. The parties agree that an open court existed before the roof deck construction at the property. However, they disagree as to whether a court remained at the property after the construction.
23. Appellant contends that after the construction, a small open court remains, and that this court is non-compliant with the court width requirements of the Zoning Regulations.
24. Appellant has not established that an open court remains at the property, or, if it remains, the size of the open court that remains. At one point Appellant alleged the open court was reduced to about nine inches. (Tr., p. 215 and Exhibit 32.) However, the Appellant also stated that the open court was reduced to only one inch. (Exhibit 17, Appellant’s Supplemental Prehearing Statement, para. 13.)
25. According to the ZA, after the construction of the roof deck, the open court at the rear of the property was eliminated. (Tr., p. 221).
26. DCRA contends that since no court is being provided, the minimum dimension requirement is not triggered. (Exhibit 24, p. 4.)
27. The Board is persuaded that the construction of the exterior stairwell and landing connecting the second and third story roof decks eliminated the open court at the rear of the property.

Alleged Nonconforming Structure Violation

28. The parties agree that the building on the property is nonconforming as to lot occupancy and has been since the enactment of the Zoning Regulations.

⁵ The Zoning Regulations defines **Building, height of** in pertinent part:

“In those districts in which the height of the building is limited to forty feet (40 ft.), the height of the building may be measured from the finished grade level at the middle of the front of the building to the ceiling of the top story.”

29. Under § 2001.3, an addition to a nonconforming structure is prohibited unless the building conforms to lot occupancy requirements.
30. Appellant claims that the roof deck is an “addition”. As such, Appellant claims that the roof deck is subject to § 2001.3, which imposes limitations on alterations and enlargements to nonconforming structures.
31. The Owner and DCRA maintain that under Board precedent, a roof deck is allowed as a matter-of-right on nonconforming buildings. See, *Appeal No. 17971 of Outerbridge and Georgina Horsey* (September 17, 2010).

Alleged inconsistency with provisions of the Dupont Circle Overlay

32. Appellant also claims that the structure is “massive” and not consistent with the provisions of the Dupont Circle Overlay (hereafter, “the Overlay”).
33. Specifically, the Appellant cites §§ 1501.1 and 1501.4, which speak, in part, to maintaining the “low scale” residential character of the Overlay. (Appellant’s Pre-Hearing Statement, p.15-19.)
34. The purposes of the Overlay are precatory and do not affect matter of right standards.

CONCLUSIONS OF LAW

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 of the Zoning Regulations. (11 DCMR §§ 3100.2 and 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.)

The administrative decision in this case is DCRA’s decision to issue two building permits which, together, authorize construction of a roof deck, and a stairwell connecting the new roof deck to an existing deck. As explained previously and as noted by DCRA, Appellant’s appeal raises numerous issues about the new roof deck. However, many of the issues raised – such as Building Code issues and Historic Preservation Act issues – are unrelated to the Zoning Regulations and are beyond the purview of the Board. *Appeal No. 18239 of Advisory Neighborhood Commission 6A* (February 17, 2012) (Board has no authority to hear appeal stemming from Construction Codes); *Appeal No. 17329 of Georgetown Residence Alliance* (July 12, 2006) (Board has no authority to hear appeal relating to historic preservations issues).

Having disposed of several issues by preliminary motion, the Board turns to the merits of the appeal.

Compliance with height requirements

Appellant claims that the permit approvals allow a building that exceeds the height limits allowed in the zone. However, the Board finds that the submitted plans show a building height in compliance with the Zoning Regulations. As explained in the Findings of Fact, DCRA asserts that the top of the highest element of the roof deck is approximately 39 feet six inches, within the 40 foot height limit in the zone. (11 DCMR § 401.1.) (Findings of Fact 17 – 19). Appellant, meanwhile, alleges that the height is 42.5 feet. (Exhibit 36.) However, as DCRA points out, the Appellant’s measurements may have been incorrect because Appellant used the wrong measuring point. (T. p. 221.) As explained during the public hearing, the term “building height” is defined in the Regulations and directs a method of measurement; to wit: “[you] measure from the finished grade at the middle of the front of the building to the ceiling of the top story” (T. p. 223) . The Board accepts DCRA’s calculation of the building height based upon this method of measurement.

