DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-AA-948

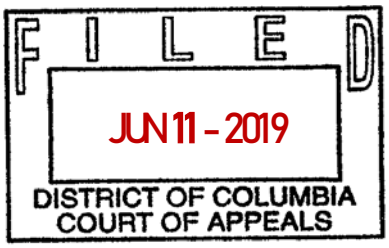
BERTHA HOLLIDAY, PETITIONER,

v.

DISTRICT OF COLUMBIA ZONING COMMISSION, RESPONDENT,

and

JAIR LYNCH DEVELOPMENT PARTNERS, INTERVENOR.



On Petition for Review of Orders of the
District of Columbia Zoning Commission
(ZC-13-14B & ZC-13-14B(1))

(Argued January 24, 2018 Decided June 11, 2019)

Before BLACKBURNE-RIGSBY, *Chief Judge*, and GLICKMAN and FISHER, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Holliday challenges the Zoning Commission's order approving a modification to the plans for a mixed-use residential/grocery building in the Planned Unit Development (PUD) at the McMillan Reservoir Slow Sand Filtration Site in the northwest quadrant of the District of Columbia. The modification permits certain structural changes to accommodate the needs of the grocery store tenant. Ms. Holliday does not take issue with any of these changes. Rather, she claims that the unmodified, previously approved residential part of the building will violate the Fair Housing Act (FHA)[1] by containing a separate wing offering affordable housing to low-income seniors. We deny Ms. Holliday's petition for two independent reasons. First, Ms. Holliday lacks standing to maintain her claim because she is not adversely affected or aggrieved by the Commission's

[1] *See* 42 U.S.C. § 3601 *et seq.* (1968).

approval of this affordable senior housing. Second, Ms. Holliday waived her claim by failing to raise it in a petition for review of the initial order in which the Commission approved the housing plans as part of the PUD.

I.

On April 17, 2015, after multiple days of hearings, the Commission issued Order No. 13-14 approving the PUD application to redevelop the 25-acre McMillan site. The order approved subdivision of the site into seven distinct parcels for development. On one of those parcels – Parcel 4 – intervenor Jair Lynch Development Partners (Jair Lynch) is to construct a mixed-use, multi-family residential building with a supermarket on the ground floor. The building design is in the shape of an "E" with three residential wings containing a total of 196 market-rate dwelling units plus 85 affordable housing units reserved for low-income seniors. All the units reserved for affordable senior housing are to be located in the southernmost wing, which is to have its own separate entrance, lobby, and elevator. This dedicated wing was incorporated in the building plans in response to requests from the local community and the District for more affordable senior housing in the development of the site.

The rationale for placing the affordable senior housing in a separate wing of the Parcel 4 building was explained during the initial proceedings on the PUD application, was not disputed in those proceedings, and was accepted by the Commission. At the hearing on May 8, 2014, a Commissioner inquired why the affordable senior housing units would be in a separate wing from the market-rate housing rather than distributed throughout the building. A member of the project development team explained that the separation was required in order to come within the exemption in the FHA of "housing for older persons" from the prohibition of discrimination based on "familial status."[2] The Commission requested statutory

[2] The FHA exemption for "housing for older persons" is contained in 42 U.S.C. § 3607(b) (2019). For the affordable senior housing in Parcel 4 to come within that exemption, it must be "intended and operated for occupancy by persons 55 years of age or older," and "at least 80 percent of the occupied units [must be] occupied by at least one person who is 55 years of age or older." *Id.* § 3607(b)(2)(C). In addition, "the housing facility or community [must] publish[] and adhere[] to

support for this requirement, which Vision McMillan Partners (VMP) later provided.[3] Again, at the May 27, 2014, hearing, a member of the development team confirmed that "[t]he affordable senior component will continue to function as a distinct building with its own lobby and amenities as is necessary to meet the senior housing exemptions to the Fair Housing Act." VMP explained this further in its post-hearing statement.[4] Subsequently, at a hearing in July 2014, two Commissioners stated on the record that they no longer had concerns about the separate wing for senior affordable housing. No one demurred.

