District of Columbia
Court of Appeals

04/21/2021

No. 18-AA-1323

ALISON SCHAFER, *et al*.,

Petitioners,

BZA-19548

v.

DISTRICT OF COLUBMIA
BOARD OF ZONING ADJUSTMENT,

Respondent.

District of Columbia Office of Zoning
One Judiciary Square
441 - 4th Street, N.W., Suite 200-S
Washington, DC 20001

Dear Director,

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

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 18-AA-1323

ALISON SCHAFER, ET AL., PETITIONERS,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

and

TARA GUELIG, ET AL., INTERVENORS.

On Petition for Review
of an Order of the District of Columbia Board of Zoning Adjustment
(BZA-19548)

(Submitted February 18, 2020 Decided March 30, 2021)

Before GLICKMAN, BECKWITH, and EASTERLY, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioners Alison Schafer and Gernot Brodnig challenge an order of the District of Columbia Board of Zoning Adjustment ("BZA") granting intervenors Tara Guelig and Yuri Horwitz, their neighbors to the west and north, respectively, a special exception from the zoning regulations' rear yard requirement, 11-D D.C.M.R. § 1206.3 (2017).[1] Intervenors seek to construct a rear addition to their home in the Georgetown Historic District, and after obtaining concept and permit approval from the Old Georgetown Board, they successfully applied to the BZA for a special exception from zoning regulation 11-D D.C.M.R. § 1206.3 (providing "a rear wall of an attached or semi-detached building shall not be

[1] The BZA proceedings on this application for a special exception took place in 2017. Since then, several of the pertinent zoning regulations have been amended. Because the parties do not argue that it matters which version of the regulations we should apply, like the parties, we cite primarily to the regulations in place at the time of the BZA proceedings.

constructed to extend farther than ten feet . . . beyond the farthest rear wall of any adjoining principal residential building on any adjacent property"). Petitioners challenge the BZA's order granting intervenors a special exception on two grounds: petitioners argue (1) the BZA's findings of fact either fail to address material contested issues or are unsupported by substantial evidence; and (2) the BZA violated contested case procedural requirements by failing to hold more than one public hearing on the special exception application. We disagree and affirm.

The BZA may grant special exception relief from the zoning regulations' rear yard requirement, pursuant to its authority under D.C. Code § 6-641.07(g)(2) (2018 Repl.), 11-D D.C.M.R. § 5201.1 (2017), and 11-D D.C.M.R. § 1206.4, based on the evaluation criteria articulated in 11-X D.C.M.R. § 901.2 (2021) and 11-D D.C.M.R. § 5201.3. "[T]he BZA's decision will be upheld if it has articulated findings on each contested issue of fact, the conclusion rationally flowed from the facts, and there was sufficient evidence supporting each finding." *United Unions, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 554 A.2d 313, 315 (D.C. 1989) (footnotes omitted).[2]

Petitioners argue that the BZA's factfinding was deficient in a number of respects. First, they challenge as "incomplete" or illogical the BZA's findings that the rear addition would neither unduly affect the light and air available to neighboring properties nor unduly compromise the privacy or occupants' enjoyment of neighboring properties. *See* 11-D D.C.M.R. § 5201.3(a)–(b). We do not share their view. Regarding the availability of light and air, the BZA observed that the proposed rear addition's impact on available light and air was less significant than what could result from the matter-of-right addition of a third story, and relied on architectural sun studies showing that the addition's shadows would "be mostly . . . subsumed by" shadows cast by a taller and larger-footprint building two lots to the west. The BZA further found that the proposed addition included features, such as a setback from the east property line, a sloped roof, and the still considerable rear yard that would be maintained, that would mitigate the addition's impact on the

[2] We have previously explained that an agency's findings of fact and conclusions of law exist "along a continuum," and that "[t]he difference between such findings and conclusions . . . is one of degree from specific to general not a difference of kind." *Citizens Ass'n of Georgetown v. District of Columbia Zoning Comm'n*, 402 A.2d 36, 42 (D.C. 1979). Thus we examine the BZA's order as a whole in assessing its factfinding.

