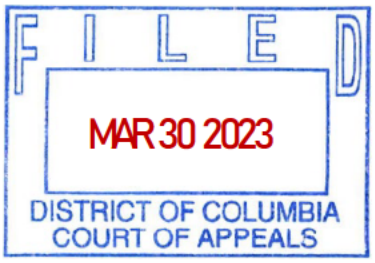
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 21-AA-0128

SENIOR RIGHTS AGING IN PLACE, PETITIONER,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT.



On Petition for Review of an Order of the
District of Columbia Board of Zoning Adjustment
(BZA Application No. 20186)

(Submitted February 15, 2022 Decided March 30, 2023)

Before MCLEESE, *Associate Judge*, and THOMPSON and GLICKMAN, *Senior Judges*.*

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Senior Rights Aging in Place (SRAIP), a group of individuals who live near the property in question, argue that the Board of Zoning Adjustment (Board) improperly granted special exceptions from residential daytime-care occupational-use requirements and minimum parking requirements. We affirm the Board's decision.

I.

The dispute centers around a property on Quackenbos Street, NE (the Property). It is in a Residential House zone, R-1-B. R-1-B zones are intended to be areas that are "predominantly developed with detached houses on moderately sized

* Senior Judges Thompson and Glickman were Associate Judges of the court at the time of submission.

lots."[1] The Property is improved with a two-story, detached dwelling in which its owner, Elizabeth Hando, has resided and operated a child-development home serving up to nine children.[2] On September 29, 2019, Ms. Hando applied for special exception relief that would enable her to change the use of the Property from a child-development *home* to a child-development *center* serving up to twenty children, without provision for on-site parking.[3] The application that Ms. Hando submitted was accompanied by her plans for renovating and expanding the building on the Property to make it suitable for the increased number of children, principally by adding a third story to the structure. The physical expansion contemplated by these plans was permissible as a matter of right in the Residential House zone without a special exception, and the application did not request any zoning relief to permit it.

With her application for zoning relief, Ms. Hando submitted a letter supporting the application that she had received from Advisory Neighborhood Commission (ANC) 4B (the ANC for the neighborhood in which the Property is located). The letter, dated January 29, 2019 (several months before Ms. Hando filed the application), was from Commissioner Alison Brooks. It stated that "[b]ased on many conversations with the neighbors, we believe that an increase to 20 children and 5 staff members will not negatively impact the quality of life for surrounding neighbors." Thereafter, the Board received reports supporting the application from the Office of the State Superintendent of Education (OSSE), the D.C. Department of Transportation, and the Office of Planning. In addition, the Board received numerous letters from persons who favored or opposed the application.

On July 8, 2020, the first day of the public hearing on the application, ANC Commissioner Brooks testified that neighbors and the ANC had become concerned after learning some things they had not been told back in January 2019. According to Commissioner Brooks, Ms. Hando's initial request to the ANC only discussed

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[1] 11D D.C.M.R. § 300.3.

[2] A child-development home serving nine children is a permitted home occupation use in an R-B-1 zone. *See* 11U D.C.M.R. § 251.1(b).

[3] *See* 11U D.C.M.R. § 203.1(h) (special-use exception for daytime-care-child-development center); 11C D.C.M.R. § 703.2 (special exception relief from minimum parking requirements).

increasing to twenty the number of children to be served; Ms. Hando did not mention that she would no longer live in the house on the Property when it was a child-development center,[4] that she planned to construct a third-story addition to the house, and that (in Commissioner Brooks's words) she would be "turning it into a business, and not a home." Neighbors and the ANC feared that this would "change the look and feel of the neighborhood" and "create a traffic and quality of life issue for residents."[5] Commissioner Brooks said this was not the "modest expansion" they thought Ms. Hando had requested and the ANC thought it was voting for, and that "[t]o go back afterward and ask for an even further expansion does not seem to be a transparent method of community engagement."

