

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18294-A in the Application of Paul and Emily Thornell, pursuant to 11 DCMR § 3104.1, for a special exception to allow the construction of an addition to an existing one-family semi-detached dwelling under § 223 of the Zoning Regulations, not meeting the lot occupancy requirements under § 403, in the R-2 District at premises 3011 Ordway Street, N.W. (Square 2067, Lot 76).

HEARING DATE: January 17, 2012

DECISION DATE: February 7, 2012

DATE OF DECISION ON

MOTION FOR RECONSIDERATION: July 31, 2012

ORDER DENYING REHEARING AND RECONSIDERATION

On July 13, 2012, Matthew and Susan Finston (the "Finstons"¹) submitted a motion for rehearing and reconsideration of the Board of Zoning Adjustment's (the "Board") July 5, 2012 order, which granted a special exception to Paul and Emily Thornell (the "Applicant"). (Exhibit 41.) The special exception allowed the Applicant to build a two-story rear addition not meeting the lot occupancy requirements under the Zoning Regulations.² The Finstons requested a rehearing and reconsideration of the application, and alleged specific errors in the Board's order pursuant to § 3126.4. On July 26, 2012, the Applicant filed its response to the motion. (Exhibit 45.) (*See*, 11 DCMR § 3126.4.³) At a decision meeting on July 31, 2012, the Board voted to deny the Finstons' motion for rehearing and reconsideration for the reasons explained below.

¹ The Finstons occupy property located at 3514 30th Street, N.W. The rear yard of the Finstons' property is to the north of the subject property, across a 15-foot wide public alley. The Finstons participated in the Board proceedings as a party in opposition and were represented at the public hearing by Susan Finston.

² Section 403 of the Zoning Regulations permits maximum lot occupancy of 40% in the R-2 Zone District. The proposed addition increased the lot occupancy from 38.6% to 43.5%, which equals approximately 99 square feet of additional area.

³ The Applicant's agent acknowledged that the Finston's Response was not filed within the seven-day period required under § 3126, due to his being out of town when the motion was initially served. (Exhibit 44.) Because the agent only saw the motion after the seven-day period had expired, the Applicants requested a waiver of the seven-day response period. (Exhibit 44.) The Finstons stated they did not object. (Exhibit 46). Therefore, pursuant to §3100.5, the Board waived the filing requirement, finding good cause and a lack of prejudice to the Finstons.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18294-A

EXHIBIT NO. 48

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The Request for Rehearing

Under § 3126.6, a request for rehearing may not be considered unless new evidence is submitted that could not reasonably have been presented at the original hearing. The Finstons attached two letters to their motion from neighbors Celestino Toribio (3518 30th Street, N.W.) and Lise Gladstone (3520 30th Street, N.W.). Both letters state their opposition to the Applicant's project. First, the letters add nothing of any evidentiary value to what already exists in the record. Even were that not the case, the Board is not persuaded that the letters could not reasonably have been presented at the original hearing in January 2012. Indeed, Ms. Toribio's letter states only that she now has a "greater understanding" of the project than she did at some unspecified time. Ms. Toribio does not explain why she did not come forward at the time of the hearing. Nor does Ms. Gladstone's letter offer any explanation as to why her letter was not presented at the hearing. Other than these two letters, the Finstons point to no additional evidence that would be proffered during a rehearing. Thus, the Board concludes that there is no new evidence, which could constitute the basis for a rehearing, and the request for a rehearing is therefore denied.

The Request for Reconsideration

The Finstons allege numerous errors made by the Board. However, for the reasons that follow the Board finds that these assertions lack merit.

Alleged Errors of Fact

The Finstons allege that the Board erred in finding that the alley north of the property is 15 feet wide. (Decision, Finding of Fact 3.) However, other than stating that the alley "has long been known to be a non-conforming, narrow alley [measuring] 9.5 feet in width", the Finstons offer no independent evidence to establish their claim. In contrast, the Board reasonably relied on evidence when it found that the alley is 15 feet wide; for example, the Applicant's Plans (Exhibit 9), a DC Survey (Exhibit 25), and a report from the Office of Planning ("OP") all establish that the alley is 15 feet wide. (Exhibit 28.)

