

**THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT
BOARD OF ZONING ADJUSTMENT**

In re:)
)
JONATHAN GOTTLIEB)
And)
ADVISORY NEIGHBORHOOD)
COMMISSION 3-D,)
)
Appellants.)

Appeal No. 17502

DISTRICT OF COLUMBIA'S MOTION TO DISMISS

On March 17, 2006, Appellants Jonathan Gottlieb ("Appellant Gottlieb") and on July 7, 2006, the Advisory Neighborhood Commission 3-D ("ANC 3-D") appealed the Appellee District of Columbia ("District") issuance of Building Permit Number 84942 ("Permit"), which was issued for the alteration, repairs and an addition of an existing structure at 4641 Dexter Street, N.W., in the R-1-A District, which is the Wesley Heights Overlay district.

The District, by and through undersigned counsel, respectfully moves the Board of Zoning Adjustments ("BZA") to dismiss this matter. Appellee adopts the arguments of Decker Development Co. ("Decker") who previously moved the BZA for dismissal of the appeal of Appellant Gottlieb in this instant case for failure to state a claim upon which relief can be granted. Decker owns the property involved in this matter. As a basis for the Motion to Dismiss, the District submits that the Appellants Gottlieb and ANC 3-D failed to state a claim for which relief can be granted, and this appeal should be dismissed. A review of the required documents that were submitted to support the

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issuance of the permit, for the alteration, repairs and addition at 4641 Dexter Street, N.W., indicated that Decker was in compliance with the zoning regulations for the Wesley Heights Overlay and R-1-B district. It was further concluded that the Zoning Administrator did not err in authorizing the Code Official to issue the permit.

STATEMENT OF FACTS

Decker applied for a building permit on July 14, 2005. The application proposed alteration and repairs, and an addition to the single family dwelling at 4641 Dexter Street, N.W., in the R-1-A district, and in the Wesley Heights Overlay. The single-family dwelling is located across the street from Appellant Gottlieb's residence at 4610 Dexter Street, N.W.

DCRA issued the permit on January 17, 2006. After issuance of the permit, and prior to Appellant Gottlieb filing this appeal on March 17, 2006, he visited DCRA to review the documents that were submitted for the issuance of the building permit that authorized the alteration, repairs and addition to the existing structure at the property.

Prior to March 17, 2006, DCRA was unable to locate the building permit application, plans, permits and other documents that were submitted to support the issuance of the permit. Appellants were accurate in their statement that these documents were misplaced for months. However, after a diligent search, on July 28, 2006, DCRA found the misplaced documents, and immediately contacted the Appellants. On August 3, 2006, ANC 3-D obtained a copy of the documents from DCRA. On August 7, 2006, Appellant Gottlieb informed the District that he would obtain a copy from ANC 3-D. Further, per BZA's requests on July 18, 2006, Counsel for Decker provided a copy of the plans to Appellant Gottlieb on July 21, 2006.

On March 17, 2006, Appellant Gottlieb filed an appeal with BZA, in which he alleged that DCRA issued the building permit in error. Appellant Gottlieb alleged that the issuance of the permit for alteration, repairs and addition to the existing structure at 4641 Dexter Street, N.W., violates many provisions of the zoning regulations. On July 11, 2006, ANC 3-D filed a letter with BZA, supporting Appellant Gottlieb's appeal.

Appellant Gottlieb informed DCRA and BZA at the previous hearing that he was at a disadvantage because of the missing DCRA files. On July 21, 2006 and August 3, 2006, both Appellants received copies of the documents submitted to support the issuance of the permits. Therefore, the alleged error was cured.

On Tuesday, September 19, 2006, Appellants failed to supplement the record after receiving the documents from undersigned counsel and Decker. Appellant Gottlieb stated on p.1, of his appeal that DCRA had failed to provide him access to any documents relating to the permit because DCRA claimed the permit and related documents were "missing". Appellant Gottlieb reserved his right to amend his appeal. Appellant Gottlieb's argument was supported by the ANC 3-D. The documents were no longer missing since July 28, 2006, and were quickly provided to the Appellants to allow them sufficient time to review and supplement the BZA records. Appellants have not supplemented the BZA record to form the factual basis of the appeal upon which the Board can grant relief.

