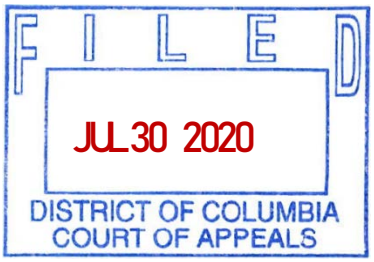
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 19-AA-71



450 K CAP LLC, PETITIONER

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

and

KLINE OPERATIONS, LLC, INTERVENOR.

On Petition for Review of an Order of the
District of Columbia Board of Zoning Adjustment
(No. 19722)

(Argued February 12, 2020 Decided July 30, 2020)

Before BLACKBURNE-RIGSBY, *Chief Judge*, THOMPSON, *Associate Judge*, and STEADMAN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Intervenor Kline Operations, LLC ("Kline") sought and received zoning relief from the District of Columbia Board of Zoning Adjustment ("the Board" or "the BZA") in connection with its plans to build a hotel in the District. Petitioner 450 K Cap LLC ("450 K") opposed Kline's application before the Board and now petitions this court for review of the Board's order. We affirm.

I. Factual & Procedural Background

On January 29, 2018, Kline submitted an application to the BZA for zoning relief in order to construct an 11-floor, 153-room, 65,000-square-foot hotel at 923-927 5th Street NW, on the eastern side of 5th Street NW, between I and K Streets NW ("the Property"). The Property consists of Lots 827, 828, 829, and 833 on Square 516. While Lot 833 is L-shaped, the four lots, taken together, are roughly rectangular: the northern and southern borders measure 111.5 feet, the western border measures 60 feet, and the eastern border measures 57 feet. A rear alley,

called Prather Court, runs north halfway up the block between 5th and 4th Streets NW and then west toward 5th Street; an 11.5-foot rear strip of the Property abuts the western end of the alley. The Property falls within the D-4-R Zone. A very small portion of the Property (on the northern side of Lot 829) also falls within the Mount Vernon Triangle Principal Intersection Sub-Area ("MVT/PIA Sub-Area"), which covers the intersection of 5th and K Streets NW.

450 K obtained party status in the matter and opposed Kline's application. 450 K owns a large apartment building located at 450 K Street NW; its property abuts the northern and eastern sides of the Prather Court alley, such that one of the western walls of 450 K's building would be directly across the alley from the eastern wall of Kline's proposed hotel. 450 K argued that the hotel would negatively impact the light, air, and views of twenty-four apartments on the western side of its building, as the windows of those units would be about 8 feet away from the hotel wall, and that the hotel would negatively impact the light of another forty apartments. It also argued that the noise and congestion in the alley resulting from frequent deliveries to the hotel would constitute a nuisance to the residents of its building.

Kline submitted three updates to its application to request additional zoning relief in February and March 2018. The Board held a public hearing on Kline's application on April 4, May 16, and June 20, 2018, during which it considered written submissions, expert testimony, and statements from both Kline and 450 K. While the matter was proceeding, Kline modified its design, in part to address some of 450 K's concerns, including expanding the rear yard of the proposed hotel from zero feet to 1.5 feet and relocating the windows on the east wall of the proposed hotel that would have directly faced the west wall of 450 K's building. Kline then submitted a final revised application, which omitted its earlier request for habitable space (a cocktail lounge) in the penthouse on the roof. The Board also received and considered a letter from the relevant Area Neighborhood Commission ("ANC"), ANC 6E05, which supported the application, subject to certain conditions; two reports from the District Department of Transportation ("DDOT"), which supported the application, subject to Kline's implementation of a proposed loading management plan; and three reports from the District Office of Planning, which supported the application with the habitable penthouse space removed.

On July 18, 2018, a majority of the Board voted to grant all of Kline's requested relief, including four area variances and two special exceptions. On

January 9, 2019, the Board issued a final order reflecting its decision. 450 K then petitioned for review to this court, challenging three of the Board's rulings:

1. the grant of area variances as to:

    a. the required number of loadings berths for the proposed building (11-C DCMR § 901.1 (2020)); and

    b. the required width of access aisle to the loading berths for the proposed building (11-C DCMR § 904.2 (2020)); and

2. the grant of a special exception as to the required size of the rear yard for the proposed building (11-I DCMR § 205.1 (2020)).

