SAG

District of Columbia
Court of Appeals

09/19/2016

No. 15-AA-153

JAMES A. HILL, *et al.*,

Petitioners,

18725

v.

DISTRICT OF COLUMBIA BOARD
OF ZONING ADJUSTMENT,

Respondent.

Sara A. Bardin, Director
District of Columbia Board of Zoning Adjustment
One Judiciary Square
441 - 4th Street, N.W., Suite 200S
Washington, DC 20001-2714

Dear Ms. Sara Bardin,

Pursuant to Rule 41(a) of this Court, the decision in the above-entitled case is attached.

Please acknowledge receipt of the decision by signing the copy of this letter and returning it to this office as soon as possible.

JULIO A. CASTILLO
Clerk of the Court

I hereby acknowledge receipt of the original of this letter with attachments.

_____

Signed

_____

Date

OAG

District of Columbia
Court of Appeals

09/19/2016

No. 15-AA-762

SIMONIDA UTH, *et al.*,

Petitioners,

18851

v.

DISTRICT OF COLUMBIA
BOARD OF ZONING
ADJUSTMENT,

Respondent.

Sara A. Bardin, Director
District of Columbia Board of Zoning Adjustment
One Judiciary Square
441 - 4th Street, N.W., Suite 200S
Washington, DC 20001-2714

Dear Sara A. Bardin,

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Signed

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Date

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 15-AA-153 and 15-AA-762

JAMES A. HILL, *et al.*, and ROBERT UTH, *et al.*, PETITIONERS,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT.

Petitions for Review of Orders
of the District of Columbia Board of Zoning Adjustment
(Order Nos. 18725 and 18851)

(Submitted May 17, 2016 Decided August 25, 2016)

Before FISHER and EASTERLY, *Associate Judges*, and KING, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: These appeals consolidate challenges to two decisions by the Board of Zoning Adjustment ("Board" or "BZA"). Petitioners first requested review of the Board's decision to grant three area variances which allow Rafael Romeu to build a deck behind his house at 1536 T Street, N.W. (No. 15-AA-153).[1] They then petitioned for review of the Board's order dismissing their challenge to the resulting building permit (15-AA-762).[2] We affirm both decisions.

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[1] The Board granted Mr. Romeu three variances from the regulations governing: the maximum percentage lot occupancy, 11 DCMR § 403 (2010); the minimum rear yard depth, 11 DCMR § 404 (2010); and the expansion of a non-conforming structure, 11 DCMR § 2001.3 (2008). All three variances were necessary because the house alone occupied a larger percentage of the lot than the maximum permitted under the zoning regulations for the district, the rear yard was already smaller than allowed under the regulations, and attaching the deck would expand the footprint of the house.

[2] Petitioners also challenged the issuance of the building permit before the Office of Administrative Hearings. Their petition for review of the decision in that

(continued...)

I. Background

The parties largely agree about the facts of this case, so our description will be brief. Homeowner Rafael Romeu (who is not a party here) purchased his house in 2012. The lot on which the house is built is one of an enclave of abnormally small lots in the area. The home, described as a "flat," is a row house with an English basement apartment on the bottom level, which is partially below grade. It is located in an R-4 District within the Dupont Circle Overlay District. An R-4 District primarily includes row dwellings, of which a substantial number have been converted to house two or more families, but the district's "primary purpose" is "the stabilization of remaining one-family dwellings." 11 DCMR § 330 (2007).

When Mr. Romeu purchased the property, there was a patio behind the house on the ground level, but no deck and no point of egress directly from the house onto the back of the property. The rear yard is reached from inside the home only by exiting the front door and walking around the house using the alley that runs alongside the property. Mr. Romeu wants to build a deck accessible from the back of the house at the level of the first floor (above the English basement). It would include stairs to the ground and provide cover for a parking spot. The garage belonging to a nearby homeowner intrudes eight inches across most of Romeu's rear property line. The property is also subject to a three-foot-wide right-of-way easement along the rear boundary line for the benefit of three nearby lots.

When Mr. Romeu applied for a permit to build the deck as a matter of right, he included documents showing that permits had been issued in 2010 for the demolition of a deck and parking pad that appear to have been approximately the same dimensions as the proposed deck. His application was approved and a building permit was issued. Mr. Romeu then entered into a contract for construction of the deck and purchased custom materials which cannot be returned or readily resold.

