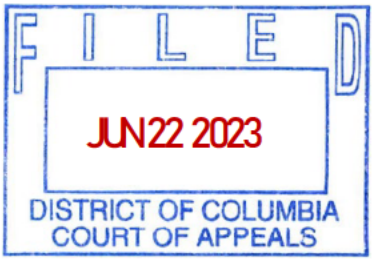
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 22-AA-0114



MATTHEW FAY, PETITIONER,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

and

VITIS INVESTMENTS, LLC, INTERVENOR.

Petition for Review of an Order
of the Board of Zoning Adjustment
(BZA Case No. 20290)

(Submitted November 15, 2022 Decided June 22, 2023)

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

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Matthew Fay appeals a decision and order of the District of Columbia Board of Zoning Adjustment (BZA) on an application submitted by Vitis Investments, LLC. Vitis sought special exception relief for a proposed addition to the building at 421 T Street NW to convert the property into a multi-unit apartment building. For the reasons set forth below, we affirm.

I.

The property at issue in this case comprised three tax lots. One of these lots contained a detached principal dwelling while the other two remained unimproved. Vitis, the owner of the property, submitted a self-certified application to the BZA for special exception relief under 11-U D.C.M.R. § 320.2 (2020) and 11-X D.C.M.R. § 901.2 to convert the existing dwelling, zoned for residential flats, to a seven-unit apartment house. The Office of Planning (OP) and the Advisory Neighborhood

Commission (ANC) 1B both recommended approving the application, and the LeDroit Park Historic Preservation Review Board reviewed and approved the proposal's design concept. The owners of properties adjacent to the proposed addition opposed the application claiming that it would adversely affect the light, air, privacy, parking and traffic, trash collection and storage, character, scale, and pattern of the neighborhood. Unpersuaded by these arguments, the BZA granted the application.

II.

Matthew Fay, the owner of a home on the same block as the property, filed a petition for review of the BZA's decision. He challenges the BZA's determination that the proposal would be in harmony with the general purpose and intent of the zoning regulations and maps for the following reasons: (1) the BZA was required to evaluate whether the proposed addition complied with the side-yard setback requirement and the maximum limit of how far the addition could extend rearward on the combined lot, (2) even if the BZA was not required to find conformity with the side-yard setback requirement and the rear-wall requirement, it relied on the erroneous conclusion that the proposed addition did comply with both requirements, and (3) the BZA failed to consider the overall size of the addition and mischaracterized its density. Next, he argues that the BZA erroneously concluded that Vitis did not need to seek variances for the side yards and rear wall or, alternatively, erroneously approved these nonconforming aspects.

"Our 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. D.C. Bd. of Zoning Adjustment*, 211 A.3d 169, 179 (D.C. 2019) (cleaned up); *see also* D.C. Code § 2-510. "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." *Id.* (cleaned up).

III.

A.

Mr. Fay first argues that in order for a special exception to be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps, the BZA

must "ensure that a special exception approval will not result in a violation of one or more development standards of the zone in which the property lies." Vitis counters that if an application satisfies the applicable special conditions, the "application is automatically compatible with the general purpose and intent of the Zoning Regulations."

Under 11-U D.C.M.R. § 320.2, the BZA may grant special exceptions from zoning regulations to convert residential buildings to apartment houses in Residential Flat 1 (RF-1) Zones, subject to the requirements set out in 11-U D.C.M.R. § 320.2(a)-(c) and 11-X D.C.M.R. § 901.2. The BZA shall permit this type of conversion provided that (1) the residential building exists at the time the conversion application is accepted as complete, (2) every fourth unit and every additional even number unit is subject to the inclusionary zoning requirements, *see* 11-C D.C.M.R. §§ 1000.1-1008.1, and (3) each existing and new dwelling unit has at least 900 square feet of land area, 11-U D.C.M.R. § 320.2(a)-(c).[1] Further, the special exception must be "in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps," not adversely affect the use of neighboring property, and meet any relevant special conditions specified in Title 11. 11-X D.C.M.R § 901.2.