The Finstons allege that the Board erred in finding that the proposed addition would not "overpower" the house and that the addition "retains elements of the house's materials". (Decision, Finding of Fact 7.) This finding was contrary to the position urged by the Finstons, namely that the house was not in scale and was incompatible with the community. However, where there is conflicting evidence, it is the Board's task to weigh the evidence and make a finding. As the trier of fact, the Board may credit the evidence upon which it relies to the detriment of conflicting evidence and need not explain why it favored the evidence on one side over that on the other. *Fleischman v. District of Columbia Bd. of Zoning Adjustment*, 27 A. 3d 554 (DC 2011), citing *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023 (DC 1995). To be sure, the Board's decision relied on portions of the Applicant's Statement (Exhibit 3). However, nothing prohibits the Board from relying on this evidence since it was in the record.

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The Finstons allege that the Applicant misled the Board regarding (a) the views of the addition from the public way and the adjacent alley, and (b) the proximity of the neighboring properties to the proposed addition. As a result it is claimed that the Board erred when it relied on the Applicant's purportedly misleading and inaccurate submissions (such as photos, elevation plans, and site plans). Subsection 223.2 (d) of the Zoning Regulations (Title 11 DCMR) requires the Applicant to use "graphical representations such as plans, photographs, or elevation and section drawings" to represent the relationship of the proposed addition to adjacent buildings and views from the public ways. The Applicant filed such graphical representations, and the Board found that they accurately depicted the relationship of the addition to adjacent buildings and views from the public ways, including the adjacent alley to the north. (Decision, Finding of Fact 9.) The claim that such representations have been found to be inaccurate is both incorrect and an attempt to re-argue a position already rejected by the Board.

Finally, the Finstons claim that the Applicant (or his representative) refused to provide them with copies of the documents that they filed. The motion cites the instructions on the application form for such a requirement. First, there is nothing on the application form that requires an applicant to serve any member of the public with anything. Second, except for the proposed filing of findings of facts pursuant to § 3121.4, the only other time service required is if the Board requests post-hearing submissions and specifically requires services on other parties. In this case, the Board left the record open for photos or other information that the parties cared to submit, but did not require service. In fact, both the Applicant and Finstons made such submissions (Exhibits Nos. 38 and 39) and neither indicates service upon the other. Since the Board did not allow responses to any submissions made, any absence of service prejudiced neither party.

The Finstons claim the Board erred in finding that the neighboring property owners would not be unduly impaired in the use and enjoyment of their homes due to the provisions of the required rear yard and the 15 foot-wide public alley. (Decision, Findings of Fact 11 and 12.) They argue that this conclusion is false and that the Board erroneously "waived" the rear yard requirement. They also claim that the Board erred in finding that the 15-foot alley provided a buffer zone because the alley was only 9.5 feet. All of these claims are incorrect.

First, the Board did not "waive" the rear yard requirement. It found, based upon OP's analysis, that the Applicant met the 20-foot rear yard requirement, and that rear yard relief was therefore not required. (Decision, p. 1, n. 1 "The Office of Planning [concluded] that the rear yard relief was not necessary, as the irregularly shaped lot had a rear yard with a mean horizontal distance in excess of the required 20 feet. The Board agreed with the Office of Planning and the Applicant and determined that rear yard relief was not required for the proposed addition."). Even if this were not correct, the failure of an applicant to request all of the zoning relief needed is not a basis for denying the relief actually requested. *See Application No. 18250 of Raymundo B. Madrid* (2011). As to the buffer, as discussed previously, the Board found that the alley was 15 feet wide based upon the evidence of record. Therefore, it could reasonably find that the 15-foot alley created a buffer.

The Finstons claim that the Board erred in finding that, as viewed from the public way, the proposed addition will not visually intrude upon the character or scale and pattern of neighboring homes. (Decision, Finding of Fact 13.) The Board had substantial evidence upon which to base this finding, including the opinion of OP and Advisory Neighborhood Commission ("ANC") 3C. Specifically, the ANC noted that the proposed addition is "small in scale and does not intrude upon the character, scale and pattern of houses along the street frontage." (Exhibit 34.) The Board found the ANC's advice to be persuasive and concludes that the Finstons are once more rearguing issues raised and decided by the Board.

