

RECEIVED
D.C. OFFICE OF ZONING
MBIA
NT
2006 SEP 20 PM 2:08

Hearing Date: September 26, 2006

Board of Zoning Adjustment
District of Columbia
CASE NO. 17502
EXHIBIT NO. 17

District, and thus the Zoning Administrator did not commit error in approving the issuance of the Permit.

II. FACTS

On January 17, 2006 the Department of Consumer and Regulatory Affairs ("DCRA") issued Building Permit No. 84942 (the "Permit") to Decker authorizing alterations, repairs and an addition to the existing single-family dwelling at 4641 Dexter Street, N.W. in the R-1-A District (the "Project"). Two months thereafter, Gottlieb filed the instant appeal, alleging that the Project violated the provisions of the Wesley Heights Overlay and the R-1-A District. However, Gottlieb did not cite one example of how the Project was not in compliance. Gottlieb indicated that he was unable to provide details of his claim because DCRA had misplaced the file for this Project. In light of this, at the July 18th BZA hearing in this matter, Decker volunteered to provide Gottlieb with copies of the approved plans. The Board continued the case until September 26, 2006, during which time the Appellant could review the drawings and determine whether his appeal could be substantiated. On Friday, July 21, 2006, the Appellant received copies of those drawings. Thereafter, on July 28, 2006, the District located its file on the Project and on August 3 provided copies to the Appellant and the Advisory Neighborhood Commission 3D.

Despite having this information for over two months, the Appellant has still failed to substantiate his claims of error in issuance of the Permit. Under section 3112.10 of the Zoning Regulations, the Appellant was required to file a statement in support of his appeal no later than fourteen days before the date of the hearing, or in this instance, the continued hearing date of September 26th. Yet, Gottlieb failed to submit *anything* additional to the record by the deadline of September 12, 2006, despite having the necessary information on the Permit from both Decker

and DCRA. Consequently, there is nothing in the record to form the factual basis of the appeal upon which the Board can grant relief.

III. ARGUMENT

A. The Appeal Should be Dismissed for Failure to State a Claim Upon Which Relief Can be Granted.

It is a fundamental principle of any contested case proceeding that a party must present sufficient facts to support a claim of noncompliance with a law or regulation. When a party fails to substantiate a claim of wrongdoing with any factual information, the action should be dismissed for failure to state a claim upon which relief can be granted. *See* Super. Ct. Civ. Proc. R. 12(b)(6). Dismissal of unsubstantiated claims is an important tool in adjudicatory processes in that it eliminates unnecessary hearings and delays, and promotes judicial economy and efficiency.

When reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the reviewing agency – in this instance, the Board – must consider the appeal in the light most favorable to the appellant, taking the facts alleged in the appeal as true and granting dismissal only where it is clear that the appellant cannot prove any facts in support of its claim which would entitle it to relief. *Id.*; *Clawson v. St. Louis Post-Dispatch, LLC*, ___ A.2d ___, WL 2504309 (D.C. August 31, 2006) (dismissal of complaint is warranted for failure to state a claim upon which relief can be granted where no facts can be proven to support claim). When an appellant fails to allege any facts in support of his claim, there are no facts that can be taken as true or viewed in a light most favorable to him. Overly broad and vague allegations, without *any* purported facts or specific proof, are simply not enough to sustain a claim, let alone the requisite burden of proof in an appeal case. Courts have consistently dismissed cases in such instances.

For example, in *Clawson*, plaintiffs alleged that certain alcoholic beverage manufacturers and importers violated the D.C. Consumer Protection Procedures Act ("CPPA") by advertising to underage consumers. *Id.* However, the plaintiffs did not allege, nor could they prove, any advertisement or other conduct by the manufacturers and importers that violated the CPPA. Consequently, the case was dismissed for failure to state a claim upon which relief could be granted.

Similarly, Gottlieb has brought a general claim that Decker has violated the Zoning Regulations without alleging, nor being able to prove, that any construction or other conduct violates the regulations. In order to meet the minimum standards even to initiate his appeal, Gottlieb had to allege with some specificity that the Project violated the Wesley Heights Overlay and the underlying R-1-A District provisions, such as exceeding the maximum permitted height, for example, or the permitted lot occupancy. However, nowhere in his initial appeal or in any supplemental filings are any such facts alleged. Without more, there is no claim upon which relief can be granted and the appeal should be dismissed. *Id.*

B. Alternatively, the Appeal Should be Denied Because the Project is in Full Compliance with the Wesley Heights Overlay and all other Zoning Regulations.

The renovations in question do not violate any provisions of the Wesley Heights Overlay District or the underlying R-1-A District. It is an accepted principle of statutory construction that a specific law concerning the same subject matter prevails over a more general provision. *See George Washington University v. District of Columbia Bd. of Adjustment*, 831 A.2d 921, 943 (D.C. 2003) (noting that this jurisdiction recognizes the well-settled rule of statutory construction that a special statute covering a particular subject matter is controlling over a general statutory

provision covering the same and other subjects in general terms) (internal citations omitted); accord *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 423 (D.C. Cir. 1977).

