

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18429-A on the Motion for Reconsideration and Rehearing of the Appeal of Edward V. Hanlon, pursuant to 11 DCMR §§ 3100 and 3101, from a decision by the Zoning Administrator (ZA) of the Department of Consumer and Regulatory Affairs made April 10, 2012, to issue building permit No. B1206336 allowing the construction of a third-story roof deck, and a decision made June 5, 2012, to issue Building Permit No. B120969, which revised Permit No. B1206336, and allowed the relocation of an exterior stairwell connecting the existing second-story roof deck to the new third-story roof deck, all in the DC/R-4 District at premises 1530 Swann Street, N.W. (Square 191, Lot 76).

HEARING DATES: October 30, 2012, November 2, 2012, and December 4, 2012

DECISION DATE: February 12, 2013

RECONSIDERATION

DECISION DATE: January 7, 2014

ORDER DENYING RECONSIDERATION AND REHEARING

By order dated December 5, 2013, the Board denied an appeal submitted on June 11, 2012 by Edward V. Hanlon (the “Appellant”), challenging the Zoning Administrator’s (“ZA”) issuance of two building permits which allowed the construction of a two-story roof deck at 1530 Swann Street, N.W., located in the DC/R-4 District (Square 191, Lot 76) (the “Subject Property”). After a public hearing, the Board found that the ZA had not erred in issuing the building permits and that the appeal should be denied. The parties in the proceeding were the Appellant, the Department of Consumer and Regulatory Affairs (“DCRA”), and the owner of the Subject Property.

On December 16, 2013, the Appellant submitted a motion for reconsideration of the Board’s decision and for rehearing of the appeal. In the motion, the Appellant contended that the Board was misled as to a critical fact in the case, and therefore, erred in its decision to deny the appeal. The Appellant claimed that, though the two-story roof deck structure that is the subject of the appeal was described as DCRA’s counsel as being open and uncovered, photographs of the property demonstrate that part of the second-floor deck is covered by a roof. Because the deck is covered, the Appellant argued that the project was an “addition” requiring additional zoning relief and that the building permits were improperly issued. The Appellant also raised the issue

BZA APPEAL NO. 18429-A
PAGE NO. 2

that the structure was wrongfully constructed on the lot line and is situated on the adjacent lot at 1528 Swann Street, N.W. The Appellant provided photographs, taken after the case record was closed, in order to support his claims of unlawful construction. Finally, the Appellant argued that a rehearing is appropriate because the Appellant only recently acquired the close-up photographs of the roof over the second-story deck.

On December 20, 2013, DCRA submitted a response to the motion, claiming that the Appellant's arguments for reconsideration were without merit and should be dismissed. DCRA argued that the existence of a roof over the second-story deck is not new evidence. Rather, documents in the record, including the Appellant's Pre-hearing Statement, contain references to this existing roof over the second-story deck. Further, DCRA claimed that the Appellant's argument that DCRA misled the Board by obscuring the truth about the presence of the roof was based on the misinterpretation on DCRA's testimony during the public hearing. In addition, DCRA noted that the unlawful construction issues raised by the Appellant would be a matter of enforcement under the jurisdiction of DCRA and not that of the Board.

On December 23, 2013, the Property Owner also submitted a response to the motion, contending that the Appellant had the opportunity to discuss the newly raised issues during the original hearing, but simply failed to do so. Further, the Property Owner noted that the roof over the second-story deck was mischaracterized by the Appellant. In his motion, the Appellant assumed that the roof structure was part of the new construction authorized by the two DCRA permits at issue; however, the Property Owner contended that the covered portion of the second-story deck was in existence before the aforementioned permits were issued.

At a public meeting on January 7, 2014, the Board voted to deny the Appellant's motion for reconsideration and rehearing.

CONCLUSIONS OF LAW AND DECISION

Pursuant to 11 DCMR § 3126.2, any party may file a motion for reconsideration of a decision of the Board, provided that the motion is filed within 10 days from the date of issuance of a final written order by the Board. In this case, the written order denying the appeal was issued on December 5, 2013 and the motion for reconsideration and rehearing was timely filed on December 16, 2013.

Pursuant to 11 DCMR § 3126.4, a motion for reconsideration must state specifically all respects in which the final decision is claimed erroneous, the grounds of the motion and the relief sought. A request for rehearing shall only be considered by the Board when new evidence is submitted that could not reasonably have been presented at the original hearing. (11 DCMR § 3126.6.)

The Board was not persuaded that the Appellant's motion provided a sufficient basis to reconsider its decision to deny the appeal. The Appellant claims that the Board was misled regarding the presence of a roof over the second-story deck on the Subject Property and that,

BZA APPEAL NO. 18429-A
PAGE NO. 3

because of the roofed structure, the construction authorized by the building permit should have been classified as an addition to a building under the Zoning Regulations. Such an addition, the Appellant argues, requires additional relief. The Appellant supports his argument with photographs showing a roof structure partially covering the second-floor deck on the Subject Property. The Appellant supports his contention that DCRA misled the Board as to this fact by citing to DCRA's testimony during the public hearing, in which DCRA's counsel stated that "the roof deck here is not covered."

The Board finds that the photographs of the roof over the second-story deck only serve to corroborate the narrative descriptions of the structure found in the record upon which the Board based its decision. These references to the roof over the second-story deck, including several mentions within the Appellant's own Pre-Hearing Statement, support the notion that the Appellant's photographs do not introduce new evidence that would justify reconsideration, but rather supplement existing evidence describing the structure. Further, the Board finds that the photographic evidence provided by the Appellant does not contradict the testimony of DCRA's counsel. The Board credits DCRA's explanation that the statement "the roof deck here is not covered," in its original context, referred to the uncovered third-story deck and not the covered second-story deck the Appellant discussed in this motion. Moreover, as the Property Owner clarifies, the Appellant mischaracterized the roofed structure, assuming that it was part of the project authorized by DCRA Building Permits No. B120969 and B1206336. The Board finds that the roofed portion of the second-story deck was in existence before these permits were issued and that the roof was considered by the ZA during the permitting process. Accordingly, the Board concludes that the Appellant's argument and evidence fail to show an error in the Board's decision.

Additionally, the Appellant argues that the deck was unlawfully constructed on the adjacent property's lot line. The veracity of this accusation aside, the Board does not have the jurisdiction to decide this issue. The alleged construction on the lot line would be a violation of D.C. Official Code § 6-404 (2012 Repl.), and not a violation of the Zoning Regulations. Pursuant to 11 DCMR § 3100.2, the Board has the authority to hear appeals "where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body ... in the administration or enforcement of the Zoning Regulations, Title 11 DCMR." Because the Appellant did not demonstrate that the Board's final decision was erroneous, as required by § 3126.4, the Board concludes that the Appellant's request for reconsideration must be denied.

Finally, the Board was not persuaded that the new evidence proffered by the Appellant could not reasonably have been presented at the original hearing. The Appellant notes that the close-up photographs of the second-story deck were only recently acquired, but does not explain why such evidence could not have reasonably been presented at the time of the original hearing. In any event, although the photographs may be new, the circumstance depicted were known at the time of the original hearing. Accordingly, the Board will not consider the Appellant's request for rehearing.

BZA APPEAL NO. 18429-A
PAGE NO. 4

Accordingly, it is hereby **ORDERED** that the motion for **RECONSIDERATION** and **REHEARING** is **DENIED**.

VOTE: **4-0-1** (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle, and Robert E. Miller (by absentee vote) to Deny; one Board seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

The majority of the Board members approved the issuance of this order.

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: August 18, 2014

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.