

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18506-B of Ontario Residential LLC, as amended, pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a special exception from the roof structure provisions under § 777. 1 (§ 411.2) governing roof structure setbacks¹, a special exception from the requirement that all compact spaces be placed in groups of at least five contiguous spaces with access from the same aisle under § 2115.4, a variance from the off-street parking requirements under § 2101.1, and a variance from the loading berth and delivery space provisions under § 2201.1, to allow a mixed-use residential building with ground retail in the C-2-B District at premises 1700 Columbia, N.W. (Square 2565, Lot 52).

HEARING AND DECISION DATE:	February 26, 2013
BOARD’S ORDER ISSUED:	September 27, 2013
MOTION FOR RECONSIDERATION FILED WITH BOARD:	October 29, 2013
MOTION FOR RECONSIDERATION DENIED BY BOARD:	January 8, 2014
APPEAL FILED WITH DC COURT OF APPEALS:	November 29, 2013
DECISION OF DC COURT OF APPEALS VACATING IN PART AND REMANDING IN PART:	June 5, 2014
REQUEST FOR IMMEDIATE HEARING FILED:	October 1, 2014
REQUEST FOR IMMEDIATE HEARING DENIED:	November 18, 2015

ORDER DENYING REQUEST FOR IMMEDIATE HEARING

This matter involves a Decision and Order by the Board of Zoning Adjustment (“Board” or “BZA”) granting zoning relief to allow a residential building with ground floor retail in the C-2-B zone. The Applicant, Ontario Residential LLC (“Applicant” or “Ontario”) sought relief from

¹ Initially, the Applicant also sought relief from the roof structure provisions governing the number and height of the roof structures on the proposed building. But as will be explained in greater detail, the Applicant withdrew these requests for relief after it revised its roof plan. The caption reflects the revised relief.

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parking and loading requirements and from the roof structure requirements. Only the roof structure requirements are relevant to the instant matter. The pertinent roof structure requirements are embodied in §§ 411.2, 411.3 and 411.5 of the Zoning Regulations, governing the setbacks, number, and height, respectively, of the roof structures on the proposed building.

The Board conducted a public hearing in this matter, at which time Adams Morgan for Reasonable Development (“AMFRD”) was granted party status in opposition to the application. The Board approved the application at the close of the hearing and a final Board Order was issued in September, 2013 granting all relief requested. AMFRD moved for reconsideration and the Board denied the motion for reconsideration. (BZA Order No. 18506-A.)

AMFRD filed a petition to review the Board’s order with the District of Columbia Court of Appeals (the “DCCA”). Once before the Court, AMFRD filed a motion for summary disposition claiming that the Board’s Order did not sufficiently support Ontario’s request for roof structure relief. In June, 2014, the Court issued an order that vacated two components of the roof structure relief: the number of structures and the height of the structures under §§ 411.3 and 411.5. The Court remanded those two requests for relief to the Board for further proceedings because the Board’s Order did not explain why the construction of conforming roof structures was “impractical”. The Court only vacated the portion of the order pertaining to these issues, such that the remainder of the Board’s order remained in place.

On July 29, 2014, Ontario notified the Board (with a copy to AMFRD) that it had revised its roof plan to provide for roof structures that were conforming as to number and height. The new roof plan provides for a single roof structure that, on its face, no longer requires relief from requirements governing the number and height of structures. (Exhibit 42.) Ontario states that it amended its building permit application to now include a roof plan with a single structure of conforming height. According to Ontario, DCRA reviewed the revised roof plan, deemed it zoning compliant, and issued a building permit for the residential building without requiring further action from the Board. (Exhibit 42, Att. B).²

In the same notification, Ontario withdrew its request for relief from §§ 411.3 and 411.5. Ontario asserts that additional BZA proceedings are no longer necessary, as there is nothing left for the Board to review. AMFRD disagrees with Ontario’s position and requests an “immediate hearing” based upon its interpretation of the Court of Appeals remand, and the Board’s rules governing the modification of plans. (Exhibit 45, AMFRD’s Request for an Immediate Hearing.) Each of these issues is addressed below.