neighbors' available air and light. *Cf. St. Mary's Episcopal Church v. District of Columbia Zoning Comm'n*, 174 A.3d 260, 272 (D.C. 2017) (upholding agency's conclusion of no undue impact on light and air based upon shadow studies, design revisions to reduce impact on light and air, and finding that proposed building's impact was less significant than what applicant was entitled to as a matter of right).[3] The fact that the BZA did not specifically reference contrary testimony from Ms. Schafer that the addition would cut off light to the patio behind her house does not compromise the reliability of the BZA's findings. *See Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 52 (D.C. 1984) (en banc) ("If there is substantial evidence to support the Board's finding, then the mere existence of substantial evidence contrary to that finding does not allow this court to substitute its judgment for that of the Board." (internal quotation marks omitted)).

Regarding the determinations that the rear addition would not unduly compromise the privacy and enjoyment of neighboring properties, *see* 11-D D.C.M.R. § 5201.3(b), and that approval of the special exception would "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps," 11-X D.C.M.R. § 901.2(a) (2021); *see also* 11-D D.C.M.R. § 1200.1 (2017), we also conclude the BZA's findings are sufficiently supported. In addition to the findings described above, the BZA noted that the addition would not alter the building's current use, that the extensive rear yard and substantial foliage provided screening from Mr. Brodnig's property, and that the addition would not include any windows facing Ms. Schafer's property. Petitioners appear to argue that the BZA's findings are inadequate because they do not include standalone, labeled findings of fact regarding the impact of the addition on privacy or enjoyment of neighboring properties. But as explained above, *see supra* note 2, we do not require such formalism.

---

[3] Petitioners argue that the BZA improperly relied upon the sun studies in concluding that the rear addition would not unduly affect the air available to neighboring properties. However, it is evident that the BZA looked to the totality of the circumstances for the proposed addition's impact on available air. To the extent that the sun studies constituted one factor among many that the BZA considered, we have previously upheld agency action that followed a similar approach in its light and air analysis. *See, e.g.*, *St. Mary's Episcopal Church*, 174 A.3d at 272; *Neighbors for Responsive Gov't, LLC v. District of Columbia Bd. of Zoning Adjustment*, 195 A.3d 35, 49–50 (D.C. 2018) (upholding agency's conclusion of no undue impact on light and air based upon shadow studies and the size of the proposed building and its yard setbacks).

Petitioners also challenge the BZA's factual findings on the ground that they failed to address whether, with the rear addition, intervenors' property would exceed the maximum permitted lot occupancy under 11-D D.C.M.R. § 1204.1 (2017). As support for the proposition that the BZA is obliged to make a factual finding regarding lot occupancy, they cite 11-D D.C.M.R. § 5201.3(e), which provides "[t]he [BZA] *may* approve lot occupancy of all new and existing structures on the lot" up to specified limits above the normal maximum lot occupancy outlined in § 1204.1. (Emphasis added). But that provision simply authorizes the BZA to grant relief from lot occupancy limits when such relief is requested. It does not require the BZA to reach out to address the need for such relief where it is not requested. Here, the intervenors only requested a special exception from the rear yard requirement of § 1206.3, not the lot occupancy requirement of § 1204.1.

Further, as the BZA observed, it "made no finding that the requested relief . . . is either necessary or sufficient." This is not to say lot occupancy limits will go unenforced; rather, it puts the burden on the applicant for the special exception to identify the relief they need. After the BZA has granted a special exception under § 5201, the applicant must apply to the Zoning Administrator for a building permit. 11-Y D.C.M.R. § 702.1 (2017). Before issuing a building permit, the Zoning Administrator must verify that the development plans "fully conform to" the zoning regulations. 11-A D.C.M.R. § 301.1 (2017). As the BZA correctly noted in its order, this review requires the Zoning Administrator "to deny any application for which additional or different zoning relief is needed." And if additional or different zoning relief is needed, the applicant must return to the BZA to request it.[4]

