

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

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WEDNESDAY

NOVEMBER 6, 2019

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The Regular Public Meeting convened in the Jerrily R. Kress Memorial Hearing Room, Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:30 a.m., Frederick L. Hill, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

FREDERICK L. HILL, Chairperson
LORNA JOHN, Board Member
CARLTON HART, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

ROBERT MILLER, Commissioner
PETER MAY, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
JOHN NYARKU, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.
JACOB RITTING, ESQ.

The transcript constitutes the minutes from the Public Meeting held on November 6, 2019.

P-R-O-C-E-E-D-I-N-G-S

9:44 a.m.

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CHAIRPERSON HILL: All right, good morning, everybody. The hearing will please come to order. We're located in the Jerrily R. Kress Memorial Hearing Room, at 441 4th Street, Northwest. This is the November 6, 2019 public hearing of the Board of Zoning Adjustment, District of Columbia. My name is Fred Hill, chairperson.

Joining me today is Carlton Hart, vice chair, Lorna John, Board member, and representing the Zoning Commission is Rob Miller on a case, and then Peter May will be with us the rest of the day. Copies of today's hearing agenda are available to you and located on the wall near the door.

Please be advised that this proceeding is being recorded by a court reporter and is also webcast live. Accordingly, we must ask you to refrain from any disruptive noises or actions in the hearing room. When presenting information to the Board, please turn on and speak into the microphone, first stating your name and home address.

When you finish speaking, please turn your microphone off, so that your microphone is no longer picking up sound or background noise. All persons planning to testify either in favor or in opposition must have raised their hand and been sworn in by the secretary. Also, each

1 witness must fill out two witness cards. These cards are
2 located on the table near the door and on the witness table.
3 Upon coming forward to speak to the Board, please give both
4 cards to the reporter sitting to the table to my right. If
5 you wish to file written testimony today or additional
6 supporting documents today, please submit one original and
7 12 copies to the secretary for distribution.

8 If you do not have the requisite number of copies,
9 you can reproduce copies on an office printer in the Office
10 of Zoning, located across the hall. Please remember to
11 collate your set of copies. The order of procedures for
12 special exceptions, variances, and appeals is also listed as
13 you come in through the door.

14 The record shall be closed at the conclusion of
15 each case, except for any material specifically requested by
16 the Board. The Board and the staff will specify, at the end
17 of the hearing, exactly what is expected and the date when
18 the person must submit the evidence to the Office of Zoning.

19 After the record is closed, no other information
20 shall be accepted by the Board. The Board's agenda includes
21 case sets for decision. After the Board adjourns, the Office
22 of Zoning, in consultation with myself, will determine
23 whether a full or summary order may be issued. A full order
24 is required when the decision it contains is adverse to a
25 party, including an affected ANC. A full order may also be

1 needed if the Board's decision differs from the Office of
2 Planning's recommendation. Although the Board favors the use
3 of summary orders whenever possible, an applicant may not
4 request the Board to issue such an order. The District of
5 Columbia Administrative Procedures Act requires that the
6 public hearing on each case be held in the open, before the
7 public, pursuant to Section 405(b) and 406 of that act.

8 The Board may, consistent with its rules and
9 procedures and the Act, enter into a closed meeting on a case
10 for purposes of seeking legal counsel on a case, pursuant to
11 D.C. Official Code Section 2-575(b)(4), and or deliberate on
12 a case, pursuant to D.C. Official Code Section 2-575(b)(13),
13 but only after providing the necessary public notice and, in
14 the case of an emergency closed meeting, after taking roll
15 call vote.

16 The decision of the Board in cases must be based
17 exclusively on the public record. To avoid any appearance
18 to the contrary, the Board requests that persons present not
19 engage the members of the Board in conversation. Please turn
20 off all beepers and cell phones at this time, so as not to
21 disrupt the proceeding.

22 Preliminary matters are those which relate to
23 whether a case will or should be heard today, such as
24 requests for a postponement, continuance, or withdrawal, or
25 whether proper and adequate notice of the hearing has been

1 given. If you're not prepared to go forward with a case
2 today, or if you believe that the Board should not proceed,
3 now is the time to raise such a matter. Mr. Secretary, do
4 we have any preliminary matters?