The Court of Appeals remand has been rendered moot

² It is apparent that DCRA was aware of the Court’s remand. Ontario submitted notes written by the “zoning reviewer” at DCRA. These notes reference the “modified plans to address court of appeals remand of rooftop structure issue”. (Exhibit 47, Att. B.)

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The Board's Rules of Practice prohibit it from considering "moot" questions. (11 DCMR § 3100.7.) As noted by the Court of Appeals, "[a] case is moot when the legal issues presented are no longer 'live.'" *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004). That standard applies here. The roof structure plans that would have been the subject of the Court's remand have been replaced and approved by DCRA and the Applicant has withdrawn that portion of the application, which it may do as of right. Subsection 3113.10 of the Board's Rules of Practice and Procedure provides, in part, that an applicant may withdraw an application at any time. As a result, the plans complained of in AMFRD's DCCA appeal are no longer "live". Since the subject matter of the DCCA remand no longer exists, the remand has become moot and no hearing as to it is required,

The Board has found mootness in similar situations; for example, *Appeal No. 17980 of William J. Reaves* (2010) (Challenge to permit authorizing building without side yard rendered moot where revised plans depicted building with conforming side yard); *Appeal No. 16984 of Advisory Neighborhood Commission 2A* (2004) (appeal challenging portion of permit approving expansion rendered moot when renovation approved under revised permit which eliminated expansion); and *Application No. 15163-A of Saint James Washington Limited Partnership I* (2002) (application seeking extensive zoning relief rendered moot where application not prosecuted and property was developed through matter-of-right construction).

The Board agrees with Ontario that AMFRD is essentially requesting a compliance hearing regarding the revised roof structure and the building permit authorizing it. However, whether the revised plans are compliant with zoning is not before the Board in the instant matter. The Board is mindful of the fact that AMFRD filed a separate appeal of the permit authorizing the revised plans, and that case was decided on its merits independent of this Request for an Immediate Hearing.³

The Board lacks authority to conduct a "modification" hearing

AMFRD also claims that the Board was required to conduct a hearing under § 3129 of its Rules of Practice because the original plans were revised without leave of the Board. AMFRD correctly states that § 3129 pertains to the modification of plans before the Board. However, this modification never came before the Board; and the Board lacks authority to hold a hearing on a modification that has not been expressly requested by an applicant. Section 3129 only applies to modifications that have been requested and, here, no such request has been made.

The language within § 3129 makes it clear that a modification must first be requested in order to be reviewed by the Board. For example, § 3129.2 states, in pertinent part, "The Board shall consider *requests* to approve minor modifications..." (emphasis supplied). Subsection 3129.3 states, "A *request* for minor modification of plans shall be filed with the Board..." (emphasis

³ Appeal No. 18888 was heard on January 13, 2015 and decided orally on February 10, 2015. The Board has not yet issued its final Decision and Order.

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supplied). Subsection 3129.4 references “[a]ll *requests* for minor modifications of plans...” (emphasis supplied); and so on.

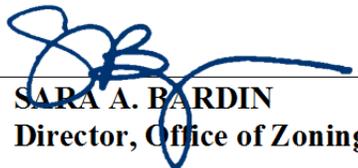
Furthermore, the Board cannot compel Ontario to request a modification of its plans any more that it can preclude a withdrawal of the relief that was requested.

Neither the Zoning Act nor the Zoning Regulations authorize the Board to compel an applicant to take such steps. Ontario revised its roof plan, withdrew a portion of its request for zoning relief, and applied to DCRA for a building permit on the basis of its revised plans. Nothing in the Regulations requires additional BZA review as a modification, and the Board lacks authority to further scrutinize the revised roof plan at this time.⁴

Accordingly, the Board hereby **DENIES** AMFRD’s Request for an Immediate Hearing regarding the roof structure relief, finding that the issues of concern have been rendered moot, and the Board lacks authority to conduct a modification hearing.

VOTE: 4-0-1 (Lloyd J. Jordan, Monique Y. Heath, S. Kathryn Allen, and Anthony J. Hood to Deny the request for an immediate hearing; Jeffrey L. Hinkle being necessarily absent.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY:  _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: September 10, 2015

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO §3125.6.

⁴ Of course as mentioned above, the Board has the authority to scrutinize the roof plan during an appeal of the building permit, and has in fact done so in BZA Appeal No. 18888.