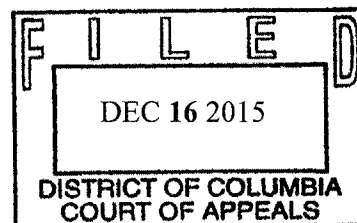


**DISTRICT OF COLUMBIA COURT OF APPEALS**

No. 14-AA-972

EDWARD V. HANLON, PETITIONER,

V.



DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT.

On Petition for Review of a Decision of the  
Board of Zoning Adjustment  
(BZA-18429)

(Submitted September 24, 2015)

Decided December 16, 2015)

Before WASHINGTON, *Chief Judge*, THOMPSON, *Associate Judge* and  
NEWMAN, *Senior Judge*.

**MEMORANDUM OPINION AND JUDGMENT**

PER CURIAM: Edward V. Hanlon ("Petitioner") challenges two building permits issued by the Zoning Administrator and affirmed by the Board of Zoning Adjustment, ("BZA" or "the Board"), allowing, *inter alia*, the remodeling of a second-story roof deck at 1530 Swann Street, NW, located in the Dupont Circle Overlay zone. Petitioner owns the property directly across the street from the property at issue. Petitioner asserts that: (1) the permits were erroneously issued because the remodeling of the second-story roof deck created an "addition" to the nonconforming structure and the relocation of the stairwell impermissibly reduced the width of the east court of the property; (2) the Board failed to make findings of fact on disputed fact issues in violation of the Administrative Procedures Act; and (3) the new structure was inconsistent with the Dupont Circle Overlay provision. We disagree and therefore affirm.

**I. Standard of Review**

"We will not reverse [the BZA's decision] unless its findings and conclusions are '[a]rbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law;’ in excess of its jurisdiction or authority; or ‘[u]nsupported by substantial evidence in the record of the proceedings before the Court.’” *Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427, 433 (D.C. 2008) (quoting *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1094 (D.C. 1994)); D.C. Code § 2–510 (a)(3) (2012 Repl.). An agency’s interpretation of the regulations that govern it must be accorded great weight, and must be upheld unless it is plainly erroneous or inconsistent with the regulations. *Oakland Condominium v. District of Columbia Bd. of Zoning Adjustment*, 22 A.3d 748, 752 (D.C. 2011).

## II.

Petitioner asserts that the BZA erred when it upheld the Zoning Administrator’s decision to issue two permits without a variance to build a roof deck structure and to relocate a stairwell that impermissibly reduced the width of the east court of the property. Petitioner further asserts that the BZA failed to make required findings of fact on disputed fact issues and therefore, its decision to uphold the Zoning Administrator’s issuance of the permits did not flow from the factual findings of the Board.

Petitioner’s first argument is that the construction of a roof over the second floor roof deck created an addition on the nonconforming property in violation of 11 DCMR § 2001.3. 11 DCMR § 2001.3 provides that enlargements or additions may be made to a nonconforming structure provided that the structure conforms to percentage of lot occupancy requirements and that the addition or enlargement itself conforms to use and structure requirements and does not increase or extend any existing nonconformity of the structure. The Board concluded that the roof deck did not create any additional enclosed living space and therefore was not an addition subject to § 2001.3. We see no reason to disturb the BZA ruling because there is substantial evidence in the record to support the BZA’s finding that the second floor roof deck did not create an additional enclosure. The BZA found that petitioner’s photographs of the roof deck, which illustrated that the roof deck remained open to the elements, “only corroborate[d]” their finding that the remodeling did not create an additional enclosure. Furthermore, the roof deck at issue is comparable to that of *Outerbridge Horsey*, where the Board found that the roof deck did not create an enclosed space because, *inter alia*, it did not create interior useable space in the dwelling and did not create any additional space that

was not already available to the homeowner. *See Appeal No. 17971 of Outerbridge and Georgina Horsey* (September 17, 2010). In this case, the roof deck did not create interior space in the dwelling and was already available to the homeowner. The BZA's interpretation of what constitutes an enclosure is within its broad discretion and not clearly erroneous and thus we will not disturb it on appeal.

Petitioner next contends that the east court was diminished by the relocated stairwell and therefore was not compliant with the minimum width requirements of 11 DCMR § 406.1. However, the Board determined that the court was eliminated by the relocation of the stairwell and thus, there was no court remaining that was subject to those requirements. This finding is supported by substantial evidence in the record. Petitioner conceded that the east court had been diminished down to somewhere between nine inches to as low as one inch by the addition of the stairwell. Thus, the Board's decision that the east court was eliminated flows rationally from its findings of fact. Furthermore, a court is not required under the regulations. It is only when a court exists that it is subject to the width requirements. Therefore, the Board did not abuse its discretion when it found the east court was not subject to the requirements of 11 DCMR § 406.1 and therefore no variance hearing was necessary.

### III.

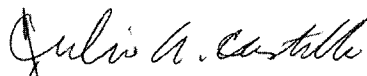
Petitioner next alleges that the third story roof deck is inconsistent with the Dupont Circle Overlay provision. However, the Board concluded that the provision is precatory, not directory, and therefore, does not impact the zoning decision in this case. In *Georgetown Residents Alliance*, this court addressed a similar argument and agreed with the BZA that a similar provision was merely precatory and did not contain the standards by which the permit applicant should be judged. *Georgetown Residents Alliance v. District of Columbia Bd. of Zoning Adjustment*, 802 A.2d 359, 365 n.6 (D.C. 2002). Similar to the provision at issue in *Georgetown Residents Alliance*, the Dupont Circle Overlay does not set any additional standards for approving building permit applications in the area. The provision merely articulates a vision for the Dupont Circle area. *See* 11 DCMR § 1501. Similarly, in *Wisconsin-Newark*, we held that the Zoning Commissioner's decision not to enforce the Overlay was not erroneous because the Overlay did not include "any specific limitations on the use of [planned unit developments]". *Wisconsin-Newark Neighborhood Coalition v. District of Columbia Zoning*

*Comm'n*, 33 A.3d 382, 392 (D.C. 2011). However, petitioner contends that the property at issue is more analogous to that of *Sisson*, where this court agreed with the BZA's denial of an applicant's permit because it violated the Overlay provision. *Sisson v. District of Columbia Bd. Of Zoning Adjustment*, 805 A.2d 964 (D.C. 2002). The Dupont Circle Overlay provision, however, is distinguishable from the provision discussed in *Sisson* because the provision at issue in that case, the Wesley Heights Overlay, specified lot occupancy and setback requirements for the area for which the permit was sought. The Dupont Circle Overlay only provides additional requirements that must be met for any planned unit developments and for driveways and curb cuts in the area and specifically recognizes that all matter-of-right uses, like the roof deck addition here, are allowed in the Dupont Circle Overlay. *See id.* at § 1502.2. Because the provision only provides broad policy guidance, except under circumstances where an application for a planned unit development is sought, the Board did not err in failing to consider the Dupont Circle Overlay provision when reviewing petitioner's challenge to the issuance of the building permit in this case.

For the reasons stated above, the decision of the Board of Zoning Adjustment is

*Affirmed.*

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO  
Clerk of the Court

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