ARGUMENTS

A. THE APPELLANTS HAVE FAILED TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

The Appellants alleges that the Zoning Administrator erred when he authorized the Building Code Official to approve the permit for property at 4641 Dexter Street,

N.W., when the construction at the property would violate zoning regulations for issuance of a building permit in an R-1-A zoning district. *See* Appeal at 1. In spite this allegation, the Appellants have not identified one procedural or evidential error on the part of the Zoning Administrator in reaching his decision.

Case law dictates that the appropriate evidence for reviewing an agency decision is the record before the decision-maker. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Comm'n*, 425 F.2d 583, 588 (D.C. Cir. 1970); *Young v. District of Columbia*, 865 A.2d 535, 540 (D.C. 2005). If the agency decision is supported by substantial evidence in that record, the reviewer should uphold the decision. *See Young v. District of Columbia*, 865 A.2d 535, 540 (D.C. 2005). In this context, the District of Columbia Court of Appeals has defined “substantial evidence” as, “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.*; *see also Ferreira v. District of Columbia Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995); *James v. District of Columbia Dep't of Employment Servs.*, 632 A.2d 395, 397 (D.C. 1993) (internal citations omitted). The Appellants have not alleged any factual statements that the Zoning Administrator erred.

The Appellants failed to establish that the issuance of the permit, resulted in noncompliance with the zoning law or regulation. This appeal should be dismissed for the failure to state a case upon which relief can be granted. *Cf. Leonard v. District of Columbia*, 794 A.2d 618, 629 (D.C. 2002); *See* Super. Ct. Civ. Proc. R. 12(b)(6).

B. CONSTRUCTION OF THE HOUSE IS IN COMPLIANCE WITH THE ZONING REGULATIONS.

A review of the required documents indicated that the alteration, repairs and addition at 4641 Dexter Street, N.W., do not violate any provisions of the Wesley Heights Overlay District or the underlying R-1-A District. Appellant Gottlieb and ANC 3-D did not supplement the BZA record with factual statements to support the basis of their allegations that this property would affect the adequate light and air" in the surrounding area in violations of Sections 1541.3¹, 101.1² and 101.1(a)³. Further Appellants argued that the District violated many of the zoning regulations with out specificity of factual statements.

C. LOT OCCUPANCY

The existing house, the new addition, and the detached garage are 4,320 square feet. The area of the lot is 20,438 square feet. The total lot occupancy is 21%, which is

¹ 11 DCMR 1541.3, provides that: "The purposes of the WH Overlay District are to:

- (a) Preserve in general the current density of neighborhood;
- (b) Allow reasonable opportunities for owners to expand their dwelling; and
- (c) Preserve existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood."

² 11 DCMR 101.1, provides that: In their interpretation and application, the provisions of this title shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to:

- (a) Provide adequate light and air
- (b) Prevent undue concentration of population and the overcrowding of land; and
- © Provide distribution of populations, business and industry, and use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and cultural opportunities; and that will tend to further economy and efficiency in the supply of public services.

³ 11 DCMR 101.1 (a), provides in part: "The regulations in this title and the Zoning Maps are designated with consideration of the character of the respective districts."

below the maximum allowable 30% lot occupancy. Therefore, the District did not violate Section 1543.2 of the zoning regulations.⁴ The existing house, the new addition, and the detached garage occupy lot less than 30% percentage of the lot occupancy.⁵ Therefore, the District did not violate Section 403.2 of the zonings regulations.

D. FLOOR AREA RATIO

The property has a lot area of 20,438 square feet. The maximum allowable gross floor area is 10,175 square feet of gross floor area $((20,438 \text{ sf} \times 40\%) + 2,000 \text{ sf} = 10,175 \text{ sf})$. This alteration, repairs and addition to the existing structure results in a total floor area of only 9,163 square feet, which is below the maximum permitted by the zoning regulations. Therefore, the District did not violate Section 1543.3 of the zoning regulations.⁶

E. REAR YARD

The District concurs with Decker that the property has a rear yard depth of approximately 90 feet, as measured from the rear of the main house to the rear property

⁴ 11 DCMR 1543.2, provides that: "No structure, including accessory buildings, shall occupy an area in excess of thirty percent (30) % of the lot; except that:

(a) Structures on lots of between five thousand square feet and six thousand hundred and sixty-seven square feet (5,000 sq. ft. and 6667 sq. ft.) may occupy up to two thousand square feet (2,000 sq. ft.) and

(b) Structures on lots of less than five thousand square feet (5,000 sq. ft.) may occupy up to forty percent (40%) of the area of the lot.