The Finstons allege that the Board erred by omitting various facts and by failing to make certain findings in their favor; for example, that the addition would result in increased noise and that the addition would substantially impair the privacy and enjoyment of their property. However, the Finstons cite no specific evidence of record to support their claim. Quite the opposite, the evidence of record suggests a lack of adverse impacts to neighboring properties. Several neighbors supported the application, and ANC 3C expressed "no objection" to the project. (Exhibit 34.) Moreover, OP concluded that the addition should *not* have an undue impact on the privacy of neighbors to the north. (Exhibit 28, p. 4.) Therefore, the Board had ample basis for finding as it did.

The Finstons also attack OP's report and ANC 3C's report, stating that neither had the final plans before them when they issued their reports. A similar argument is made with respect to the letters received in support. With respect to OP, this is incorrect. The OP report clearly states at page 1: "On December 9, 2011, the Applicant filed a supplemental submission which made minor changes to the original proposal and provided copies of letters from neighbors. The changes did not alter the relief requested." While the ANC may not have had the final plans when they wrote their report, the project's footprint and massing had not changed materially since the drawings had been presented to them. (Exhibit 39, Statement from Applicant's Architect.) It is safe to assume, therefore, that the ANC report would not have significantly changed, or even that a subsequent report would have been issued had the ANC possessed the updated plans. The same may be said for the authors of the letters in support.

Alleged Misapplication of Relevant Standards

General Test for Special Exception Relief

The Board concluded that the special exception would be in "harmony" with the general purpose and intent of the Zoning Regulations and Zoning Maps. (Decision, Conclusions of Law, p. 5.) The Finstons seem to claim that it was not possible for the Board to reach this conclusion. Again, the Finstons are using the reconsideration process as a pretext to rehash arguments made and rejected by the Board.

"Special conditions" for a Special Exception Under § 223

The Finstons claim that the Board "misapplied" the relevant standards under § 223, claiming the

Board ignored evidence regarding adverse impacts on neighboring properties such as loss of privacy, loss of green cover and vegetation, the impact of slope on noise levels, the placement of windows, and the project's incompatibility with the neighborhood. First, the Finstons do not point to a single shred of evidence that supports their claim of adverse impacts in the above respects. Second, the Board did not misapply the regulatory standards. The Board evaluated the application under the criteria of §§ 223.1, 223.2(a), 223.2(b), 223.2(c), 223.2(d), 223.3, and 223.4. The Finstons repeat the same arguments throughout their motion. For instance, they claim that the Applicant's photos and elevations were "misleading" and did not accurately depict the location of structures. Again, these arguments were made during the hearing and were rejected. (See, Post-Hearing submission, Exhibit 38, p. 2-5.)

Other Miscellaneous Allegations

The Finstons claim that the Board erroneously gave great weight to the ANC report because the ANC did not provide a detailed narrative analysis or justification in its report. Again, this is incorrect. All that is required of an ANC is that its recommendations "be in writing and articulate the basis for its decision." D.C. Official Code § 1-309.10 (d)(1). The ANC report met this requirement.

The Finstons claim that the Board should have credited various letters in opposition that they believe "demonstrate[d] [an] accurate understanding of the proposed addition". (Motion, p. 6.) The Board is required to resolve all disputed material issues. It is not required to comment on each and every piece of evidence that it receives, or explain why a particular letter should or should not be credited. *Fleischman, id.*

In conclusion, the Finstons have not identified any legal or factual errors, or any other basis upon which the Board should rehear or reconsider its decision in this case. For these reasons, it is hereby **ORDERED** that the Motion for Rehearing and Reconsideration is **DENIED**.

VOTE: **4-0-1** (Lloyd J. Jordan, Rashida Y.V. McMurray, Jeffrey L. Hinkle, and
Marcie I. Cohen, voting in support of the motion to DENY; Nicole
C. Sorg not voting, being necessarily absent)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this Order.

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: May 20, 2013

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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.