Compliance with court width requirements

Appellant alleges that the court located to the east at the rear of the property does not meet the court width requirements contained in §406.1. However, the Board agrees with the Owner and DCRA that this particular court was eliminated during construction. At the ground level, this area was fully occupied by the first story of the building. The subsequent construction of the exterior stairwell and landing connecting the second and third story roof decks eliminated the court at the eastern rear corner of the property. (Exhibit 24, p. 4.)

Appellant argues that a small amount of open space (of only inches) still exists and claims that open space constitutes a nonconforming court. (Exhibit 32.) It should be noted that Appellant never conclusively established the dimension of the alleged open court, only that it was between one inch and nine inches. (Finding of Fact 24.) The ZA, who went to the site and observed the conditions, concluded that there was no open court. The ZA asserted that, if there is a small open space between the stairwell and the neighboring building, that space would not necessarily be a court. (T. p. 225.) While the definition of “court” has no minimum size, the ZA concluded that an area that is so negligible in size would not constitute a court. Accordingly, if the court is not provided, there is no dimension requirement.

Compliance with nonconforming structure requirements

Appellant maintains that the deck is an addition to a nonconforming building that is prohibited under § 2001.3. It is undisputed that the building is a nonconforming building. (Finding of Fact 3.) However, the Board has already addressed this question and determined that a deck is *not* an addition or enlargement under § 2001.3, at least where the deck does not create any additional enclosed living space. Specifically, the Board has held that the limitation under § 2001.3, that prohibits enlargements and additions unless the building conforms to the percentage of lot occupancy requirements, does not apply to roof decks. *Appeal No. 17971 of Outerbridge and Georgina Horsey* (September 17, 2010).

Appellant attempts to distinguish the *Horse* matter from the case at hand, contrasting the rooftop decks in the two cases. However, the Board is not persuaded by Appellant's analysis. In fact, the Board finds that in two critical respects the facts of this case and the *Horse* case are similar; i.e., in both cases the decks are uncovered and add no interior enclosed space to the dwelling.

Consistency with Dupont Circle Overlay

Appellant lastly claims that the deck is not consistent with the provisions of the Overlay. Appellant alleges that the permits authorizing such a massive deck runs afoul of §§1501.1 and 1501.4 of the Zoning Regulations, the Dupont Circle Overlay provisions. Subsection 1501.1 states that "Strong protections are needed to retain [the] low scale [of the Overlay as well as] human scale streetscapes, and [the] historic character [of the Overlay]." Subsection 1501.4 details the purpose of the Dupont Circle Overlay, including the [preservation of] "low scale buildings". (11 DCMR § 1501.4(a).) However, the purpose provisions in both of the above sections are merely precatory and do not alter the matter of right standard. Rather, the purposes are directed to the Board and the Zoning Commission when considering a request for zoning relief within the Overlay. *See Application No. 17337A of N Street Follies, Ltd.* (2010). Therefore, Appellant cannot sustain a claim of administrative error based solely on these provisions. *See Appeal No. 17746 of Reed Cooke Neighborhood Association* (January 12, 2009).

Based on the findings of fact and conclusions of law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to its claim of error in the April 10, 2012 determination by the ZA to issue Building Permit No. B1206336 and Building Permit No. 120969, together allowing the construction of a roof deck and stairwell in the DC/R-4 District at premises 1530 Swann Street, N.W. (Square 191, Lot76). Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**.

VOTE: **4-0-1** (Lloyd J. Jordan, Nicole C. Sorg, Jeffrey L. Hinkle and Robert E. Miller, voting to Deny the appeal, one Board seat vacant.)

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

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

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: December 5, 2013

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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.