At the time Commissioner Brooks testified, the ANC had not formally retracted its January 2019 approval, nor had it prepared a new report on the application. The Board continued the hearing to allow the ANC to reconsider and advise the Board of its position. On July 27, 2020, the ANC adopted a resolution "oppos[ing] the expansion of the daycare center to 20 students and . . . the plan to construct a three-story rear addition and a third story addition to the existing detached dwelling." The resolution stated that the ANC "was not asked to consider a home expansion or conversion to a day care center"; that "the owner does not intend to reside in the home going forward"; and that the owner "has not provided the ANC with any plans for a home addition and has not presented the plans at an ANC meeting."

Commissioner Brooks testified again when the hearing before the Board resumed on August 5, 2020. She objected in her testimony to the large addition to the house on the Property, which fueled the neighbors' "concern that ultimately this is going to grow beyond 20 students"; to the fact that no one would reside in the

[4] Ms. Hando believed that OSSE would not approve the Property as a day-care center if it also were to be used as a residence.

[5] Commissioner Brooks also testified that after Ms. Hando obtained the ANC's support for 20 children, she started "discuss[ing] with neighbors and members of the [ANC] the possibility of having as many as 45 children in the home." Ms. Hando dropped that idea after "it was clear" that the community would not support such an increase, but her decision to raise it when she did contributed to neighbors' growing unease about Ms. Hando's future plans for the child-development center.

house after it became a child-development center; and to the increased traffic that would result from the expansion. Commissioner Brooks again pointed to the "lack of transparency" as "what is causing so much concern for residents" and a resulting "lack of trust."

In response, Ms. Hando insisted that she had "reached out to the community" from 2018 onward, had shared her architect's plans with neighbors and the ANC as early as January 2019, and had "always been open and transparent" about the process of applying to expand into a child-development center. She said that the plan was to serve "20 kids only, not more or not anticipating any more than that." She explained that she would reside on the third floor of the center if she were allowed to do so, but that she had been given the impression that this would not be permitted in a "center" (i.e., a facility that was not a child-development "home").

The Board continued the hearing one more time to encourage further discussions between the ANC and Ms. Hando in the hope they would come to an agreement that would satisfy both sides. On October 7, 2020, however, the Board was informed that a compromise had not been reached.

Thereafter, on January 25, 2021, the Board issued a final order granting the application for special exceptions. "A child development center," the Board stated, "is a principal use that may be permitted in Residential House zones by special exception when the Board finds that the requirements specified in the Zoning Regulations have been satisfied." The Board so found in this case. It found that the applicant's plans to enlarge the building on the Property did not require a special exception because they "will comply with all applicable development standards and may be undertaken as a matter of right." The Board further found and concluded that the application, subject to conditions imposed by the order, satisfied the requirements for special exception approval for daytime care uses in residential zones under 11U D.C.M.R. § 203.1(h) and for a special exception under 11C D.C.M.R. § 703.2 from the minimum of three parking spaces required by 11C D.C.M.R. § 701.5.[6] The Board concluded that it lacked the authority to adopt, and

[6] Ms. Hando sought the special exception from the parking space requirement because the "physical constraints" of the Property prevented the required spaces either on or within 600 feet of the lot. The Board was satisfied that the characteristics of the neighborhood ("a low density area developed primarily with detached

it specifically declined to adopt, a condition requiring Ms. Hando (or anyone else) to reside at the child-development center on the Property.[7]

The Board specified that it "has given great weight to the issues and concerns stated by ANC 4B but does not find its lack of support a persuasive reason to deny the application" because it is "required to accord 'great weight' only to the issues and concerns of the affected ANC that are legally relevant to the application at issue." The Board stated that the ANC's concerns regarding an alleged lack of "transparency" about the application "in dealings between the Applicant and neighbors, as well as the planned enlargement of the building at the Property, are not grounds for the Board to deny the application." The Board explained that its "authority is determined by statute, and its jurisdiction to consider applications for special exceptions is limited to the matters stated in the zoning provisions relevant to those specific special exceptions." The Board "also note[d] that notice of the application and of the public hearing in this matter was given in accordance with requirements set forth in the Zoning Regulations."