In its decision and order, the BZA concluded that the proposal "satisfie[d] the requirements for a special exception under [11-X D.C.M.R. § 901.2]." It found that the proposal was "in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps" because it "satisfie[d] the requirements for a special exception consistent with [11-U D.C.M.R. § 320.2] . . . [and was] consistent with [11-E D.C.M.R. § 101.1], which recognizes that within the Residential Flat zones there have been limited conversions of dwellings or other buildings into more than

[1] As of 2020, 11-U D.C.M.R. § 320.2 no longer incorporates a rear-wall requirement. *Compare* 11-U D.C.M.R. § 320.2(e) (2018) ("An addition shall not extend farther than ten feet (10 ft.) past the farthest rear wall of any adjoining principal residential building on any adjacent property."), *with* 11-U D.C.M.R. § 320.2 (2020) (no similar requirement). The Zoning Commission removed this "duplicative provision[]" in favor of 11-E D.C.M.R. § 205.4. D.C. OFF. OF ZONING, NOTICE OF PROPOSED RULEMAKING at 1 (2020), https://dcregs.dc.gov/Common/NoticeDetail.aspx?NoticeId=N0094865; https://perma.cc/LRM2-8BUK (last visited Feb. 27, 2023). Mr. Fay does not argue that a version of this regulation from prior to 2020 applies.

two dwelling units." The BZA further noted that

> the general purpose and intent of the provisions of the RF zones . . . are intended, inter alia, to recognize and reinforce the importance of low- and moderate-density housing to the overall housing mix and health of the city; to recognize and reinforce the importance of neighborhood character and walkable neighborhoods; and to allow for the matter-of-right development of existing lots ([11-E D.C.M.R. § 100.3]). The project will introduce a moderate-density apartment house into an RF zone.

"The [BZA]'s discretion to grant special exceptions is limited to a determination whether the exception sought meets the requirements of the regulation." *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973). As cited by the BZA, 11-E D.C.M.R. § 100.3 explicitly sets out the general purpose and intent of provisions related to RF zones that the BZA must consider under 11-X D.C.M.R. § 901.2.[2] Nowhere does 11-E D.C.M.R. § 100.3 incorporate or require strict compliance with each of the numerous development standards applicable to the RF-1 zone. *See* 11-E D.C.M.R. § 100.3(a)-(f); *see also* 11-E D.C.M.R. §§ 201.1-207.4 (listing development standards in the RF zone for density, lot dimensions, penthouses or rooftop structures, courts, pervious surfaces, rear yards, rooftops or upper floor additions, and side yards); 11-E D.C.M.R. §§ 302.1-306.1 (modifying RF development standards in the RF-1 zone for maximum number of dwelling units, height, lot occupancy, front setback, and rear yard).

Mr. Fay, however, contends that the BZA had to find that Vitis's proposal included conforming side yards, *see* 11-E D.C.M.R. § 207, and a conforming rear wall, *see* 11-E D.C.M.R. § 205.4-.5, to determine that the proposal would be in harmony with the purpose and intent as described by 11-E D.C.M.R. § 100.3. He provides no authority for this interpretation and does not explain why a violation of any applicable development standard, particularly the side-yard and rear-wall requirements, would render the proposal "necessarily incompatible with a residential

[2] Mr. Fay concedes that "[a]t the fundamental zone-purpose level, the RF zones are . . . intended to" serve the purposes enumerated by 11-E D.C.M.R. § 100.3(a)-(f).

neighborhood." *See Clerics of St. Viator, Inc. v. D.C. Bd. of Zoning Adjustment*, 320 A.2d 291, 295 (D.C. 1974) ("[I]t does not necessarily follow from the findings that the increase in density in this case is necessarily incompatible with a residential neighborhood.").[3] While nothing precludes the BZA from requiring compliance with development standards that affect the purpose and intent of a specific zone in making its harmony determination, we are not persuaded that the BZA was required to find conformity with these development standards to grant a special exception in this case.

B.

Mr. Fay also argues that regardless of whether the BZA was required to find conformity with the side-yard and rear-wall requirements, it did in fact rely on these development standards in arriving at its conclusion that the proposal would be in harmony with the general purpose and intent of the provisions of the RF zones. In its decision and order, the BZA stated that

> [t]he project . . . will be in conformance with the development standards of Subtitle E Chapter 3, including height of the addition ([11-E D.C.M.R. § 303.1]), lot occupancy ([11-E D.C.M.R. § 304.1]), rear yard ([11-E D.C.M.R. § 306.1]), and side yard ([11-E D.C.M.R. § 207.4]). The project will preserve the original house, constructed in 1876, and the addition will require no