⁵ 11 DCMR 403.2, provides that: "No structure, including its accessory building, shall occupy its lot in excess of the percentage of lot occupancy ..."

⁶ 11 DCMR 1543.3, provides that: "The gross floor area of all building and structures on the lot shall not exceed the sum of two thousand square feet (2,000 sq. ft.) plus forty percent (40%) of the area of the lot, provided, that the following modification of gross floor area shall apply in the WH Overlay District:

(a) The first two hundred square feet (200 sq. ft.) of an open porch, or total open porch space if there is more than one open porch, and the first six hundred square feet (600 sq. ft.) of a garage shall not count in gross floor area; and

(b) Basement or cellar floor area shall count in gross floor area if a finished floor is provided, if the floor to ceiling height is in excess of six feet, six inches (6 ft., 6 in), and shall count only up to a floor area equal to five (5) times the total fenestration area for the cellar or basement floor."

line. Further there was approximate distance of 55 feet between the back of the detached garage located in the rear yard and the rear property line. In a Wesley Heights Overlay and R-1-A district, a rear yard must have a minimum of 25 feet. Therefore, the District did not violate Section 405.9 of the zoning regulations.⁷

F. SIDE YARD

The property has minimum width of nine feet for a side yard. The Zoning regulations require a minimum side yard width requirements of eight feet. Therefore, the District did not violate Section 405.9 of the zoning regulations.⁸

G. HEIGHT REQUIREMENTS

The renovation and alteration will result in a maximum building height of 31.2 feet. The height of buildings or structures in the R-1-A District shall not exceed 40 feet. Therefore, the District did not violate Section 400.1 of the zoning regulations.⁹ Further, the District adopts Decker argument that the "Gottlieb misquotes 11 DCMR § 400.5 and erroneously implied 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.¹⁰ ”

⁷ 11 DCMR 404.1, provides that: "A rear yard shall be provided for each structure located in a Residence District, the minimum depth of which shall be as set forth in the following table."

⁸ 11 DCMR 405.9, provides that: "Side yards shall be provided in Residence Districts, as set forth in the following table, subject to the special requirements of other provisions of this chapter."

⁹ 11 DCMR 405.9, provides that: "Side yards shall be provided in Residence Districts, as set forth in the following table, subject to the special requirements of other provisions of this chapter."

¹⁰ 11 DCMR 400.5, provides 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 the lot lines of its lot for a distance equal to the height of the building or structure above the natural state."

H. REQUIRED YARD FOR DETACHED GARAGE

The garage occupies less than ten percent (10%) of the required yard. The zoning regulations require that any structures should not occupy more than 50% of any required yard. 11 DCMR § 199.1 ("Yard"). Therefore, the District did not violate Section 400.1 of the zoning regulations. ¹¹

CONCLUSION

The District agrees with Decker, that even if the Board finds it has jurisdiction to hear the case, the appeal should nevertheless be denied because the alterations, repairs, and addition to the structure is in full compliance with the Zoning Regulations. The District also adopts Decker's argument that dismissal of unsubstantiated claims is an important tool in adjudicatory processes in that it eliminates unnecessary hearings or delays, and promotes judicial economy and efficiency. For the reasons stated above, the District's Motion to Dismiss should be GRANTED, and the Appellants' Appeal should be DISMISSED.

Respectfully Submitted,

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Department of Consumer and
Regulatory Affairs

¹¹ 11 DCMR 199.1, defines a yard as: "An exterior space, other than a court, on the same lot with a building or other structure. A yard required by the provisions of this title shall be open to the sky from the ground up, and shall not be occupied by any building or structure, except as specifically provided in this title. No building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing District of Columbia's Motion to Dismiss, or in the Alternative, Opposition to the Appeal was served this 21st day of September, 2006, by hand-delivery, electronic mail, facsimile or first-class mail postage prepaid, on the following:

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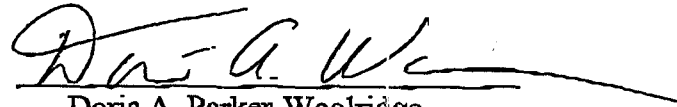
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