

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18154 of Capitol Hill Restoration Society, pursuant to 11 DCMR §§ 3100 and 3101, from an October 13, 2010 decision of the Department of Consumer and Regulatory Affairs to grant Building Permit No. B1008586 allowing an addition to a one-family row dwelling in the R-4 District at premises 1363 Massachusetts Avenue, S.E. (Square 1037, Lot 73).

HEARING DATE: January 4, 2011
DECISION DATE: January 4, 2011

BOARD OF ZONING ADJUSTMENT
District of Columbia

DISMISSAL ORDER

CASE NO. 18154
EXHIBIT NO. 30

PRELIMINARY MATTERS

On October 25, 2010, the Capitol Hill Restoration Society ("CHRS" or "Appellant") timely filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board"). CHRS appealed the granting of Building Permit No. B1008586 by the D.C. Department of Consumer and Regulatory Affairs ("DCRA"). That building permit authorized the construction of an addition to a rear porch at premises 1363 Massachusetts Avenue, S.E. ("subject property"). The subject property is improved with a row dwelling with an existing rear porch. The porch extension permitted by the building permit occupies the entire rear yard of the dwelling, resulting in a lot occupancy of 100% on the subject property in violation of 11 DCMR § 403.2. The permit was issued without the owner of the subject property first obtaining a variance from § 403.2 pursuant to § 8 of the District's Zoning Act, D.C. Official Code § 6-641.07. DCRA concluded that a variance was unnecessary because it had already granted a reasonable accommodation from § 403.2 pursuant to the federal Fair Housing Act. 42 U.S.C. § 3604(f)(3)(b). The Appellant claims this conclusion was erroneous.

The Board scheduled a hearing on the appeal for January 4, 2011.

Appellee DCRA and the property owner to whom Building Permit No. B1008586 was issued were automatically parties to this appeal pursuant to 11 DCMR § 3199. Both filed motions to dismiss the appeal. (Exhibits 22 and 25, respectively.) The motions argued that the Board does not have jurisdiction to hear this appeal because it is based solely on DCRA's interpretation and implementation of the federal Fair Housing Act, and not on the Zoning Regulations. Both motions also argued that this appeal is inappropriate because the applicable DCRA regulation

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Board of Zoning Adjustment
District of Columbia
CASE NO. 18154
EXHIBIT NO. 30

BZA APPLICATION NO. 18154
PAGE NO. 2

makes the decision of the Director of DCRA ("Director") regarding a reasonable accommodation a final decision of the District government, not subject to further administrative remedies, such as this appeal. (14 DCMR § 111.13.) The Appellant filed a one-paragraph response to the two motions to dismiss that addressed the second argument concerning the finality of the Director's decision, but did not address the question of the Board's jurisdiction. (Exhibit 26.)

On January 4, 2011, the Board after deliberating upon the merits of the motions to dismiss, and the opposition thereto filed by the Appellant, dismissed the appeal for lack of jurisdiction by a vote of 4-0-1.

Notice of Appeal and Notice of Hearing. By memoranda dated November 1, 2010, the Office of Zoning ("OZ") provided notice of the appeal to DCRA, and specifically to the Zoning Administrator at DCRA, the D.C. Office of Planning, Advisory Neighborhood Commission ("ANC") 6B, the ANC within which the subject property is located, Single Member District 6B08, the Councilmember for Ward 6, and the owner of the subject property. Pursuant to 11 DCMR § 3112.14, OZ published notice of the hearing in the *D.C. Register*, and, on November 1, 2010, mailed such notice to the Appellant, the Zoning Administrator, ANC 6B, and the owner of the subject property.

Party Status. Consistent with 11 DCMR § 3199.1, the parties in this proceeding were the Appellant, DCRA, ANC 6B, and the owner of the subject property. There were no requests for party status.

ANC Report. ANC 6B filed a letter with the Board dated November 10, 2010 indicating that, at a regularly scheduled, properly noticed meeting, with a quorum present, the ANC voted to support the instant appeal. (Exhibit 21.) The ANC's letter opines that the Zoning Administrator exceeded his authority in granting Building Permit No. B1008586 and also requests that a Stop-Work Order be issued to stop construction at the subject property.

