

**District of Columbia
Court of Appeals**

07/14/2020

No. 18-AA-355

CHRIS OTTEN,

Petitioner,

v.

19648

DISTRICT OF COLUMBIA

BOARD OF ZONING ADJUSTMENT,

Respondent,

and

POTOMAC ELECTRIC POWER COMPANY,

Intervenor.

Presiding Administrative Law Judge
D.C. Zoning Commission
441 4th Street, NW
Washington, DC 20001

Dear Judge:

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-355

CHRIS OTTEN, PETITIONER,

v.

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT, RESPONDENT,

and

POTOMAC ELECTRIC POWER COMPANY, INTERVENOR.

On Petition for Review of an Order from the
District of Columbia Board of Zoning Adjustment
(No. 19648)

(Submitted September 16, 2019)

Decided May 29, 2020)

Before EASTERLY and MCLEESE, *Associate Judges*, and NEBEKER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: As part of the Capital Grid Project, a comprehensive effort to modernize the District's electricity infrastructure, Potomac Electric Power Company (Pepco) sought to make improvements to the preexisting Champlain Substation in Adams Morgan. To that end, Pepco applied to the Board of Zoning Adjustment (BZA) for (1) special exceptions to expand utility use pursuant to 11-X DCMR § 900.3 (2016) and 11-X DCMR § 901.2 (2016) and to extend the validity of the special exception for 5 years, pursuant to 11-Y DCMR § 702.1 (2020); and (2) variances regarding vehicle parking, bicycle parking, and loading and side yard requirements pursuant to 11-X DCMR §§ 1002.1, 1002.2 (2016). After a hearing, the BZA approved Pepco's application.¹ Pro se petitioner, Chris Otten, now

¹ In addition to getting the BZA's approval, Pepco was required to get permission for its project from the Public Service Commission, the Historic
(continued...)



challenges that approval in a petition for review.

Mr. Otten appears to ask this court to conduct a wholesale reevaluation of Pepco's application to the BZA, but "[o]ur consideration of a BZA decision granting zoning relief is subject to the usual limitations on appellate review of agency actions in a contested case." *Citizens for Responsible Options v. District of Columbia Bd. of Zoning Adjustment*, 211 A.3d 169, 179 (D.C. 2019) (internal quotation marks omitted). We will not address in the first instance issues that were not litigated before the BZA, *see Miller v. District of Columbia Bd. of Zoning Adjustment*, 948 A.2d 571, 579 (D.C. 2008) (explaining that this court generally does not consider issues not raised before the agency), and we will affirm the BZA's resolution of litigated issues unless the agency's "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,"² *Neighbors for Responsive Gov't, LLC v. District of Columbia Bd. of Zoning Adjustment*, 195 A.3d 35, 47 (D.C. 2018) (internal quotation marks omitted).

Applying this standard of review, we focus on the arguments Mr. Otten made to the BZA, notwithstanding the broad and various framing of his arguments in his petition.³ We discern two. First, Mr. Otten argued that the BZA should

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Preservation Review Board, and the District Department of Consumer and Regulatory Affairs.

² "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." *District of Columbia v. District of Columbia Dep't of Emp't Servs.*, 734 A.2d 1112, 1115 (D.C. 1999) (internal quotation marks omitted).

³ Mr. Otten filed a motion for summary reversal pursuant to D.C. App. R. 27(c); after the court denied his motion, he both adopted his summary reversal motion as his brief and filed an "opening brief" with an "addendum"; he subsequently filed a reply brief in support of his opening brief.

In his motion for summary reversal, Mr. Otten argued that the BZA had failed to adequately consider the "[s]afety, welfare, and institutional need" for the Capitol Grid Project, expressing general concern about its environmental impact
(continued...)

disapprove Pepco's request for special exceptions and variances because the electromagnetic fields from the substation could have adverse health effects on the surrounding community. Second, Mr. Otten argued that the BZA was acting prematurely in considering the project before it had been approved by the Public Service Commission (PSC), a forum in which Mr. Otten represented that Pepco was facing opposition to its project.⁴

At the hearing, Mr. Otten testified that he was "sensitive to electromagnetic fields" and had "health issues" as a result. He argued that the BZA had to determine that the planned "heavy-up" of the Champlain Substation "won't harm the surrounding community." In response to his testimony, the Chairperson of the BZA asked Pepco to explain how the agency could be "reasonably sure" that the renovated substation would be "a safe thing." Pepco then recalled an expert, Dr.

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and, consistent with his testimony at the BZA hearing, particular concern about electromagnetic fields.

In his opening brief, Mr. Otten broadly argued that the BZA order was "based on unreliable evidence & incomplete agency findings resulting in unsubstantiated conclusions" and vaguely asserted that the BZA had "ignore[d] contested issues raised before the agency by opposition parties"; he also expansively argued that the BZA had "understep[ped] their statutory duty to protect people and property in approving zoning entitlements not in accordance with the law," and further that "[t]he BZA cannot point to evidence to show how the zoning relief to Pepco is in harmony with the agency's [] ' . . . promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to: (a) Provide adequate light and air; (b) Prevent undue concentration of population and the overcrowding of land; and (c) Provide distribution of population, business and industry, and use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and cultural opportunities; and that will tend to further economy and efficiency in the supply of public services.'"

⁴ Mr. Otten articulated this argument more clearly during the BZA's review of Pepco's application regarding the Harvard Substation, but he explained that he had the same objection to the Champlain Substation.

William Bailey,⁵ who testified that “[b]asically since the beginning of electricity” researchers had been studying electromagnetic fields to determine if they had any effect (positive or negative) on human health, and there was no evidence that they did. In its order, the BZA credited Dr. Bailey’s testimony and relied on it “to find that the substation use will be in harmony with the general purpose and intent of the Zone Plan and will not tend to adversely affect the use of neighboring property.” Reviewing this determination, we conclude that it is supported by substantial evidence, see *supra* note 2, in the form of Dr. Bailey’s credited testimony.

Turning to Mr. Otten’s argument that the BZA should wait for the PSC to conclude its own review of Pepco’s application,⁶ Mr. Otten has never identified any law or regulation requiring the BZA to stay its decision-making as to the requested zoning relief until the PSC reviewed Pepco’s separate application to that agency, and in its order, the BZA concluded that no such requirement exists. Instead, it explained that “the BZA and PSC approval processes are separate with different standards of review.” In the absence of any authority indicating that the BZA was not free to decide Pepco’s application on its own timetable, we cannot say that its decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Neighbors for Responsive Gov’t*, 195 A.3d at 47 (internal quotation marks omitted).

For the foregoing reasons, the BZA’s order is

Affirmed.

⁵ Earlier in the hearing, Pepco had called Dr. Bailey to testify in connection to its application for special exceptions and variances with respect to a different substation not at issue in this petition.

⁶ To the extent Mr. Otten made arguments at the hearing about broader community and environmental impacts of Pepco’s Champlain Substation project, those arguments were couched in the contention that the BZA should wait for the PSC to evaluate these impacts in its review first.

ENTERED BY DIRECTION OF THE COURT

A handwritten signature in blue ink that reads "Julio A. Castillo". The signature is written in a cursive style with a large, stylized initial 'J'.

JULIO A. CASTILLO
Clerk of the Court

Copies sent to:

Chris Otten

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

Philip T. Evans, Esquire