District of Columbia
Court of Appeals

09/28/2022

No. 19-AA-1049

MASSACHUSETTS AVENUE HEIGHTS
CITIZENS ASSOCIATION,

Petitioner,

BZA19751

v.

DISTRICT OF COLUBMIA
BOARD OF ZONING ADJUSTMENT,

Respondent,

and

MED DEVELOPERS, LLC,

Intervenor.

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. 19-AA-1049

MASSACHUSETTS AVENUE HEIGHTS CITIZENS ASSOCIATION, PETITIONER,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

and

MED DEVELOPERS, LLC, INTERVENOR.

Petition for Review of an Order
of the Board of Zoning Adjustment
(BZA-19751)

(Submitted January 29, 2021 Decided September 06, 2022)

Before BLACKBURNE-RIGSBY, *Chief Judge*, BECKWITH, *Associate Judge*, and WASHINGTON, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Massachusetts Avenue Heights Citizens Association seeks review of a final order of the District of Columbia Board of Zoning Adjustment ("BZA") granting intervenor MED Developers, LLC's application for special exception relief for continuing care retirement community ("CCRC") use. We affirm.

I.

The BZA granted intervenor's application for a special exception to build a memory care facility at 2619-2623 Wisconsin Avenue, NW, in a residential (R-1-B) zone. Guest Services Senior Living ("GSSL") will operate the facility and will provide specialized care, as well as other services including meals, housekeeping, and security, to 36 residents with dementia conditions. The property consists of three lots at the corner of Wisconsin Avenue, NW, an arterial street, and Edmunds Street, NW. The surrounding neighborhood east of Wisconsin Avenue in the R-1-B

zone is primarily comprised of detached, single-family homes. The proposed facility will be three stories plus a cellar level and mechanical penthouse, and meets the zoning development standards for height and lot occupancy. *See* 11-D D.C.M.R. §§ 303.1, 303.2, 304.1. The rear and side yards exceed the minimum zoning requirements, *see* 11-D D.C.M.R. §§ 206.2, 306.1, and include landscaping elements to buffer the facility.

In response to concerns raised about parking, intervenor revised its building design to include a below-grade garage with 19 spaces. The BZA found that "the [a]nticipated day-to-day demand for parking spaces is 12-14 spaces, plus a space for the community van." This estimate was based on its findings that a maximum of 18 employees will be working at the facility at any given time, 55% of whom will drive to work, and that two to four visitors will come to the facility per day. The residents themselves will not have cars. The plans for the building also include a loading area for deliveries and trash removal that will be accessible through the back alley.

The Office of Planning ("OP") recommended approving the application and the District Department of Transportation ("DDOT") did not object to it. The Advisory Neighborhood Commission ("ANC") 3C, an automatic party to the proceeding, opposed the application. Petitioner was granted party status and opposed the application. After holding three hearings, the BZA voted to approve the application on January 30, 2019.

II.

"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." *Citizens for Responsible Options v. D.C. Bd. of Zoning Adjustment*, 211 A.3d 169, 179 (D.C. 2019) (quoting *Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1082 (D.C. 2016)). On review, we will not reweigh the evidence and we recognize that "[a]s the trier of fact, the [BZA] may credit the evidence upon which it relies to the detriment of conflicting evidence, and need not explain why it favored the evidence on one side over that on the other." *Id.* (quoting *French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995)).

The zoning regulations establish a special exception in R-1-B zones for CCRC use including, as the BZA concluded applies here, assisted living facilities. 11-U

D.C.M.R. § 203.1(g)(1)(B).[1] To qualify, an assisted living facility must "provide sufficient off-street parking spaces for employees, residents, and visitors" and "be located and designed so that it is not likely to become objectionable to neighboring properties because of noise, traffic, or other objectionable conditions." 11-U D.C.M.R. § 203.1(g)(4)-(5). In addition, an application is subject to the general requirement that, "in the judgment of the [BZA]," the use "[w]ill be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps" and "[w]ill not tend to affect adversely[,] the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps." 11-X D.C.M.R. § 901.2(a)-(b). Petitioner challenges the parking requirement of § 203.1(g)(4) and the harmony requirement of § 901.2(a).

III.