FINDINGS OF FACT

1. The subject property is located in an R-4 Zone District, where a lot occupancy of 60% is permitted as of right. (11 DCMR § 403.2.)
2. The subject property is improved with a row dwelling which has an existing rear porch.
3. Between the existing rear porch and the rear lot line of the subject property is a rear yard.
4. On or about July, 2010, the owner of the subject property filed an application for a building permit to extend the rear porch so as to cover the entire rear yard, resulting in 100% lot occupancy of the subject property, which would be in violation of § 403.2. (Exhibit 7.)
5. The property owner also filed a request for a "reasonable accommodation" from compliance with § 403.2 pursuant to 14 DCMR § 111, the relevant provisions of which are as follows:

BZA APPLICATION NO. 18154
PAGE NO. 3

111.1 This section implements the policy of the District of Columbia on requests for reasonable accommodation in its rules, policies, and procedures for handicapped individuals as required by the Fair Housing Act, as amended, 42 U.S.C. § 3604(f)(3)(B). The policy of the District of Columbia is to facilitate housing for the handicapped and to comply fully with the spirit and the letter of the Fair Housing Act.

111.2 Any person eligible under the Fair Housing Act may request a reasonable accommodation as provided by the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B), pursuant to the procedures set out in this section in lieu of the procedures that would otherwise apply to such requests

111.16 While a request for reasonable accommodation is pending, all laws and regulations otherwise applicable to the dwelling that is the subject of the request shall remain in full force and effect.

6. DCRA granted the reasonable accommodation request in early October, 2010.
7. Thereafter, on October 13, 2010, DCRA issued Building Permit No. B1008568 believing that its grant of the reasonable accommodation from § 403.2 obviated the need for the owner to obtain a variance from that same provision. (Exhibit 5.)
8. DCRA's conclusion was based entirely upon its interpretation of the Fair Housing Act and not on the Zoning Regulations.
9. On October 25, 2010, the Appellant appealed the issuance of the building permit, claiming that DCRA's interpretation of the Fair Housing Act as preempting the Zoning Act was erroneous.

CONCLUSIONS OF LAW

Section 8 of the Zoning Act of 1938 authorizes the Board to hear appeals of any decision of any administrative officer or body "in the carrying out or enforcement" of any Zoning Regulation. D.C. Official Code § 6-641.07(g)(1) (2008 Supp.). Such appeals may be taken "by any person aggrieved . . . by any decision of the [Department of Consumer and Regulatory Affairs] granting . . . a building permit . . . *based in whole or in part upon any zoning regulation.*" D.C. Official Code § 6-641.07(f) (emphasis added). Therefore, the Board has no authority to hear an appeal that is not based to some degree upon an interpretation of a zoning regulation. *See Appeal No. 17444 of Kuri Brothers, Inc.*, 55 DCR 4442 (2008) ("The Board has no jurisdiction to hear allegations of error concerning the DCRA Director's interpretation of a provision not contained

in the Zoning Regulations.”).

Here, the Appellant claims error in DCRA’s issuance of Building Permit No. B1008586 because the agency decided that its grant of the property owner’s request for reasonable accommodation from 11 DCMR § 403.2 pursuant to the federal Fair Housing Act obviated the need for the owner to obtain a variance from the same provision from this Board under the District’s Zoning Act. This conclusion was based solely upon its interpretation of the Fair Housing Act and not on any Zoning Regulations. Because its decision was not based in whole or part on any zoning regulation, the Board lacks the subject matter jurisdiction to hear and decide this appeal, and must dismiss it.

ANC 6B, to whose issues and concerns the Board must give great weight, pursuant to D.C. Official Code § 1-309.10(d) (2001), voted to support CHRS’s appeal and also requested that “an immediate Stop-Work Order be issued” to stop the construction authorized by Building Permit No. B1008586. (Exhibit 21.) Because the Board did not reach the merits of the appeal, the ANC’s issues and concerns are not legally relevant. *See, Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C. 1993) (ANC’s views as to whether variance should be granted became irrelevant once the BZA concluded that the use was permitted as a matter of right.).

It is hereby **ORDERED** that this appeal be **DISMISSED**.

VOTE: **4-0-1** (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle, and Anthony J. Hood to Dismiss; No other Board member (vacant) participating)

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT

A majority of Board members has authorized the issuance of this order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: APR 14 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.