Ms. Holliday participated in the hearings on the PUD on her own behalf as a property owner in the surrounding Bloomingdale neighborhood,[5] and as an elected Commissioner of ANC 5E (the local Advisory Neighborhood Commission). The ANC supported the PUD application and raised no objection to the configuration of the Parcel 4 building. Ms. Holliday, who was present at the hearings when the separate affordable housing wing for low-income seniors was explained, did not object to it either (though she did raise objections to other aspects of the PUD). No other participant in the proceedings questioned the propriety of a separate wing for affordable senior housing either. Accordingly, when the Commission rendered its

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policies and procedures that demonstrate the intent required" by the exemption. *Id.* § 3607(b)(2)(C)(ii).

[3] VMP is the co-applicant for the PUD along with the Office of the Deputy Mayor for Planning and Economic Development (DMPED).

[4] VMP's June 23, 2014, post-hearing statement included the following explanation:

> The senior component comprises a single "bar" of the E-shaped multifamily building. In conformance with the senior housing exemption that allows for discrimination based on familial status under the Fair Housing Act, the senior housing component must function independent of the market-rate apartments. Thus a separate lobby, common and core areas, and amenities have been provided for the senior component.

[5] Ms. Holliday's reply brief in this court states (without record citation) that she "lives 6 blocks from the McMillan site."

decision in Order No. 13-14 approving the Parcel 4 housing plans as part of the PUD, it did not find it necessary to address the issue.[6]

A number of organizations and individuals petitioned this court to review the Commission's PUD approval order, but not Ms. Holliday. None of the petitioners argued that the affordable senior housing configuration violated the FHA or raised any issue about the Commission's approval of that aspect of the PUD.

In October 2015, while the petitions for review by this court were still pending, Jair Lynch applied to the Commission to modify the approved plans for the Parcel 4 building to accommodate the unanticipated needs of the newly-identified grocery store tenant. The application was given the case number 13-14B. The requested changes did not materially alter the residential configuration of the building or the separation of the affordable senior apartments from the market-rate apartments.[7] There were no parties in opposition to the application; ANC 5E, among others weighing in, supported it.

The day after the public hearing on the modifications, however, Ms. Holliday asked the Commission to reopen the record to allow her to submit written testimony on her own behalf as a "resident of the Bloomingdale neighborhood." The Commission granted her request. In her written testimony, Ms. Holliday stated that, after reviewing the Commission's order approving the initial PUD application, she was "quite surprised to see renderings that detailed separate entrances, elevators, lobbies, contiguous apartment units, and mechanical penthouses for 'market rate'

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[6] The Commission is required to make findings only on contested issues. *See* D.C. Code § 2-509(e) (2012 Repl.).

[7] As stated in the Commission's modification order, the requested changes included

> (a) the introduction of a modest-sized interior mezzanine and outdoor terrace to support an accessory café space; (b) modifications to the location and configuration of the parking garage entrance and loading facilities; (c) revisions to the previously approved loading management plan to adjust loading hours and other restrictions; (d) modification to the approved roof plan to accommodate the grocery store mechanical penthouses; and (e) other minor architectural and plan refinements.

and affordable (50%-60% AMI) senior (age 55 years or more) units" in the Parcel 4 building. Ms. Holliday said she "initially speculated this separation was age-related and intended as a means to more effectively address any special needs of seniors." She acknowledged having been told by DMPED that the "Fair [H]ousing [A]ct prohibits discrimination of housing based on age so senior affordable housing units have to have separate entrance. If they were dispersed through the building it would be a violation." But because any seniors in the building who could afford market-rate units would reside in a wing separate from the wing reserved for the low-income seniors, Ms. Holliday "concluded the separation was not age-related, but rather social-economic." She believed that "[i]n this city, that kind of social-economic separation usually translates to racial separation/segregation." Decrying the "indignity" of segregating the senior tenants' units from the market-rate units and the "potential impact of such 'separation'/segregation on the social fabric of the McMillan development and its surrounding neighborhoods," Ms. Holliday urged the Commission to delay action on the modification application, to ask the PUD applicant to provide a "rationale and justification" for its senior housing arrangement, and to investigate and determine what building configuration would be appropriate and lawful. Ms. Holliday cited no law that the separation of senior housing might violate and professed uncertainty as to whether it violated any law at all.

