District of Columbia
Court of Appeals

05/23/2022

No. 21-AA-129

JAMES H. HULME, *et al*.,

Petitioners,

BZA No. 20205

v.

DISTRICT OF COLUMBIA
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

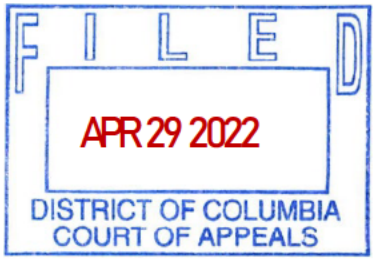
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 21-AA-129

JAMES H. HULME, *et al.*, PETITIONERS,

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
(Order No. 20205)

(Submitted October 1, 2021 Decided April 29, 2022)

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

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: James and Carol Hulme seek review of a final order of the District of Columbia Board of Zoning Adjustment granting Christopher Cahill's request for special exceptions for an addition to his property. Because we conclude that the Board's findings are supported by substantial evidence, we affirm.

I.

In November 2019, Mr. Cahill filed an application with the Board proposing renovations to the property, a single-family home at the corner of Lowell Street and 34th Street NW. These renovations included a three-story rear addition, which would replace a smaller existing two-story open-air porch. Because the proposed rear addition would create a nonconforming zero-foot side yard along 34th Street for the length of the addition, Mr. Cahill sought a special exception from the side yard requirements of 11 D.C.M.R. Subtitle D, § 206.7 (2021).[1] The Board held a virtual

[1] Mr. Cahill also sought a special exception from the pervious surface requirements of Subtitle D § 308.1 and a waiver of the accessory apartment

public hearing on Mr. Cahill's application in June 2020. At the hearing, the Hulmes—whose home directly abuts the subject property to the north along 34th Street—were granted party status and testified in opposition to the application. The neighbors whose home abuts the property to the west also opposed the application, as did other neighbors and persons affiliated with the elementary school across the street from the property. The D.C. Department of Transportation (DDOT) and the local Advisory Neighborhood Commission (ANC) submitted no objection to the special exceptions, and the application received approval from the Historic Preservation Review Board (HPRB). The Office of Planning (OP) also recommended approval of the application and testified in support of the application at the hearing.

The Board rendered an oral decision granting the special exceptions and subsequently entered a written final decision and order setting forth its findings of fact and conclusions of law. The Hulmes timely petitioned this court for review of the Board's decision.

II.

In reviewing the Board's decision, we 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." *Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 182 A.3d 138, 141 (D.C. 2018) (quoting *Ait-Ghezala v. District of Columbia Bd. of Zoning Adjustment*, 148 A.3d 1211, 1215 (D.C. 2016)). We will not reverse the Board's decision "unless its findings and conclusions are '[a]rbitrary, capricious, an abuse of discretion, or otherwise not accordance with law;' in excess of [the Board's] jurisdiction or authority; or '[u]nsupported by substantial evidence.'" *Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427, 433 (D.C. 2008) (first and third alterations in original) (quoting D.C. Code § 2-510(a)(3) (2001)).

The Board "ordinarily must grant [an] application" for a special exception where the applicant has met his burden to demonstrate that the proposal satisfies the requirements generally applicable to special exceptions and those requirements

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requirements of Subtitle U § 253.7(c). Neither is at issue here.

"enumerated in the particular regulation pursuant to which the exception is sought." *Glenbrook Rd. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22, 30 (D.C. 1992) (quoting *Stewart v. District of Columbia Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)).

Special exceptions to D.C. zoning regulations are subject to two generally applicable requirements: an applicant must show that a special exception (1) "[w]ill be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps" and (2) "[w]ill not tend to affect adversely[] the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps." 11 D.C.M.R. Subtitle X, § 901.2 (2021). At this stage, the Hulmes do not meaningfully challenge the Board's conclusion that these general requirements were met.[2] Instead, they focus their challenge on one of the enumerated requirements for relief from the side yard requirements, which provides that the "proposed addition . . . together with the original building, . . . as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale, and pattern of houses along the street or alley frontage." 11 D.C.M.R. Subtitle D, § 5201.4(c).

The Hulmes contend that Mr. Cahill failed to prove that the proposed addition would not be a substantial visual intrusion because he failed to provide information as to the "character, scale, and pattern of houses along 34th Street." Absent such a showing, they argue, it was arbitrary and capricious for the Board to rule in Mr. Cahill's favor.

The Board concluded, however, that the rear addition "will not substantially visually intrude upon the character, scale, and pattern of houses" because "the development surrounding the Property is comprised of a mix of different architectural styles, building sizes and uses . . . and . . . the Rear Addition will not

[2] To the extent the Hulmes contend that the "no undue adverse impact" finding was not supported by substantial evidence, we disagree. The Board found no adverse effect on three grounds that the Hulmes do not challenge, including (1) that the project has received the support of the OP and the ANC and been deemed consistent with the Cleveland Park Historic District, (2) that the project would not cause a safety hazard for pedestrians, and (3) that the project includes "extensive landscaping" that will reduce stormwater runoff and help screen the addition.

be unusual in terms of scale or design given this preexisting mix." The Board based this conclusion "on the photos and other evidence in the record, the extensive review and design changes that resulted in the approval of the Rear Addition by HPRB, and the testimony of OP."[3] The Board also found the Hulmes' arguments about the proximity to the 34th Street right of way unpersuasive "because the Application only proposes to extend the existing eastern side yard that is nonconforming due to the historic widening of 34th Street" and because DDOT had found "no adverse impact on the District's transportation network." And the Board described OP's testimony, to which the Board gave "great weight," as concluding that the 34th Street frontage "would not be irregular or impermissibly encroach on the public right of way." The Board's determination that the application met the requirements for the special exception was supported by substantial evidence, and its decision to approve the application was not arbitrary or capricious.