However, after objections by neighbors and nearby property owners, including petitioners, the DCRA revoked the permit. Mr. Romeu then applied to the Board for area variances. The local Advisory Neighborhood Commission

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(...continued)
case is also pending before this court. See *Uth v. District of Columbia Dep't of Consumer & Regulatory Affairs*, No. 14-AA-1389.

("ANC") filed a report supporting his application after he altered the plans so that support posts would not intrude upon the easement. The Board granted the variances, and a new building permit was issued.

II. Analysis

"We will not reverse the BZA's decision unless its findings and conclusions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of its jurisdiction or authority; or unsupported by substantial evidence in the record of the proceedings before the Court." *Fleischman v. District of Columbia Bd. of Zoning Adjustment*, 27 A.3d 554, 557 (D.C. 2011) (brackets and internal quotation marks omitted).

A. A New Argument

For the first time on appeal, petitioners assert that the "Nonconforming Use" statute, D.C. Code § 6-641.06a (2012 Repl.),[3] forbids the Board to grant an area variance that allows a property owner to expand a nonconforming structure on a nonconforming lot. "We have often and consistently held that administrative and judicial efficiency require that all claims be first raised at the agency level to allow appropriate development and administrative response before judicial review." *Aziken v. District of Columbia Alcoholic Beverage Control Bd.*, 29 A.3d 965, 969 (D.C. 2011) (brackets and internal quotation marks omitted).

Petitioners attempt to circumvent our rule by claiming, incorrectly, that the question is jurisdictional and may be raised at any time. Their challenge is not whether the Board has jurisdiction to grant variances, because it plainly does under its authorizing statute. D.C. Code § 6-641.07 (g)(3). Rather, their objection is that the Board did not properly exercise its authority within its jurisdiction. Petitioners should have raised this claim below, and we will not consider it here.

B. Area Variances

We turn now to petitioners' other challenges to the Board's decision to grant the area variances. To obtain an area variance, an applicant must demonstrate "an extraordinary or exceptional condition affecting the property" that causes

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[3] The "Nonconforming Use" provision has also been located, at various points in its history, at D.C. Code § 5-423 and D.C. Code § 5-419.

"practical difficulties . . . if the zoning regulations are strictly enforced"; and that the relief can be granted "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan." *Washington Canoe Club v. District of Columbia Zoning Comm'n*, 889 A.2d 995, 1000 (D.C. 2005); *see also* D.C. Code § 6-641.07 (g)(3); 11 DCMR § 3103.2 (2013).

The "exceptional condition" requirement may be satisfied by a characteristic of the land, *Fleischman*, 27 A.3d at 561; a condition "inherent in the structures built upon the land," *Capitol Hill Restoration Soc'y, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 942 (D.C. 1987); or prior zoning actions regarding the property, *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097-98, 1100 (D.C. 1979). The practical difficulty caused by "strict application of the zoning regulations," must be due to the exceptional condition. *Capitol Hill Restoration Soc'y*, 534 A.2d at 941. There is no "clear definition of what constitutes 'practical difficulties.'" *Palmer v. Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). Rather, this is a fact-based determination "that compliance with the area restriction would be unnecessarily burdensome." *Id.*

To obtain a variance, the property owner must be uniquely affected by the "exceptional condition" or "practical difficulties." *See Palmer*, 287 A.2d at 539; *see also Capitol Hill Restoration Soc'y*, 534 A.2d at 941. In other words, the justification for a variance cannot be a condition or difficulty affecting the neighborhood at large. Crucial for this case, a property's "past zoning history can be taken into account in the uniqueness facet of the variance test." *Monaco*, 407 A.2d at 1098.

Here, the Board identified multiple factors that together created an exceptional condition, including detrimental reliance on the initial permit, encroachment of the neighboring garage, the three-foot-wide easement, the property's location along an alley, the internal configuration of the house, and the unusually small size of the lot. The Board then concluded that strict compliance with the zoning regulations would cause unique practical difficulties for Mr. Romeu because of the exceptional condition. In particular, without the

variances, the house's internal configuration and the costs incurred in detrimental reliance on the first building permit would be "unnecessarily burdensome."[4]

In this respect, the Board disagreed with the Office of Planning ("OP"), which opined that Mr. Romeu should have to prove that he would suffer "practical difficulties" if required to build a smaller deck. The Board must "give 'great weight' to the issues and concerns raised in the recommendations of Advisory Neighborhood Commissions and the Office of Planning." *Spring Valley-Wesley Heights Citizens Ass'n v. District of Columbia Zoning Comm'n*, 88 A.3d 697, 705 (D.C. 2014) (footnotes omitted); *see also* D.C. Code § 6-623.04.