Jair Lynch responded to Ms. Holliday's submission. Noting that the issue had been addressed during the proceedings on the initial PUD application and in its post-hearing submission, Jair Lynch explained once more that the separation of the affordable senior housing was considered necessary to meet the requirements of the FHA exemption for senior housing from the prohibition of discrimination based on familial status. Ms. Holliday did not reply.

On April 11, 2016, the Commission issued Order No. 13-14B approving the requested changes to the Parcel 4 building plans. In doing so, the Commission noted that it had "carefully considered ANC 5E's support for the project and ha[d] given that support great weight." In answer to Ms. Holliday, the Commission found that it had addressed her concerns regarding the configuration and location of the affordable senior housing "during the Approved PUD process," that the separate configuration "is related to federal Fair Housing Act requirements that are required in order to set aside dwelling units for the exclusive use by seniors," and that the modification order "does not change any of [the] Commission's prior findings relating to this issue."

ANC 5E then moved for rehearing of the modification order. Its motion asserted that the separation of affordable senior units from market-rate units appeared to violate a Department of Housing and Urban Development (HUD) regulation implementing the FHA that had not been brought to the Commission's attention previously.[8] This was the first time anyone had claimed that the configuration of the Parcel 4 building violated the FHA. The Commission denied the request for rehearing in Order No. 13-14B(1), finding that because "ANC 5E did not submit any new evidence that could not have been presented at the public hearing," the motion did not meet the requirements of (then applicable) 11 DCMR § 3029.6.[9]

Ms. Holliday filed the present petition for review of Order Nos. 13-14B and 13-14B(1) on September 19, 2016, while the petitions seeking review of the original PUD approval in Order No. 13-14 were still pending decision by this court. On December 8, 2016, this court vacated Order No. 13-14, and remanded the case for further proceedings to resolve a number of the issues raised by the petitioners. The lawfulness of the affordable senior housing plans was not one of those issues, and

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[8] In pertinent part, the HUD regulation, 24 C.F.R. § 100.304(b), provides that "[a] portion or portions of a single building shall not constitute a housing facility or community" for purposes of the exemption for housing intended and operated for persons 55 years of age or older. The obvious reason for this regulation is to ensure that housing meant for seniors is indeed separate from, not integrated with, non-senior housing. It is not obvious that the regulation should be applied literally to preclude a residential configuration like the one at issue in the present case, where the senior units are separated geographically and structurally from the non-senior units in their own distinct wing of a tripartite, mixed-use building. However, in the view we take of this case, we have no reason to decide that question, and we refrain from addressing it.

[9] Former 11 DCMR § 3029.6, which has been recodified as 11 DCMR § Z700.7, provides that "[n]o request for rehearing shall be considered by the Commission unless new evidence is submitted that could not reasonably have been presented at the original hearing." There was ample opportunity for parties to present evidence on the separation of the affordable senior units at the original hearing. As the Commission pointed out, the justification for this separation had been addressed both in the initial proceeding for the PUD application and when Ms. Holliday questioned it in connection with the modification of the PUD.

our opinion did not direct the Commission to revisit that question on remand.[10] We take judicial notice of the fact that the proceedings on remand have occurred and that petitions for review of the Commission's order on remand, No. 13-14(6) (decided September 14, 2017), are now pending before this court.[11] Ms. Holliday is not among the petitioners in these matters.

II.

Ms. Holliday asks this court to vacate Order No. 13-14B because, she claims, the Commission approved a development that would violate the FHA and tend to perpetuate unlawful discrimination.[12] In opposition, the Commission and Jair Lynch argue, among other things, that Ms. Holliday lacks standing to raise these issues and, in any event, that she waived them by failing to raise them at the appropriate time. We agree with both those arguments and therefore do not reach the merits of her claims.

A. Standing

Standing is a question of law that we consider *de novo* on appeal.[13] In order to have standing to petition this court to review a decision of the Zoning Commission in a contested case, a petitioner must be "adversely affected or aggrieved" by the

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[10] *See Friends of McMillan Park v. District of Columbia Zoning Comm'n*, 149 A.3d 1027 (D.C. 2016).

[11] The petitions are filed in *Friends of McMillan Park v. District of Columbia Zoning Comm'n*, No. 18-AA-698, and *DC for Reasonable Development v. District of Columbia Zoning Comm'n*, No. 18-AA-706. The two petitions have been consolidated for decision by a single division of this court.