5 MR. MOY: Good morning, Mr. Chairman, members of
6 the Board. I do have a brief announcement for the record.
7 First, Application No. 20044 of Madison Heights, LLC has been
8 withdrawn by the Applicant. Finally, Case Application No.
9 20111 of Trinity Episcopal Church has been postponed,
10 rescheduled to December 11, 2019. There are some other
11 preliminary matters, Mr. Chairman, but staff would suggest
12 that the Board address those when I call the case.

13 CHAIRPERSON HILL: All right, thank you, Mr. Moy.
14 Good morning, everybody. If you wouldn't mind standing, if
15 you plan on testifying, and take the oath administered by the
16 secretary, to my left.

17 MR. MOY: Good morning. Do you solemnly swear or
18 affirm that the testimony you're about to present in this
19 proceeding is the truth, whole truth, and nothing but the
20 truth?

21 (Witnesses sworn.)

22 MR. MOY: Ladies and gentlemen, you may consider
23 yourselves under oath.

24 CHAIRPERSON HILL: Just to close the loop on this
25 one, the Nationals did win the World Series. Game 7 was last

1 Wednesday. It feels like it's been forever ago. I'm just
2 closing the record that we've talked about each and every
3 game, including the last one. There you go. Mr. Moy, if you
4 wouldn't mind calling our first decision case.

5 APPEAL NO. 20026 OF ARBORETUM NEIGHBORHOOD ASSOCIATION

6 MR. MOY: Thank you, Mr. Chairman. I believe,
7 with Mr. Miller here, we are calling the decision making of
8 Appeal No. 20026 of Arboretum Neighborhood Association. This
9 is the appeal from the decision made on January 27, 2017 by
10 the zoning administrator, Department of Consumer and
11 Regulatory Affairs, to issue an unpublished zoning
12 certification in response to a request to certify that a
13 community-based institutional facility adult rehabilitation
14 center is a matter of right use, PDR-1 zone, at 3400 New York
15 Avenue, Northeast, Parcel 173/118.

16 CHAIRPERSON HILL: Okay, thank you, Mr. Moy. Is
17 the Board ready to deliberate? Would someone care to begin?

18 VICE CHAIRPERSON HART: Sure. After reviewing
19 this case, I guess one of the things that we needed to do was
20 to address the DCRA motion to dismiss the appeal for lack of
21 jurisdiction. Under that motion, I understood that the DCRA
22 was stating that the Appellant had not challenged the content
23 of the certification or the ZA's analysis. DCRA was also
24 stating that the nature of the appeal that is before us did
25 not fall within the Board's powers. I actually, after

1 reviewing the record -- I would actually have to agree with
2 that motion. I would vote to approve that motion. There
3 were -- it was very difficult to understand what the
4 Appellant was noting as any error.

5 Actually, they didn't really state an error. The
6 only issue that they seemed to continue to come back to was
7 that the item that was under -- that the ZA had made a -- had
8 stated that this was a CBIF, but the ZA was able to do that
9 themselves. The CBIF was a matter of right use in this zone.

10 The zoning clearly states that it is a matter of
11 right zone, so I didn't see any particular error there. Then
12 there was an issue that was around notice of this particular
13 certification that the ZA put forward, but there isn't any
14 directive that states that DCRA or the zoning administrator
15 needs to send out this directive. I don't know. It seemed
16 like this, in many ways, was a little bit premature.

17 There is no building permit for this -- for what
18 the Appellant is stating is an error. The only thing that
19 we have is this DCRA -- excuse me, ZA certification. Really,
20 all that says is that the particular use is included in that
21 particular zone, and that's it. That's something that is
22 actually in the zoning, itself. I just didn't see a
23 particular error that the zoning administrator made, but I
24 also didn't think that there was an error that the Appellant
25 had brought forward that said that beyond some sort of notice

1 issue, it was really outside of our purview. I would have
2 to agree with DCRA and approve the motion to dismiss the
3 appeal.

4 COMMISSIONER MILLER: Thank you, Mr. Chairman.
5 I agree with Vice Chair Hart in supporting the motion to
6 dismiss this appeal. I agree with DCRA and the zoning
7 administrator that the Board of Zoning Adjustment lacks
8 jurisdiction to consider the constitutional and due process
9 claims that were made in the Appellant's argument.

10 I also believe that it's the Zoning Commission,
11 which I'm a member of, not the BZA, which is the proper forum
12 for the Appellant to seek any change or clarification, which
13 their argument refers to, of existing zoning regulations
14 regarding community-based institutional facilities or to seek
15 a zoning map amendment for this property, so it wouldn't be
16 matter of right, which is what it is.