"Great weight" requires the Board to "specifically acknowledge[] and address[]" the OP's positions and "provide[] a reasonably precise explanation for any disagreements with them." *Spring Valley-Wesley Heights Citizens Ass'n*, 88 A.3d at 705. The Board need not follow the OP's recommendation if it explains why it finds the position unpersuasive. *Cf. Foggy Bottom Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 791 A.2d 64, 76-77 (D.C. 2002) (affirming decision where Board acknowledged ANC's concerns but was "not persuaded" by its witness).

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[4] Petitioners present three arguments against allowing Mr. Romeu to rely upon the costs he incurred in detrimental reliance on the first permit. All are meritless. The DCRA erred when it issued the first permit based on a 2010 permit for *removal*, rather than a pre-1958 permit for *building*, but it cannot blame Mr. Romeu for misleading the agency about the 2010 permit attached to his application. Although petitioners complained that the plans Mr. Romeu submitted with his application did not mention the easement, the DCRA did not appear to rely on that ground when it revoked the permit. An applicant's costs due to agency error may factor into the decision whether to grant variances. *Monaco*, 407 A.2d at 1097-98, 1100. Nor did Mr. Romeu forfeit any arguments in favor of variances when he decided not to challenge the revocation of the building permit. Finally, petitioners misconceive the situation when they argue that it is unreasonable *per se* to rely on advice from a government employee, citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). Mr. Romeu incurred costs based on the official government action of issuing the permit, not on mere advice, and the principle underlying *Federal Crop Insurance*, that the government may not pay money from the public treasury in derogation of conditions set by Congress, has no application here because the permit only allowed a private actor to spend his own money.

The Board acknowledged and discussed the OP's concerns and recommendations on the topic of "practical difficulties," but found the objections unpersuasive. The Board explained specifically why it disagreed with the OP's recommendation and, having done so, it had discretion to approve the variances. *Cf. Spring Valley-Wesley Heights Citizens Ass'n*, 88 A.3d at 714-18 (Board acted within its discretion when it sufficiently explained why its conclusions diverged from ANC's recommendations).

Our final step is to review the Board's evaluation of whether granting the variances will cause substantial detriment to the public good or substantially impair the intent, purpose, and integrity of the zoning plan. *Washington Canoe Club*, 889 A.2d at 1000. The Board concluded that the variances would not be substantially detrimental to the public good after considering the results of the sun study and measures taken to protect the neighbor's privacy. In addition, the Board required Mr. Romeu to use the revised plans that moved the support posts obstructing the easement. The Board also determined that granting the variances would not substantially impair the zoning plan. The "primary purpose" of the R-4 District is "the stabilization of remaining one-family dwellings," 11 DCMR § 330.2, and the Board concluded that the proposed deck would not "destabiliz[e] the remaining one[-]family[] dwellings" in the district or be "out of character with the neighborhood." The variances "simply allow[] a deck to occupy more of a very small lot than is otherwise permissible."

The Board and the OP again diverged on the question of whether the zoning plan would be substantially impaired by granting the variances. The OP supported its position simply by reiterating its previously-voiced concern that Mr. Romeu had not demonstrated the practical difficulties of building a smaller deck: "The Applicant should explore a more conforming design or provide additional evidence satisfying the variance test." The Board noted the circularity of the OP's position, writing that "because [the OP] believes that the Applicant has not shown the practical difficulty in building a smaller deck, then the deck the Applicant proposes to build must cause substantial detriment to the zone plan." However, as the Board pointed out, "[t]he existence of practical difficulties and the question of whether there will be substantial detriment are two different tests." As the OP did not articulate why the proposed deck would impair the zoning plan, the Board acted within its discretion when it found the recommendation unpersuasive.

We hold that the Board's conclusions flow rationally from its factual findings and are supported by substantial evidence in the record. The Board's determination is not arbitrary or capricious, and it did not abuse its discretion in

granting the variances. *See Fleischman*, 27 A.3d at 557; *Draude v. District of Columbia Bd. of Zoning Adjustment*, 582 A.2d 949, 954-57 (D.C. 1990).

III. Conclusion

Petitioners acknowledge that their challenge to the building permit (No. B1409246) rises or falls with their argument that the variances were improperly granted. The orders under review are therefore affirmed.

It is so ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

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