II. Standard of Review

"This court's standard for reviewing orders of [the] BZA is well-settled." *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). "[W]e must determine: (1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings." *Id.* (citation omitted); *see also First Baptist Church of Wash. v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981) (same). Thus, we will affirm "when the findings of basic facts are each supported by sufficient evidence and, when taken together, rationally lead to conclusions of law and an agency decision consistent with the governing statute." *Draude v. District of Columbia Bd. of Zoning Adjustment*, 582 A.2d 949, 953 (D.C. 1990) ("*Draude II*"). Stated differently, "[w]e 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." *Metropole Condo. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1082 (D.C. 2016) (cleaned up).

III. Discussion

Reviewing under this standard, we decline to reverse the BZA's decision.[1]

A. Area Variances: Number of Loading Berths and Width of Access Aisles

The BZA is empowered to grant variances that relieve applicants from complying with the area-related requirements of zoning regulations. D.C. Code § 6-641.07(g)(3) (2018 Repl.) ("Board of Zoning Adjustment'); 11-X DCMR § 1000.1 (2020) ("Variances: General Provisions"). Specifically,

> [t]he BZA is authorized to grant an area variance where it finds that three circumstances exist: (1) there is an

[1] 450 K argues that we should subject the Board's decision to a heightened standard of review because the Board's final order "adopted virtually word for word" the text of a draft order submitted by Kline following the Board's July 18, 2018 vote. In support of this argument, 450 K submitted a redline document comparing Kline's proposed order and the Board's final order. While Kline does not dispute the accuracy of the redline, it argues that this court cannot review the redline because it was not in the BZA's official record. The redline, however, is not evidence, but merely a demonstrative to aid this court's review – one that this court could have created itself. In any event, even if the Board had adopted the proposed order verbatim, this would not necessarily mandate reversal. *Metropole Condo.*, 141 A.3d at 1082. More importantly, the redline demonstrates that the Board did not adopt Kline's proposed order verbatim. As 450 K notes, the Board's final order did reproduce certain mistakes from the proposed order – including a somewhat ambiguous statement suggesting that the buildings would be separated by 18.5 feet, rather than 10 feet (as accurately stated in the findings of fact), and a paragraph that purports to list the "three conditions" of the ANC's support for Kline's building, but then lists only two – which suggests that the Board could have exercised greater diligence in preparing its order. Nevertheless, it is clear that the Board "did not accept uncritically the findings tendered by" Kline because, "[a]lthough the majority of paragraphs were adopted verbatim" from the proposed order, the Board "added sentences and phrases, changed sentence structure, . . . changed the grammar, and, in some places, added entirely new paragraphs." *Watergate E. Comm. v. District of Columbia Zoning Comm'n*, 953 A.2d 1036, 1045 (D.C. 2008). We therefore apply our ordinary standard of review. *See id.*

> extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested variance can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.

Metropole Condo., 141 A.3d at 1082 (D.C. 2016) (cleaned up); *see also Draude v. District of Columbia Bd. of Zoning Adjustment*, 527 A.2d 1242, 1254 (D.C. 1987) ("*Draude I*").

The regulations require that lodging buildings of 50,000 to 100,000 square feet have two loading berths, 11-C DCMR § 901.1, and that the access aisles to these loading berths be at least 12 feet wide, *id.* § 904.2, and they specify that hotels qualify as lodging buildings. 11-B DCMR § 200.2(s) (2020). While Kline's 65,000-square-foot proposed hotel would ordinarily be subject to these requirements, Kline sought and received from the BZA two area variances: one variance allowing its building to have only one loading berth (rather than two), and a second variance allowing the access aisle to that berth to be 11.5 feet wide (rather than the minimum of 12). 450 K contends that the BZA's decision to grant these variances cannot be upheld. We disagree.

As to the first prong of the analysis, extraordinary or exceptional condition, the Board found that "the Property's width is narrow in comparison to non-rowhome properties in the square" because the Property is about 60 feet wide and other "non-rowhome" lots "are more than 80 feet in width, with several over 100 feet in width." In addition, it found that the Property "abuts an 11.5-foot-wide portion of the Alley," while "[t]he other large lots that abut the Alley have broad frontages on the Alley, which expand up to 30-feet wide," meaning that "many other properties . . . do not face the same narrow alley width as the Property." The Board also noted that "[a] majority of the non-rowhome lots nearby are exceedingly large" and "the Property is smaller than a majority of such lots in the neighborhood," including "many other lots in Square 516," which is "particularly notable given that the Property is located in the D-4-R zone, which is intended for higher-density development." 450 K asserts that there is no legal basis upon which to distinguish between rowhome and non-rowhome properties, but it does not point to any prohibition on doing so. To the contrary, the relevant statute and regulation provide that "exceptional narrowness [or] shallowness" may serve as the basis for a finding of an extraordinary or exceptional condition. D.C. Code § 6-