[3] Mr. Fay cites *Sheridan Kalorama Hist. Ass'n. v. D.C. Bd. of Zoning Adjustment*, 229 A.3d 1246, 1269 (D.C. 2020), for the proposition that the BZA should address a contested development standard when granting a special exception. In *Sheridan*, however, the contested issue was a prerequisite to the special exception sought by the applicant, and the BZA necessarily had to reach it to make a decision. *Id.* at 1252. Here, by contrast, 11-U D.C.M.R. § 320.2 does not include any side-yard or rear-wall requirements as prerequisites, and Mr. Fay does not contest the BZA's conclusion that the proposal satisfied the special conditions specified in 11-U D.C.M.R. § 320.2. Contrary to Vitis's position, however, the BZA may consider some development standards as they relate to the character of a residential neighborhood. *See Neighbors Against Foxhall Gridlock v. D.C. Bd. of Zoning Adjustment*, 792 A.2d 246, 252 (D.C. 2002) ("[The BZA] considered the size of the proposed school . . . in relation to the character of a residential neighborhood . . . .); see also *infra* Part I.C.

> zoning relief under Subtitle E. Conformance with these development standards ensures that the project will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.

According to Mr. Fay, the BZA's conclusion that the proposed addition conformed to the side-yard and rear-wall provisions was erroneous, and therefore it abused its discretion when it determined that the proposal would be in harmony with the general intent and purposes of the RF zone.

Even assuming that the proposed addition's side yards and rear wall were nonconforming, any reference to their compliance in the BZA's harmony determination was harmless. The BZA made detailed findings regarding the proposed addition's character, scale, and pattern using the provided dimensions, gave great weight to the OP's recommendation, D.C. Code § 6-623.04, and considered the ANC 1B's recommendation, *see id.* § 1-309.10(d)(3)(A), both of which found that the proposal would help achieve the purposes of the RF zone. Additionally, the BZA considered the LeDroit Park Historic Preservation Review Board's approval of the addition and finding that the proposal was compatible with the character of the existing dwelling and the LeDroit Park Historic District.

The BZA's conclusion "rationally flowed from findings of fact supported by substantial evidence in the record as a whole," despite the purported errors. *See Neighbors Against Foxhall Gridlock*, 792 A.2d at 253 (cleaned up). Without any specific argument from Mr. Fay as to why a nonconforming side yard or rear wall is necessarily incompatible with the purpose and intent of the RF zones, we see no reason to reverse the BZA's grant of the special exception on these grounds. *See, e.g.*, *Arthur v. D.C. Nurses' Examining Bd.*, 459 A.2d 141, 146 (D.C. 1983) ("[R]eversal and remand is required only if substantial doubt exists whether the agency would have made the same ultimate finding with the [claimed] error removed.").

C.

Next, Mr. Fay contends that the BZA abused its discretion by concluding that the proposal would be "in harmony with the general purpose and intent of the Zoning Regulations" because RF zones are fundamentally intended to "prohibit the conversion of flats and rowhouses for apartment buildings." *See* 11-X D.C.M.R. § 901.2; 11-E D.C.M.R. § 100.3(f). Specifically, Mr. Fay argues that the BZA failed

to consider the proposed addition's size relative to other buildings on the block and mischaracterized the proposal as a "moderate-density apartment house" when the density exceeds that allowed in a zone better suited for apartments.

We find no abuse of discretion. The BZA appropriately applied the development standards for an RF zone rather than those applicable to residential apartment zones. *See Neighbors Against Foxhall Gridlock*, 792 A.2d at 252 (upholding BZA's conclusion that proposed school was in harmony with residential zoning based in part on development standards, including lot occupancy). Mr. Fay claims that the proposed addition would be the largest structure and the only three-story building on the block, but RF-1 zones permit buildings up to three stories high. 11-E D.C.M.R. § 303.1-.2.