17 I also think it's important to note that dismissal
18 of this appeal would not preclude a timely appeal of a
19 building permit, as Vice Chair Hart alluded to. The
20 dismissal of this appeal would not preclude a timely appeal
21 of a building permit issued later to permit the use of the
22 property as a CBIF because the zoning certification, which
23 they're appealing, does not represent any kind of decision
24 or determination regarding a particular use of the property.
25 As DCRA confirmed in their hearing testimony, the

1 certification does not, itself, authorize the establishment
2 of a specific CBIF at this site. Rather, the certification
3 merely reports that the property is zoned PDR-1, and that a
4 CBIF use is a permitted matter of right use in that zone.
5 For all those reasons, I support the motion to dismiss the
6 appeal.

7 MEMBER JOHN: Mr. Chairman, I also support the
8 motion to dismiss the appeal for the same reasons and would
9 grant -- what did I say? I would grant DCRA's motion to
10 dismiss because the Board has no jurisdiction to consider the
11 appeal because the Appellant did not allege any error by the
12 ZA.

13 The Appellant is claiming that the certificate
14 basically allowed the Bureau of Prisons to operate at that
15 location, but in essence, all the ZA's certificate said was
16 what the regulations stated, that a CBIF could be operated
17 at that location.

18 The certificate specifically stated that the ZA
19 reserved the right to deny any subsequent permit or
20 certificate of occupancy for that property. There was no
21 action by the ZA that could be appealed. The Appellant also
22 claimed that there was lack of due process because the
23 certificate was not published, and there was no notice to the
24 public. But because it was not an action that took any
25 specific act, not a letter, not a determination, a statement

1 that took any specific act concerning a particular piece of
2 property and how the CBIF would operate, then I do not agree
3 with the Appellant's arguments, so I would also grant DCRA's
4 motion to dismiss. As my colleague noted, in the future, if
5 a permit was issued for that particular property, it could
6 also be appealed at that time. Thank you.

7 CHAIRPERSON HILL: Okay, great, thank you. I'm
8 agreeing with my colleagues. I think that there are a couple
9 of motions on the table, obviously, not obviously, but we
10 have spoken about the one from DCRA in terms of the lack of
11 jurisdiction, and the one, also, from the property owner to
12 dismiss as moot.

13 I think that I am of the opinion that I would be
14 voting in favor of the motion for the lack of jurisdiction
15 for all of the reasons that my colleagues stated. I do think
16 that lack of jurisdiction and all the other items that were
17 mentioned, as well as the items in Exhibit 21 from DCRA's
18 motion.

19 I do think that, and I will note that in terms of
20 the motion to dismiss as moot, I think that is -- I would be
21 in -- I don't think it's necessary. I'm more in agreement
22 with, again, DCRA's argument, in terms of why we should
23 dismiss this. I will note, however, that I did think that
24 it was interesting, in terms of that zoning certification
25 that kept getting brought up, that it did clearly state that

1 the certificate of the proposed use upon the indicated date
2 does not -- and it was in all caps -- does not imply future
3 approval of building plans and/or certificates of occupancy.
4 However, as Commissioner Miller just mentioned, if a building
5 permit actually were brought forward, that would actually be
6 something that could be appealed. I would be in agreement
7 with my colleagues.

8 VICE CHAIRPERSON HART: I'll make a motion to
9 approve the motions to dismiss, both of the motions to
10 dismiss, and would we also have to deny the appeal? I'm
11 asking OAG.

12 MS. NAGELHOUT: You would be granting motions to
13 dismiss the appeal.

14 VICE CHAIRPERSON HART: I would be making a motion
15 to grant the motions to dismiss the appeal for Appeal No.
16 20026 of Arboretum Neighborhood Association, as read and
17 captioned by the secretary. Do I have a second?

18 MEMBER JOHN: Second.

19 PARTICIPANT: Second.

20 CHAIRPERSON HILL: Motion made and seconded. All
21 those in favor say aye.

22 (Chorus of ayes.)

23 CHAIRPERSON HILL: All those opposed.

24 (No audible response.)

25 CHAIRPERSON HILL: The motion passes, Mr. Moy.

1 MR. MOY: Staff would record the vote as 4-0-1.
2 This is on the motion of Vice Chair Hart to grant the
3 motions, the two motions to dismiss. Seconding the motion
4 is Ms. John, also in support Zoning Commissioner Robert
5 Miller and Chairman Hill. We have a Board member not
6 present. The motion carries, sir.