641.07(g)(3); 11-X DCMR § 1000.1. While further explication regarding the width and alley access of particular nearby lots may have been helpful, the Board's finding of an exceptional condition was based on substantial record evidence and consistent with the law.[2]

As to the second prong, practical difficulty, the Board found that it would be "practically difficult for [Kline] to design the [hotel] with a second loading berth due to the Property's limited 11.5-foot-wide frontage on the Alley." It also found that, "given the narrow width of the Property and the Alley, the [hotel] would have to be substantially redesigned in order to accommodate a second loading berth," which would "result in the loss of a large portion of the ground level" of the proposed hotel. Further, it found that "[a]s designed, [Kline] has already had to place the loading berth on a diagonal, as opposed to the standard 90-degree angle," and that "the nature of the Property would make installing a second loading space below grade effectively impossible while also remaining compliant with ramping and clearance requirements for the access." This court has stated that "[t]he nature and extent of the burden which will warrant . . . area variance[s] [are] best left to the facts and circumstances of each particular case," *Palmer v. Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972), and that the "BZA has the flexibility to consider a number of factors including, but not limited to: 1) the weight of the burden of strict compliance; 2) the severity of the variance(s) requested," including

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[2] That said, we acknowledge that some of the Board's statements are questionable. The Board's order refers twice to the "L-shape" of one of the four lots that make up the Property, twice to the "irregular" shape of the Property, three times to the Property's "jogged" shape, and nine times to the Property's "unique" shape. However, as noted, the L-shaped lot fits together with the other three lots in the Property to form a near-perfect rectangle, and the "jog" appears to be minimal at best (3 feet across 111.5 feet, for a 2.7% differential). Nor does the Board provide support for its statement that "no other properties in the neighborhood have a 'jogged' shape like the Property." To the contrary, the official zoning map, which is part of the zoning regulations, 11-A DCMR § 205.3, shows that several of the lots in the immediate vicinity of the Property are less rectangular and have more severely "jogged" lines than the Property, including lots 59, 822, 834, 879, and 881. In addition, the Board's order states that the Property is exceptional in that only a small portion of it falls within the MVT/PIA Sub-Area – though this appears to be relevant only to the Board's grant of a variance as to the floor-to-ceiling height requirements of the Sub-Area, which 450 K does not appeal.

whether the variances are "de minimis"; and "3) the effect the proposed variance(s) would have on the overall zone plan." *Gilmartin*, 579 A.2d at 1171. In light of the fact-intensive nature of the practical difficulty analysis and the flexibility accorded to the Board, considering the burden of a substantial re-design and loss of area on the ground floor in order to create two loading berths, and taking into account the de minimis nature of a reduction in the width of the access aisle to the one loading berth from 12 to 11.5 feet, we conclude that the Board's finding of practical difficulty was supported by substantial evidence. While further explication regarding practical difficulty – perhaps including financial projections or other particulars – may have been helpful, the Board's finding was consistent with our holding that, "at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure." *Id.* at 1170-71.

As to the third prong, the public good and the intent, purpose, and integrity of the zoning plan, this court has previously noted that it is important not to

> confuse[] the "public good" with the more narrow interests of the Condominium [adjacent to the site of a proposed building] and its unit owners; what is beneficial to them, singly or as a group, is not necessarily synonymous with the public good. This does not mean, of course, that petitioner['s] interests are to be discounted; on the contrary, they must be fully considered by the BZA. It does mean, however, that to win reversal of the BZA's decision on this ground, petitioner[] must convincingly show that the [proposed building] will be detrimental to the public good.