In addition to the development standards, the BZA relied on the fact that the zoning regulations specifically provided for "limited conversions of dwellings or other buildings into more than two (2) dwelling units" in this zone. 11-E D.C.M.R. § 100.1; *see also id*. § 100.3(e) (RF zone provisions are intended to "[a]llow for the limited conversion of rowhouse and other structures for flats"). Vitis proposed such a conversion, and the BZA considered whether the proposal aligned with the purpose and intent of the RF zones "to recognize and reinforce the importance of low- and moderate-density housing to the overall housing mix and health of the city; to recognize and reinforce the importance of neighborhood character and walkable neighborhoods; and to allow for the matter-of-right development of existing lots." *See id*. § 100.3. The BZA concluded that the proposal, as a "moderate-density apartment house," fit within the character of the neighborhood by using materials consistent with the existing dwelling and other buildings in the neighborhood, and further noted that it would not impact walkability. The OP's and ANC 1B's recommendations similarly found that the proposal would help achieve the purposes of the RF-1 zone specifically by providing moderate-density affordable housing. Substantial evidence in the record supports the BZA's findings as to the density of the apartment house under the RF regulations. Its conclusion that this use was in harmony with the zoning maps was not arbitrary, capricious, or an abuse of discretion.

IV.

Finally, Mr. Fay argues that the BZA erroneously approved nonconforming side yards, *see* 11-E D.C.M.R. § 207, and a nonconforming rear wall, *see* 11-E D.C.M.R. § 205.4-.5. We disagree. We take Mr. Fay's point that the BZA's order

contains some statements along these lines in its Conclusions of Law and Opinion. But this order did not definitively determine that Vitis did not need to seek relief from the side-yard and rear-wall regulations. Even assuming the proposed addition's side yards and rear wall did not conform to the applicable regulations, by submitting the self-certified application, Vitis "assum[ed] the risk that [it] may require additional or different zoning relief from that which [was] self-certified in order to obtain . . . [a] building permit." D.C. OFF. OF ZONING, FORM 135 - ZONING SELF-CERTIFICATION (2016), https://dcoz.dc.gov/sites/default/files/dc/sites/dcoz/publication/attachments/Zoning%20Regulations%20of%202016%20Form_135_0_0.pdf; https://perma.cc/9ASR-EZNX (last visited Feb. 27, 2023) [hereinafter Form 135] ("[A]ny person aggrieved by the issuance of any permit, certificate, or determination for which the requested zoning relief is a prerequisite may appeal that permit, certificate or determination on the grounds that additional or different zoning relief is required."); *see also* 11-A D.C.M.R. § 301.1 ("[A] building permit shall not be issued for the proposed . . . conversion . . . unless the plans . . . fully conform to the provisions of this title."); *Kalorama Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393, 396 n.5 (D.C. 2007) ("The Zoning Administrator is an officer of DCRA who reviews zoning issues presented by building permit applications." (citation omitted)).[4]

Nor did the BZA grant Vitis relief from these regulations. "No [BZA] order shall be deemed to include relief from any zoning regulation unless such relief was expressly requested by the applicant and expressly granted in the order." 11-A D.C.M.R. § 301.7. First, such relief was not "expressly requested" by Vitis. In its application, Vitis requested relief under only 11-U D.C.M.R. § 320.2. Second, the BZA did not expressly grant such relief in its order. Indeed, the BZA expressly disavowed considering any arguments that "did not address the legal criteria under [11-U D.C.M.R. § 320.2] and [11-X D.C.M.R. § 901.2] by which the [BZA] must judge the request for special exception relief." Instead, the BZA only "conclude[d] that [Vitis] ha[d] satisfied the burden of proof with respect to the request for special exception under [11-U D.C.M.R. § 320.2] and [11-X D.C.M.R. § 901.2]," without

[4] "The undersigned agent and owner acknowledge that they are assuming the risk that the owner may require additional or different zoning relief from that which is self-certified in order to obtain, for the above-referenced project, any building permit, certificate of occupancy, or other administrative determination based upon the Zoning Regulations and Map." Form 135.

granting any additional variances that Vitis may require prior to construction.[5] Vitis also concedes that whether the proposed addition meets the side-yard and rear-wall requirements remains open for the Zoning Administrator to determine during the permitting process. We are therefore not persuaded that the BZA excused noncompliance with the applicable zoning regulations by granting Vitis's application under 11-U D.C.M.R. § 320.2.

V.

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

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo
JULIO A. CASTILLO
Clerk of the Court

[5] "Any approval of [a property owner's] application by the Board of Zoning Adjustment (BZA) does not constitute a Board finding that the relief sought is the relief required to obtain" a "building permit, certificate of occupancy, or other administrative determination." Form 135. In that same vein, the BZA noted in its decision and order that "[c]onstruction matters related to the planned window wells"—an aspect of the renovation that appears to relate to the rear wall requirement—"are under the purview of DCRA and not zoning related or under the purview of the Board."

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