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principal dwellings, with relatively little existing traffic congestion or demand for parking") and the planned use of the Property ("the use will not require long-term parking to serve the expected enrollment of 20 children," who would either walk, use public transportation, or be dropped off and picked up at staggered times) minimized the need for the otherwise required parking spaces, and that their absence would not create traffic congestion or cause other adverse impacts in the area.

[7] As the Board explained, such a "requirement would impermissibly regulate the conduct of the property owner and is not related to any of the requirements set forth in the Zoning Regulations for approval of a special exception for operation of a child development center in the R-1-B zone." The Board further explained that while a child-development *home* "is an accessory use that must be 'clearly secondary to the use of a dwelling unit for residential purposes'" (quoting 11U D.C.M.R. § 251.3), a child-development *center* "is a principal use that may be permitted in Residential House zones by special exception when . . . the requirements specified in the Zoning Regulations have been satisfied." Those requirements do not require anyone to be residing on-site.

II.

SRAIP petitions for review of the Board's decision. It states that it "raise[s] one legal issue and does not ask the court to re-weigh evidence." SRAIP does not challenge the Board's conclusions that all the requirements for granting the requested special exceptions were satisfied. SRAIP likewise does not challenge the Board's conclusions that the proposed construction of an addition to the house on the Property could be undertaken as a matter of right and did not require a special exception or any other permission from the Board. And SRAIP does not claim that the Board erred in declining to require Ms. Hando or anyone else to reside in the house on the Property as a condition of approving its use as a child-development center. We therefore defer to, and do not address further, the Board's reasons for reaching those conclusions.

SRAIP argues that the Board erred in determining that Ms. Hando's lack of "transparency" when she discussed her application with her neighbors and the ANC — specifically, her initial nondisclosure to them of her intentions to enlarge the house on the Property and to discontinue using it as a residence — was not within the Board's legal purview. We conclude this claim of error lacks merit.[8]

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[8] SRAIP also contends that Ms. Hando did not provide certain information with her application that was required for the purpose of giving notice to all property owners within 200 feet of the Property and to ANC 4B, *see* 11Y D.C.M.R. § 300.8(g), (l) and 11Y D.C.M.R. § 300.11(b). We do not reach this contention because it was not raised before the Board (nor has it been shown to have adversely affected the members of SRAIP, other neighbors, or ANC 4B). "In the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative agency at the appropriate time." *Goodman v. D.C. Rental Hous. Comm'n*, 573 A.2d 1293, 1301 (D.C. 1990); *see Rafferty v. D.C. Zoning Comm'n*, 583 A.2d 169, 178 (D.C. 1990) (declining to address argument that Zoning Commission failed to mail a required notice of hearing to the affected ANC because the applicants did not raise the issue before the Commission). That said, it is clear from the Board's decision and the record that the notice was in fact provided and that ANC 4B and the neighbors had a full and fair opportunity to oppose the application for zoning relief.

"This court's review of the decision of the Board of Zoning Adjustment is limited to a determination of whether the decision is arbitrary, capricious, or otherwise not in accordance with the law."[9] "The Board's interpretation of the [zoning] regulations must be accorded great weight, and must be upheld unless it is plainly erroneous or inconsistent with the regulations."[10]

We conclude that the Board did not err in determining that Ms. Hando's purported lack of transparency was inconsequential for the following reasons.

First, and preliminarily, although SRAIP repeatedly asserts in this court that Ms. Hando "lied" about her application in her dealings with her neighbors, we fail to see that the record supports that charge. The application was solely for the special exceptions for child-development center use and parking relief. Since Ms. Hando was entitled to enlarge the house as a matter of right, and since the child-development center use was a permitted use that did not require the house to be occupied as a residence, we can draw no adverse inference from her failure to mention the anticipated construction and residence change in her initial discussions with her neighbors and the ANC.