In his initial statement in support of the appeal, Gottlieb quotes various regulations that deal with extremely broad principles such as "provid[ing] adequate light and air" and preventing overcrowding on lots. See 11 DCMR §§ 1541.3, 101.1 (2003). These regulations, however, do not provide any objective means to determine whether or not a construction project is in breach. Therefore, one must look to more specific regulations that contain quantifiable standards. Not only does the project comply with the general provisions of the Zoning Regulations, it is in strict compliance with the controlling quantifiable regulations.

1. The Renovations Do Not Exceed the Maximum Lot Occupancy Limitations.

Under section 1543.2 of the Zoning Regulations, "[n]o structure, including accessory buildings, shall occupy an area in excess of thirty percent (30%) of the lot." 11 DCMR § 1543.2 (2003). Here, the building area of all structures on the property – the existing house, the new addition, and the detached garage – is 4,328 square feet. The area of the lot is 20,438 square feet. Therefore, the total lot occupancy is 21.17%, well below the maximum permitted lot occupancy of 30%. Significantly, Gottlieb has not submitted anything to the record that disputes this calculation.

2. The Renovations Do Not Exceed the Floor Area Ratio Limitations.

The Zoning Regulations further restrict the gross floor area of all buildings and structures on a lot within the Wesley Heights Overlay to a sum not to exceed 2,000 square feet of space plus 40% of the area of the lot. 11 DCMR § 1543.3 (2003). Based on a lot area of 20,438 square feet, the maximum allowed gross floor area is 10,175 square feet of gross floor area ((20,438 sf x 40%) + 2,000 sf = 10,175 sf). The Project results in a total floor area of only 9,163 square feet,

and thus, is well below the maximum outlined in the regulations. Gottlieb has not disputed this calculation.

3. The Renovations Do Not Exceed the Side and Rear Yard Setback Limitations.

Projects within the Wesley Heights Overlay and R-1-A District are required to provide rear yards a minimum depth of 25 feet. 11 DCMR § 404.1 (2003). Here, the Project provides a rear yard depth of approximately 90 feet, as measured from the rear of the main house to the rear property line. Moreover, there is an approximate distance of 55 feet between the back of the detached garage located in the rear yard and the rear property line. Thus, the Project fully complies with the rear yard requirements and there is no regulatory infraction under section 404.1.

Similarly, the Project does not violate the minimum width of eight feet prescribed for side yards. See 11 DCMR § 405.9 (2003). The minimum width provided is nine feet and thus is in full compliance with the side yard requirements. These yard calculations are likewise not disputed by the Appellant.

4. The Renovations Do Not Exceed the Height Limitations.

Section 400.1 of the regulations provides that the height of buildings or structures in the R-1-A District shall not exceed 40 feet. 11 DCMR § 400.1 (2003). The renovation and new construction will result in a maximum building height of 31.2 feet, and the construction is likewise well below the regulatory maximum.

The regulations also state that "[a] building or other structure may be erected to a height not exceeding ninety feet (90 ft.); provided, that the building or structure shall be removed from all lot lines of its lot for a distance equal to the height of the building or structure above the natural grade." 11 DCMR § 400.5 (2003). Gottlieb misquotes this regulation, and erroneously

implies that *any* building, regardless of whether it complies with the maximum height permitted under section 400.1, must be removed from all lot lines a distance equal to its height. Clearly, such a reading is inconsistent with other provisions of section 400 providing height limits and side and rear yard setbacks requirements, the long-standing interpretation of the residential height provisions and the hundreds of thousands of detached dwellings constructed throughout the city without application of this provision.

5. The Detached Garage Does Not Take Up More than Half of the Yard.

The Project similarly does not violate the prohibition against any structure occupying more than 50% of any required yard. 11 DCMR § 199.1 ("Yard"). The only structure located in a required yard is the garage, and it occupies less than ten percent of the rear yard. Thus, the Project is in full compliance with this provision of the regulations and the Appellant does not allege any violation of this provision.

**IV.
CONCLUSION**

Due to Appellant's failure to provide any factual support for his vague claims, the appeal should be dismissed for failure to state a claim upon which relief can be granted. In the event the Board finds it has jurisdiction to hear the case, the appeal should nevertheless be denied because the Project is in full compliance with the Zoning Regulations.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Mary Carolyn Erown

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss, or in the Alternative, Opposition to the Appeal was served this 20th day of September, 2006, by hand delivery, electronic mail, or first-class mail postage prepaid, on the following:

Mr. Bill Crews
Zoning Administrator
D.C. Department of Consumer & Regulatory Affairs
941 North Capitol Street, N.E., Second Floor
Washington, D.C. 20001
bill.crews@dc.gov

Doris Parker-Woolridge
Office of the General Counsel
D.C. Department of Consumer & Regulatory Affairs
941 North Capitol Street, N.E., Ninth Floor
Washington, D.C. 20001
doris.parker-woolridge@dc.gov

Jonathan Gottlieb
4610 Dexter Street, N.W.
Washington, D.C. 20007

Advisory Neighborhood Commission 3D
P.O. Box 40846 Palisades Station
Washington, D.C. 20016
ANC3D@hotmail.com