Draude II, 582 A.2d at 957. 450 K has not made such a showing. It appears to assume that frequent deliveries to Kline's proposed hotel would be detrimental to the public good, rather than detrimental only to the residents of 450 K's apartment building, but there is no evidence that this is the case. 450 K raised the issue of noise and congestion in the alley as one that would affect its residents, and the Board considered and disposed of the issue – including by crediting Kline's expert testimony over 450 K's evidence regarding the frequency of daily deliveries to the hotel and by relying on DDOT's finding that Kline's loading management plan would mitigate such traffic. *See Draude I*, 527 A.2d at 1251 ("The Board need not provide its reasons for adopting one or another position on the 'basic' or 'underlying' facts which were themselves disputed by the parties," so long as it

"reach[es] sufficiently detailed findings on basic factual issues to demonstrate that it has considered and ruled upon each of the party's contentions." (citation omitted)).

We therefore do not disturb the Board's grant of area variances with respect to the number of loading berths and width of access aisles to the berths.

B. Special Exception: Rear Yard

The BZA may grant a request for a special exception from particular zoning requirements, D.C. Code § 6-641.07(g)(2); 11-X DCMR § 900 (2020), provided that the exception:

> (a) Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;
>
> (b) Will not tend to affect adversely[] the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and
>
> (c) Will meet such special conditions as may be specified in this title.

11-X DCMR § 901.2. "The applicant for a special exception shall have the full burden to prove no undue adverse impact . . . through evidence in the public record." *Id.* § 901.3.

Because Kline's proposed hotel would be 99 feet tall, it was required under the zoning regulations to build a rear yard of at least 20 feet. *See* 11-I DCMR § 205.1.[3] However, it was eligible for a special exception from this requirement, so long as the windows in its proposed building and in a "facing building" would be at a sufficient distance "to provide adequate light and privacy to habitable rooms as determined by the angle of sight lines and the distance of penetration of sight lines into such habitable rooms." 11-I DCMR § 205.5(c). Kline sought and received a special exception allowing it to build a rear yard of only 1.5 feet. 450 K

[3] 11-I DCMR § 205.1 mandates that a rear yard must be at least 2.5 inches long for every foot of building height. 99 x 2.5 = 247.5 inches = 20.6 feet.

argues that the BZA's grant of a special exception must be reversed because the BZA failed to address the adverse impact on the rental value of 450 K's apartments. We disagree.

As an initial matter, 450 K offers no support for the assertion that the Board is required to explicitly consider "rental value" as such in determining whether to grant a special exception. More importantly, the Board directly addressed 450 K's claim that Kline's proposed hotel would "affect adversely the use" of the units in 450 K's building, specifically addressing "light" and "privacy," as required by 11-I DCMR § 205.5(c). With respect to light, the Board cited Kline's sun and shadow study, which showed that a 1.5-foot rear yard would have "a minimal impact on light and air in comparison to" the 20-foot rear yard required by the regulations. With respect to "privacy," the Board noted that Kline had redesigned the proposed hotel "so that there would be no windows facing directly into 450 K Street NW" and had committed to installing translucent window treatments on the eastern-facing windows to enhance privacy, and the Board credited Kline's architect's testimony that hotel guests, unlike residential or office building occupants, will likely not be in the building during the day, which reduces privacy impacts.[4] Hence, while the Board did not explicitly use the term "rental value," it did consider, consistent with the regulation, the elements that would affect the value of the units in 450 K's building – light and privacy – and it made findings on these elements based on the evidence in the record. It then concluded that "the proposed

[4] We acknowledge, however, certain puzzling statements in the Board's order. For example, the Board observed that 450 K's building was "built to its western property line," without a rear yard of its own, which put its western windows "at risk." The Board did not explain its use of that term or why adverse impact need not be fully considered with respect to neighboring property owners who may have obtained their own zoning relief at an earlier date.

Additionally, while the language of 11-I DCMR § 205.5 mentions sight lines in conjunction with light and privacy – and we therefore do not perceive a need for the Board to necessarily consider sight lines separately, given its findings on light and privacy – we note that the Board asserted that "an adjacent property owner is not entitled to views across another property," citing *Hefazi v. Stiglitz*, 862 A.2d 901, 911 (D.C. 2004), in support. However, that case is inapposite, as it concerned a negative prescriptive easement between existing buildings, rather than a special exception under the zoning regulations.

rear yard provides adequate light and privacy to habitable rooms" in 450 K's building.

The Board relied on substantial evidence in the record and made findings in accord with the applicable regulation. We therefore perceive no reason to disturb the Board's grant of a special exception.

IV. Conclusion

For the reasons explained, we conclude that the Board's findings and conclusions are not arbitrary, capricious, an abuse of discretion, inconsistent with law, or unsupported by substantial evidence. We therefore affirm the order on appeal.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

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