Second, the alleged lack of transparency and delay in providing that information to the neighbors and the ANC did not prejudice them in the hearing before the Board or otherwise, for they had that information sufficiently in advance of that proceeding to rely on it. Indeed, the Board continued the hearing twice to allow the ANC and Ms. Hando to discuss the plans again, which further demonstrates the lack of prejudice.

Third, as provided in 11X D.C.M.R. § 901.1, the Board's task in this case was simply to "evaluate and either approve or deny [Ms. Hando's] special exception application" according to the general standards in 11X D.C.M.R. § 901.2 and the

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[9] *Neighbors on Upton St. v. D.C. Bd. of Zoning Adjustment*, 697 A.2d 3, 6 (D.C. 1997) (quoting *Davidson v. D.C. Bd. of Zoning Adjustment*, 617 A.2d 977, 981 (D.C. 1992)).

[10] *Id*. (alteration in original) (quoting *Glenbrook Rd. Ass'n v. D.C. Bd. of Zoning Adjustment*, 605 A.2d 22, 30 (D.C. 1992)).

specific conditions of the use and parking exceptions she sought, set forth in 11U D.C.M.R. § 203.1(h) and 11C D.C.M.R. § 703.2. Thus, it is well settled that in evaluating special exception requests, the Board

> is limited to a determination whether the exception sought meets the requirements of the particular regulation on which the application is based. The applicant has the burden of showing that the proposal complies with the regulation; but once that showing has been made, the Board ordinarily must grant [the] application.[11]

The Board found that Ms. Hando met the relevant standards and conditions, and SRAIP does not dispute that finding.[12]

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[11] *Nat'l Cathedral Neighborhood Ass'n v. D.C. Bd. of Zoning Adjustment*, 753 A.2d 984, 986 n.1 (D.C. 2000) (alteration in original) (internal quotation marks omitted) (quoting *French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1023, 1032-33 (D.C. 1995)).

[12] For the first time in its reply brief, SRAIP argues that the Board was obligated to assess whether the as-of-right enlargement of the house on the Property would create objectionable conditions for neighboring properties. "It is the longstanding policy of this court not to consider arguments raised for the first time in a reply brief," *Stockard v. Moss*, 706 A.2d 561, 566 (D.C. 1997), and we see no good reason to depart from that policy here. Assuming arguendo that the Board did have the posited obligation, it is unclear whether SRAIP contends the Board failed to fulfill it. SRAIP identifies nothing specifically objectionable in the plans for enlarging the house and no deficiency in the conditions the Board imposed in granting the application. In any event, we perceive that the Board *did* address the matter in its decision and approved the application "subject to certain conditions intended to mitigate any potential adverse impacts of the planned use." Those conditions incorporated most of the ANC's specific "impact mitigation requests," and included limitations on enrollment, staffing, and hours of operation; the construction of a six-foot high privacy fence around the Property; and a restriction on signage, in order to preserve the "continued residential appearance of the property" and the quiet residential character of the neighborhood. The Board also

Fourth, SRAIP identifies no statute or regulation that reasonably can be construed as having required the Board, in deciding whether to grant the special exceptions Ms. Hando requested, to consider the transparency, or lack thereof, of her prior dealings regarding her application with her neighbors and the ANC. We are not persuaded by SRAIP's argument that D.C. Code § 6-641.02 imposed that obligation merely because it states that the zoning regulations were designed to, among other things, "create conditions favorable to . . . civic activity." A nonspecific clause setting forth one of the general purposes of the Zoning Act is insufficient to overcome clear provisions of that Act and the Zoning Regulations.[13]

III.

For the foregoing reasons, we affirm the Board's decision.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

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set conditions designed to ensure no adverse traffic or parking impact on the vicinity of the Property.

[13] *Cf. D.C. Dep't of Mental Health v. Hayes*, 6 A.3d 255, 260 (D.C. 2010) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987))).

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