[12] Petitioner's Br. at 26. Although Ms. Holliday also invokes the District of Columbia Human Rights Act (DCHRA) in her brief, D.C. Code § 2-1401.01 *et seq.* (2016 Repl.), she does not identify any particular violation of that Act. The pertinent housing provisions of the DCHRA appear to mirror those in the FHA. *See* D.C. Code § 2-1402.21 (c).

[13] *Padou v. District of Columbia ABC Bd.*, 70 A.3d 208, 211 (D.C. 2013).

decision.[14] This requires the petitioner to satisfy both the "constitutional" requirement of a "case or controversy" and, in addition, the recognized "prudential" prerequisites of standing.[15]

"The *sine qua non* of constitutional standing to sue is an actual or imminently threatened injury," a so-called "injury in fact" that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[16] A "particularized injury" is one that "affect[s] the plaintiff in a personal and individual way,"[17] and "[t]he additional requirement of concreteness is meant to convey that the injury also 'must actually exist,' i.e., be 'real,' and not 'abstract.'"[18] Further, under prudential standing principles, a petitioner may assert only her own legal rights, and "may not attempt to litigate generalized grievances."[19]

The burden is on Ms. Holliday to establish that the Commission's action exposes her personally to actual or imminent "injury in fact."[20] She plainly has not done so. Her expressed concerns – over the "indignity" that other persons may endure because the senior tenants' units are to be separated from the market-rate units, and the "potential impact of such 'separation'/segregation on the social fabric

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[14] D.C. Code § 2-510(a) (2016 Repl.).

[15] *See, e.g.*, *Union Mkt. Neighbors v. District of Columbia Zoning Comm'n*, 197 A.3d 1063, 1067 n.3 (D.C. 2018); *York Apts. Tenants Ass'n v. District of Columbia Zoning Comm'n*, 856 A.2d 1079, 1083-84 (D.C. 2004); *see also Padou*, 70 A.3d at 211.

[16] *York Apts.*, 856 A.2d at 1084 (quoting *Friends of Tilden Park v. District of Columbia*, 806 A.2d 1201, 1206-07 (D.C. 2002)); *see also, e.g.*, *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547-48 (2016).

[17] *Vining v. Exec. Bd. of the District of Columbia Health Benefit Exch. Auth.*, 174 A.3d 272, 278 n.26 (D.C. 2017) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

[18] *Id.* (quoting *Spokeo*, 136 S.Ct. at 1548).

[19] *Padou*, 70 A.3d at 211 (internal quotation marks and brackets omitted); *York Apts.*, 856 A.2d at 1084.

[20] *See Vining*, 174 A.3d at 278 (citing *Spokeo*, 136 S.Ct. at 1547).

of the McMillan development and its surrounding neighborhoods" – are vague and unsubstantiated. They are neither concrete nor particularized to Ms. Holliday (who has never alleged that she intends to reside in the Parcel 4 building, or indeed anywhere in the PUD); rather, her concerns, particularly about the "potential" that a separate wing of affordable housing for seniors may engender a return of segregation to the surrounding Bloomingdale neighborhood, are entirely conjectural and hypothetical. Accordingly, Ms. Holliday has not shown she is adversely affected or aggrieved by the Commission's approval of the plans for Parcel 4.

B. Waiver

Although Ms. Holliday's lack of standing deprives us of jurisdiction and is the end of the matter, there is a second reason why we must dismiss Ms. Holliday's petition for review. To the extent she claims to be aggrieved at all, it is not by the Commission's decision in Order No. 13-14B. That order did nothing more than approve changes in the previously approved building plans to accommodate the grocery tenant. These changes had no effect on the residential configuration that Ms. Holliday finds objectionable. The Commission approved that configuration in its initial order approving the PUD, Order No. 13-14. If Ms. Holliday is aggrieved, it is by that order. But she did not petition for review of Order No. 13-14, and the time for doing so has long since passed.