Nevertheless, we must consider the Hulmes' contentions that the Board's decision was not supported by "subsidiary findings . . . on all material issues," *Dietrich v. District of Columbia Bd. of Zoning Adjustment*, 293 A.2d 470, 473 (D.C.

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[3] The Hulmes also argue that a commissioner's reliance on Google Street View at the hearing subjects the Board's decision to reversal. Vice Chairperson Hart noted that it "seemed [from Street View] like there was a variety of architectural styles already going on" in the area. The Hulmes do not argue that the information gleaned from Street View would be any different than the information provided in the many photographs, plans, and maps in the record before the Board. As the written decision and order makes clear, there was other evidence in the record concerning the variety of architectural styles in the neighborhood. The Hulmes themselves presented "street views" along 34th Street to the Board. Even if the use of Street View was improper, then, the Board's finding is supported by substantial evidence on the record as a whole and we see no reason to remand. *See Economides*, 954 A.2d at 433; *see also Am. Combustion, Inc. v. Minority Bus. Opportunity Comm'n*, 441 A.2d 660, 668 (D.C. 1982) ("We will not overrule an agency's decision merely because it went outside the record on a collateral matter which, given the record before it, could have had no bearing on the ultimate decision."); *Apartment & Off. Bldg. Ass'n of Metro. Wash. v. Pub. Serv. Comm'n of the District of Columbia*, 129 A.3d 925, 930 (D.C. 2016) (noting that the principle that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which the action can be sustained" is "subject to [an] exception[]" where "the agency would doubtless reach the same result").

1972), and that it rested on a mistaken understanding of the facts. These arguments both concern the relation of the house to the property line along 34th Street. As the Hulmes point out, the existing house has an open-air, covered porch that extends over the lot line and into the public space, but the house itself—not including the porch—is set back four or five feet from the property line. The proposed addition would move the house itself against the lot line.

The Hulmes assert that OP's report and testimony, on which the Board relied, was based on the mistaken premise "that the existing house was located on the street lot line." During Mr. Hulme's questioning of OP's Jonathan Kirschenbaum, Mr. Kirschenbaum stated that the "house itself is built on the property line." When Mr. Hulme asked if Mr. Kirschenbaum would have to "change [his] views" if it "turned out that the house itself was not built on the property line and was set back," Mr. Kirschenbaum responded that he "would have to evaluate based on any changes [he saw] to the plans." What the Hulmes do not acknowledge, however, is that any confusion surrounding this point was explicitly cleared up later in the hearing. Mr. Cahill's architect testified that "[t]he house is behind the property line right now" and that the project would build "behind the porch line" but beyond the existing house line and up to the property line, noting that this was always "part of the paperwork" but "needed to be corrected as a matter of record" in light of "one statement made during OP's answer to Mr. Hulme's question." Mr. Kirschenbaum then clarified that he was "thinking about the proposed house when [he] answered that question" and that the existing porch "goes off the property line which means that it obstructs the side yard, which means there's no side yard . . . on that side of the house. So regardless of the existing house or the proposed house, there's no compliant side yard along 34th Street." Thus, we reject the Hulmes' claims that the OP report and the Board's approval of the project were premised on factual errors.

Relatedly, the Hulmes argue that the Board erred in failing to make a finding of fact concerning "whether any other house on the 34th Street frontage was constructed on the street lot line with no setback." But, as the Hulmes acknowledge, whether other homes on the street were built on the lot line was not a *contested* issue. The Board thus was not required to make a specific finding on this point. *See Economides*, 954 A.2d at 433, 437 (requiring Board to make a finding on "each material *contested* issue of fact" and noting the Board's view that in the absence of contradictory evidence on an issue there is no need for a specific factual finding (emphasis added) (quoting *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1094 (D.C. 1994))); *Citizens Ass'n of Georgetown, Inc. v. District of Columbia Zoning Comm'n*, 402 A.2d 36, 42 n.9 (D.C. 1979) ("[T]he

required findings are limited to material contested issues of fact, for not every factual issue injected by a party is germane to the decision."). Similarly, the uncontested record evidence that no other house is built without a setback from the 34th Street lot line does not mean that the Board's decision is not supported by substantial evidence. The Board found that there was variety in the structures in the area and accorded great weight to the ANC's and HPRB's determinations. The Board's conclusion that the proposal would not cause a substantial visual intrusion flows rationally from those findings.[4]

An open-air porch extending over the lot line may well, as the Hulmes argue, "pale[] in comparison" to a higher, enclosed addition built along the lot line in terms of visual effect, notwithstanding the fact that the side yard is the same width—and equally nonconforming—in either scenario. But the Board explicitly considered testimony to this effect and concluded that the addition would not be a visual intrusion. This determination was not arbitrary or capricious.

The Board's decision is affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

[4] The Hulmes have no support for their related argument that the lot line issue was material to whether the addition intruded upon the "pattern" of houses on the street, such that the Board failed to address the "pattern" element. *See Economides*, 954 A.2d at 433 ("An agency's interpretation of the regulations that govern it 'must be accorded great weight, and must be upheld unless it is plainly erroneous or inconsistent with the regulations.'" (quoting *Glenbrook Rd. Ass'n*, 605 A.2d at 30)).

Copies sent to:

Presiding Administrative Law Judge

James H. Hulme, Esquire

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