7 CHAIRPERSON HILL: All right, thank you, Mr. Moy.
8 All right, Mr. Moy, you can call our next meeting case.

9 APPLICATION NO. 13540-A OF NATIONAL GEOGRAPHIC SOCIETY

10 MR. MOY: Thank you, sir. The next and final case
11 for decision making is Application No. 13540-A of National
12 Geographic Society. This is a request for a modification of
13 consequence to the plans approved by BZA Order No. 13540, to
14 add a front entry pavilion to an existing building, RF-1
15 zone, at 1600 M Street, Northwest, Square 183, Lots 883 and
16 884.

17 CHAIRPERSON HILL: Okay, great, thank you. Is the
18 Board ready to deliberate? Okay, I can start. This was
19 originally approved in 1981. The modification, as I reviewed
20 it, I didn't have any issues with it, actually. I agreed
21 with the analysis that was provided by the Office of
22 Planning, as well as that by ANC 2B. DDOT, however, did have
23 a condition concerning the curb cuts. I don't necessarily
24 think that it is something that I would be comfortable about,
25 in terms of making that as a condition, because I think that

1 the curb cuts, they're introducing something new into the
2 discussion.

3 I don't think it has anything to do with the
4 variance or the special exception relief that was granted in
5 the original application. I think that I would be against
6 that particular condition; however, I would go ahead and
7 encourage the Applicant to work with DDOT in terms of that
8 curb cut. Is there anything that anyone else would like to
9 add?

10 COMMISSIONER MAY: I just have a question. I know
11 we have the report from the ANC. Were there any other
12 parties in this case that we need to be --

13 CHAIRPERSON HILL: As I understand it, the ANC was
14 the only actual party that was in the original application.
15 I know that there were other people that were not in -- I
16 should say that came to testify and that came to participate,
17 but they weren't actual parties in the original application,
18 so I would say that would be no.

19 COMMISSIONER MAY: If there are no other parties,
20 the ANC is the only party, then we could deliberate on this
21 today, right?

22 CHAIRPERSON HILL: As I understand it, yes. Would
23 you like to deliberate?

24 COMMISSIONER MAY: Sure.

25 CHAIRPERSON HILL: Sure, go ahead. Oh, sorry.

1 Does anybody else? Oh, you're thinking. Does anybody --
2 would anyone else like to comment at this point?

3 MEMBER JOHN: I will just comment, Mr. Chairman.
4 I don't think that there was a material change in -- a change
5 in any of the material facts on which the original order was
6 issued. This is just to add a front entry. I also agree
7 that DDOT's condition is beyond the scope of the Board's
8 authority. The curb cut was not involved in the initial
9 order. It's not something that we ought to impose. I
10 basically agree with what you said.

11 VICE CHAIRPERSON HART: I think I'd be able to
12 support the application the modification of consequence
13 again. I agree that it could be -- it would be considered
14 a redesign of the building. I believe that the relief that
15 they sought several -- now several decades ago, it would not
16 be materially affected by this proposed change.

17 That relief was for a court, which was on the
18 southeastern portion of the site, and expansion of the
19 building in an SP-2 zone, which was, I guess, the former --
20 that was what the zone was at that point. I would be in
21 support of the application. That's all I'm going to say.

22 CHAIRPERSON HILL: All right. I'm going to make
23 a motion to approve Application No. 13540-A, as captioned and
24 read by the secretary, and ask for a second.

25 VICE CHAIRPERSON HART: Second.

1 CHAIRPERSON HILL: Motion made and seconded. All
2 those in favor say aye.

3 (Chorus of ayes.)

4 CHAIRPERSON HILL: All those opposed.

5 (No audible response.)

6 CHAIRPERSON HILL: The motion passes, Mr. Moy.

7 MR. MOY: Staff would record the vote as 4-0-1.
8 This is on the motion of Chairman Hill to approve the request
9 for a modification of consequence. Seconding the motion,
10 Vice Chair Hart. Also in support, Ms. John and Zoning
11 Commissioner Peter May, and no other Board members. The
12 motion carries, sir.

13 CHAIRPERSON HILL: Okay, great, thank you, Mr.
14 Moy.

15 (Whereupon, the above entitled matter went off the
16 record at 10:07 a.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Public Meeting

Before: DC BZA

Date: 11-06-19

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.



Court Reporter

NEAL R. GROSS

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