Petitioner first argues that the BZA's finding that the facility will provide sufficient off-street parking is not supported by substantial evidence because intervenor failed to establish, with specificity, the number of staff, visitors, and deliveries and their parking demands on the proposed facility. At bottom, most of petitioner's arguments in this regard amount to conflicting expert opinions. We are satisfied that substantial evidence supports the BZA's findings, noting that "the mere existence of substantial evidence contrary to th[ose] finding[s] does not allow this court to substitute its judgment for that of the Board." *Citizens for Responsible Options*, 211 A.3d at 179 (quoting *Brown v. D.C. Bd. of Zoning Adjustment*, 486 A.2d 37, 52 (D.C. 1984)).

First, the BZA's finding that a maximum of 18 employees will be present at any given time was supported by the testimony of GSSL's President John Gonzales, qualified as an expert in the operations and management of senior housing facilities with experience managing memory care facilities, and Jeff Keller, an expert in memory care facilities. Mr. Keller testified that in smaller facilities, like the proposed facility in this case, a "universal worker model" that consolidates cooking and cleaning duties, for example, has been effective. Intervenor's anticipated ratio of one direct-care staff per 4.2 residents during the day and 8.5 residents overnight leaves around nine daytime staff members to cover other programmatic and administrative duties. This ratio conforms with the standard given by petitioner's

[1] This exception was previously § 203.1(f), but was renumbered to § 203.1(g) without making any substantive changes to the exception. 66 D.C. Reg. 11964, 12163 (Sept. 13, 2019).

expert in geriatric psychiatry, Dr. Nathan Billig, of one care staff for every 5 residents during the day and for every 10 residents overnight. [2]

Second, the BZA credited intervenor's transportation expert, Erwin Andres of Gorove/Slade, who used census tract data for the neighborhood to determine a "mode split" estimating that 45% of employees will use a non-auto mode of transportation to get to the facility. The analysis included a survey of public transportation options and bicycle and pedestrian access to the facility and was reinforced by the requirement that intervenor incentivize alternatives to driving, a condition endorsed by DDOT. Therefore, substantial evidence in the record supports the BZA's finding despite the contrary testimony of petitioner's transportation expert, Joe Mehra, who opined that the mode split analysis greatly overestimated the desirability and feasibility of employees using public transportation.

Third, the BZA credited the testimony of Mr. Gonzales that the total number of visitors on a given day will not exceed 10% of the number of residents based on his experience with visitation patterns. Although petitioner's expert Dr. Billig testified that family members and friends "should be encouraged to visit the facility regularly" and that family members often hire supplementary private care workers, that evidence alone does nothing to undermine the substantial evidence in the record that the parking provided in the plan was sufficient. This is especially the case when no alternative estimate on visitation was provided.

Finally, the BZA's findings that the loading area will adequately accommodate delivery vehicles was supported by substantial evidence, including AutoTURN diagrams of the loading area and testimony of Mr. Gonzales anticipating one to two weekly food deliveries. These findings are reinforced by intervenor's loading management plan, which the BZA incorporated as conditions into the order.

In reaching these conclusions, the BZA properly gave great weight to the OP's recommendation, D.C. Code § 6-623.04, which concluded the facility will provide sufficient parking. Petitioner argues that the BZA failed to give great weight, as required by D.C. Code § 1-309.10(d)(3)(A), to the issues and concerns the ANC raised about parking, including intervenor's acknowledgment that it might need to

[2] Petitioner also cites a letter to the BZA in opposition of the project from Dr. Catherine May, a geriatric psychiatrist with experience at a continuing care facility with a memory care unit. Dr. May did not testify at the hearing and was not qualified as an expert.

adjust its staffing numbers and the lack of data from other CCRC facilities about commuting patterns. However, we are satisfied that the BZA "articulate[d] with particularity and precision the reasons why the [ANC] does or does not offer persuasive advice under the circumstances," recognizing that it need not "exhaustively discuss every detail in the ANC's submission, or . . . defer to the ANC's views.'" *Youngblood v. D.C. Bd. of Zoning Adjustment*, 262 A.3d 228, 239-40 (D.C. 2021) (quoting *Citizens for Responsible Options*, 211 A.3d at 184). As the BZA noted, the ANC submitted its comments before intervenor revised its plans to provide additional on-site parking. Because the BZA thoroughly analyzed intervenor's revised plans and concluded that it met its burden of showing sufficient off-street parking, we see no reason to disturb the BZA's findings in this regard.