Lastly, petitioners argue that the BZA neglected its obligation to give "great weight" to the "issues and concerns raised" by the affected ANC. D.C. Code § 1-309.10(d)(3) (2016 Repl. & 2020 Supp.). The ANC raised no "issues and concerns"

---

[4] This understanding of the limited nature of the BZA's review of an application for a special exception finds further support in 11-A D.C.M.R. § 301.7 (2021), which states that "[n]o [BZA] order shall be deemed to include relief from any zoning regulation unless such relief was expressly requested by the applicant and expressly granted in the order." Although this language was added after the proceedings in this case, the legislative history indicates that this amendment was intended to make explicit the limitations on relief provided by a BZA order, to prevent applicants from arguing "that the BZA . . . has approved zoning relief not expressly stated in an order, because the approved plans show other areas where such relief is needed." 66 D.C. Reg. 66.

for the BZA to address, however. Instead, in a letter submitted to the BZA, the ANC resolved that it was "not in a position to take a position either for against the application." Petitioners direct us to a prior resolution, adopted by the ANC when the proposal was before the Old Georgetown Board, in which the ANC "object[ed] to the mass of the proposed rear addition." But only "[i]ssues raised *before the BZA* by the ANC are accorded special status." *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C. 1990) (emphasis added); *see also* 11-Y D.C.M.R. § 406.2 (2021) (listing application-specific information that must be contained in the ANC's "written report" for the BZA to give its concerns "great weight"). The BZA was not required to give "great weight" to issues raised at an earlier point in time before a different agency.

In addition to challenging the substance of the BZA's factual findings, petitioners argue that the BZA improperly failed to hold additional public hearings on the application after intervenors revised their plan in response to their neighbors' feedback.[5] We discern no error in the process afforded in this case. Petitioners appear to concede there was no deficiency in the public hearing held pursuant to D.C. Code § 2-509 (2016 Repl.); the BZA allowed each party "to present . . . oral and documentary evidence, to submit rebuttal evidence, and to conduct . . . cross-examination." D.C. Code § 2-509(b). After this hearing, the BZA kept the record open, as was its prerogative under 11-Y D.C.M.R. § 602.1 (2021), and accepted extensive submissions from all parties, including in person at two subsequent public meetings.[6] During this period, at the BZA's urging, the parties discussed possible compromises on intervenors' proposal, which led intervenors to submit a series of revised plans to reduce the proposed addition's impact on the neighboring properties. At no point did petitioners object to the BZA's procedures for handling these discussions and revisions; to the contrary, petitioners "le[ft] it to the [BZA] to determine the procedural implications of" intervenors' final revised plans. Where petitioners now argue for the first time on appeal that an additional hearing on the

---

[5] While the revised plans included a basement, they required no additional zoning relief and, in fact, decreased the size of the rear addition.

[6] Petitioners' principal argument that the BZA's process was defective appears to rest on a misconstruction of what the BZA did in this case. Contrary to petitioners' argument, the BZA did not "continue" the hearing in this case; rather, it held a hearing and then kept the record open while it encouraged intervenors to scale back their proposal and seek a compromise resolution. Petitioners' reliance on regulations governing continuances is therefore inapposite.

revised plans was necessary, we decline to disturb the BZA's decision on that basis. *See Goodman v. District of Columbia Rental Hous. Comm'n*, 573 A.2d 1293, 1301 (D.C. 1990) ("In the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative agency at the appropriate time.").

For the foregoing reasons, the decision of the Board of Zoning Adjustment is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies sent to:

Presiding Administrative Law Judge

Alison Schafer
2719 Dumbarton Street, NW
Washington, DC 20007

Gernot Brodnig

Meridith H. Moldenhauer, Esquire

Loren L. AliKhan, Esquire
Solicitor General for the District of Columbia