It makes no difference to the outcome here that this court subsequently vacated Order No. 13-14. There was no challenge to the separate senior housing in that appeal, and our opinion did not address the issue.[21] Even though our vacatur deprived Order No. 13-14 of its preclusive effect,[22] it is well-settled that "[w]here an argument could have been raised on an initial appeal, it is inappropriate [for the

[21] We express no view on whether Ms. Holliday might have been permitted to object to the separate senior housing in the Commission's proceedings on remand. The question appears moot inasmuch as Ms. Holliday did not petition for review of the Commission's decision to approve the PUD on remand.

[22] *Jordan v. Washington Metro. Area Transit Auth.*, 548 A.2d 792, 795 n.4 (D.C. 1988) ("The pendency of an appeal . . . does not alter the *res judicata* or collateral estoppel effect of a judgment or order. Only if that order is reversed does it lose its collateral estoppel effect." (citations omitted)).

appellate court] to consider that argument on a second appeal following remand."[23] "This widely-accepted rule furthers the important value of procedural efficiency, and prevents the 'bizarre result' that 'a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."[24] "This is especially so where, as here, none of the parties have come forward with an explanation (beyond inadvertence) for the failure to properly present these issues in the initial appeal."[25] *A fortiori*, a claim that should have been raised in a petition to review an initial agency decision will not be entertained if it is raised instead in a petition to review a subsequent, collateral agency decision – even if this court vacates the initial decision (on the other grounds that were raised in that appeal) and remands for further proceedings.

We recognize that, because the separate senior housing was not contested before the Commission in the initial proceedings in No. 13-14, it is possible this court would not have entertained Ms. Holliday's claim of error had she presented it to us in a petition for review of the Commission's initial order.[26] Even if that is so, that merely reflects a double default on her part in the initial proceedings; it does not

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[23] *Fleming v. Carroll Pub. Co.*, 621 A.2d 829, 837 (D.C. 1993) (quoting *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989)).

[24] *Northwestern Indiana*, 872 F.2d at 470 (citations omitted).

[25] *Id.* While it has been posited that this waiver rule might itself be waived in "exceptional circumstances," *United States v. Brice*, 748 F.3d 1288, 1289 (D.C. Cir. 2014), no such circumstances have been shown to exist here. *Cf. Oubre v. District of Columbia Dep't of Empl. Servs.*, 630 A.2d 699, 704 (D.C. 1993) (recognizing a "manifest injustice" exception to application of collateral estoppel where the parties agreed that a mutual mistake of fact had resulted in an erroneous wage determination and award in a workers' compensation proceeding).

[26] Normally, "[i]n the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative agency at the appropriate time. . . . [H]owever, we have recognized that the courts may show a measure of flexibility in this regard when the interests of justice so require." *Goodman v. District of Columbia Rental Hous. Comm'n*, 573 A.2d 1293, 1301 (D.C. 1990). In the present case, "a measure of flexibility" might have been shown because the question of compliance with the FHA actually was addressed by the applicant and the Commission in the course of the proceedings.

justify her belated attempt to raise the claim in the instant petition for review of the modification order. Ms. Holliday has not demonstrated that the Commission erred by declining her and ANC 5E's invitations to expand the inquiry in the modification proceeding to include the senior housing issue of interest to her. As the Commission stated, it already had considered the FHA and the propriety of separating the affordable senior apartments from the market-rate apartments in the original proceeding on the PUD application. Ms. Holliday's submission in the modification proceeding disregarded the Commission's prior consideration of the issue, did not explain her failure to raise her concerns about the separate seniors wing during that prior consideration, and presented no claim that the approved configuration of the building contravened applicable law or that the Commission committed legal error in approving it. In short, she failed to articulate any reason for the Commission to reconsider its approval of the building plans beyond her own personal discomfort with the result. And although ANC 5E did contend that, under a HUD regulation, the senior wing would be ineligible for the senior housing exemption, its attempt to present that contention for the first time in a motion for reconsideration in the modification proceeding was unexcused and untimely under the Commission's regulations.

Thus, even assuming Ms. Holliday might be aggrieved, we conclude that she waived her challenge to the affordable senior housing by failing to pursue it in a petition to review the initial PUD approval. She cannot overcome that waiver by asserting the challenge in a petition to review a subsequent order that properly was limited to a different issue.

III.

For the foregoing reasons, the petition for review is denied.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

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