IV.

Petitioner next contends that the BZA failed to separately analyze, as required by 11-X D.C.M.R. § 901.2(a), whether the use "will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps" beyond compliance with the underlying development standards that apply to the R-1-B Zone. The R-1-B zone has two purposes: to "[p]rotect quiet residential areas now developed with detached dwellings and adjoining vacant areas likely to be developed for those purposes" and to "[s]tabilize the residential areas and promote a suitable environment for family life." 11-D D.C.M.R. § 300.1.

Petitioner's main argument as to why the facility will not be in harmony with the purpose and intent of the zoning map is that the surrounding area is all single-family homes and the facility will be of a different "scale" than the rest of the neighborhood. The ANC similarly expressed concern that "the architecture and mass of the proposed facility takes it[s] cues from the apartment buildings across Wisconsin Avenue rather than the single family neighborhood that surrounds it." Given these concerns, the BZA reasonably referred to the matter-of-right development standards pertaining to building size applicable to the R-1-B zone. *See Neighbors Against Foxhall Gridlock v. D.C. Bd. of Zoning Adjustment*, 792 A.2d 246, 252 (D.C. 2002) (upholding BZA's conclusion that proposed school was in harmony with R-1-A zone based in part on development standards, including lot occupancy). In addition to the development standards, the BZA relied on the fact that the zoning regulations specifically provide a special exception for this type of use in the R-1-B zone and, despite petitioner's characterization of the facility as "institutional and commercial," the regulations classify assisted living facilities as a residential use. 11-B D.C.M.R. § 200.2(aa)(3).

The BZA also gave great weight to OP's report and noted its "in-depth analysis of how the Application met each of the requirements." OP concluded that the proposed use was in harmony with the zoning scheme because "[t]he R-1-B zone is a low density residential zone that supports continuing care retirement communities with the approval of a special exception. The facility would be sited along a major thoroughfare, providing memory care in a residential setting; the type of use anticipated by the zoning." *Cf. Neighbors Against Foxhall Gridlock*, 792 A.2d at 253 (noting OP's observations that "schools by their very nature are associated with residential areas" and the school would be located on "a busy arterial road, not a quiet residential collector street"). Therefore, the BZA's conclusion that this use is in harmony with the zoning maps is supported by substantial evidence and not arbitrary, capricious, or an abuse of discretion and it sufficiently explained why its view diverged from the ANC.

Petitioner also argues that the BZA failed to give great weight to the ANC's concern about the Comprehensive Plan Generalized Policy Map, which designates the neighborhood as a Neighborhood Conservation Area. But as we have previously explained, the BZA "has only the limited function of assuring that the regulations adopted by the Zoning Commission are followed; the BZA has no authority to implement the Comprehensive Plan." *Citizens for Responsible Options*, 211 A.3d at 187 (internal quotation marks and brackets omitted). Our review is likewise limited to ensuring that the BZA followed the regulations, not the Comprehensive Plan. *Id.*

V.

Finally, petitioner assigns two procedural errors to the BZA proceedings. First, petitioner contends that the BZA did not provide notice to the D.C. Department of Health as an "appropriate government agency[]" under 11-Y D.C.M.R. § 402.1(f). However, petitioner never raised this claim before the BZA nor requested that DOH be notified of the proceeding, so we decline to consider it on appeal. *See Hughes v. D.C. Dep't of Emp. Servs.*, 498 A.2d 567, 570 (D.C. 1985) ("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.").

Second, petitioner argues that the BZA's decision is not based entirely on the record because it allowed intervenor to supplement its proposed findings of fact and conclusions of law after the application had been approved without notice to petitioner. However, the procedures complained of complied with the regulations which allow the prevailing party to file "a revision to a previously filed proposed

order after a vote to approve . . . the application" and do not permit responses to the revised proposed order by any other party. 11-Y D.C.M.R. § 604.4.

VI.

For the foregoing reasons, we affirm the BZA's order approving intervenor's application for a special exception in this case.

So ordered.

Entered by Direction of the Court:

JULIO A. CASTILLO
Clerk of the Court

Copies emailed to:

Presiding Administrative Law Judge

Copies e-served to:

John Patrick Brown, Jr., Esquire

Caroline S. Van Zile, Esquire
Solicitor General for the District of Columbia