

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18460 of Ginia L. Avery, *et al.*, pursuant to 11 DCMR §§ 3100 and 3101, from a decision by the Department of Consumer and Regulatory Affairs to issue Building Permit No. B1202925 allowing the construction of a retail store in the C-3-A and the R-5-A Districts at premises 5929 Georgia Avenue, N.W. (Square 2986, Lot 38).

HEARING DATE: October 16, 2012

DECISION DATE: October 16, 2012

DISMISSAL ORDER

PRELIMINARY MATTERS

On August 10, 2012, Ginia L. Avery and five other individuals (“Appellant”) filed this appeal with the Board of Zoning Adjustment (“BZA” or “Board”). Appellant appealed the granting of Building Permit No. B1202925 (“Permit”) by the D.C. Department of Consumer and Regulatory Affairs (“DCRA” or “Appellee”). That building permit authorized the construction of a new retail building to be leased to Wal-Mart (“Project”) at premises 5929 Georgia Avenue, N.W. (“Property”). The Appeal concerns the Large Tract Review process set forth in Chapter 23, of Subtitle B, of Title 10 of the District of Columbia Municipal Regulations. The Appeal notes that one of the goals of the Chapter is to carry out the policies of the District Elements of the Comprehensive Plan for the National Capital. The Appellant asserts that the Project fails to carry out several of those goals and therefore the building permit should not have been issued. Motions to dismiss were filed by the Appellee and the property owner¹, which argued that because the Large Tract Review process is not included in the Zoning Regulations, the Board has no authority to hear any appeal of a building permit issued as a result of a purported flaw in the review.

On October 16, 2012, after deliberating upon the merits of the motions to dismiss and the opposition thereto filed by the Appellant, the Board dismissed the appeal for lack of jurisdiction by a vote of 3-0-2.

¹ A motion to dismiss was also filed by Wal-Mart along with a motion to intervene. Because the Board reached the issue of its jurisdiction, it did not rule on the motion to intervene and therefore did not consider Wal-Mart’s motion to dismiss.

BZA APPEAL NO. 18460
PAGE NO. 2

Notice of Appeal and Notice of Hearing. By memoranda dated August 13, 2012, 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") 4B, the ANC within which the subject property is located, Single Member District 4B04, the Councilmember for Ward 4, and the owner of the subject property. On September 11, 2012, the Office of Zoning mailed a Notice of Public Hearing to ANC 4B and on September 12, 2012, the Office of Zoning mailed a Notice of Public Hearing to the Appellant.

Party Status. Consistent with 11 DCMR § 3199.1, the parties in this proceeding were the Appellant, DCRA, ANC 4B, and the owner of the subject property.

ANC Report. ANC 4B filed a letter with the Board dated October 1, 2012 indicating that, at a regularly scheduled, properly noticed meeting, with a quorum present, the ANC voted to adopt a resolution in support of the appeal. (Exhibit 22.) The ANC's resolution notes that the appeal is based on the Comprehensive Plan and the Upper Georgia Avenue Great Streets Redevelopment Plan and that the Project appears to be inconsistent with these plans and will have adverse impacts. (Exhibit 22.)

FINDINGS OF FACT

1. The Property is located in the C-3-A and R-5-A Zone Districts. All of the proposed building improvements will be located in the C-3-A zone where the project is permitted as of right. (Exhibit 24.)
2. The Office of Planning promulgated regulations to establish a coordinated interagency review process in the District of Columbia of certain types of projects before an application for a building permit is filed. This coordinated review is known as the Large Tract Review process and is set forth in Chapter 23 of Subtitle B of Title 10 of the District of Columbia Municipal Regulations ("DCMR").
3. The parties agree that the Project was subject to the Large Tract Review process.
4. The Office of Planning issued a memorandum dated August 10, 2011, indicating that its review concluded that the Project addressed the goals of the Large Tract Review regulations and would not be inconsistent with the Comprehensive Plan. (Exhibit 24.)
5. On or about June 13, 2012, DCRA issued Building Permit No. B1202925 for the Project.
6. On August 10, 2012, the Appellant appealed the issuance of the building permit claiming that DCRA erred in granting the Permit because the Project violates the goals of the Comprehensive Plan and the Upper Georgia Avenue Great Streets Development Plan. (Exhibits 1-8.)

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. 18239 of ANC 6A*, 59 DCR 1655 (2011) ("As the Board has held several times, the Board has no authority to hear an appeal that is not based upon an interpretation of a zoning regulation").

Here, the Appellant claims error in DCRA's issuance of Building Permit No. B1202925 because the Project purportedly does not carry out the policies of the District Elements of the Comprehensive Plan for the National Capital and therefore was not consistent with one of the stated goals of the Large Tract Review process.

The Large Tract Review process was adopted as a regulation by the Office of Planning. It therefore cannot be considered a Zoning Regulation, because those can only be adopted by the Zoning Commission. *See* D.C. Official Code § 6-621.01 (e) ("The Zoning Commission shall exercise all the powers and perform all the duties with respect to zoning in the District as provided by law") (made part of the District Charter through § 492 of the Home Rule Act.) All of the Zoning Regulations are set forth in Title 11 of the DCMR and in no other Title. *See* 11 DCMR 100.5 ("The regulations in this title shall be known and may be cited by the short title of the "Zoning Regulations of the District of Columbia."). Since the Large Tract Review Process and the Comprehensive Plan were not adopted by the Zoning Commission, neither can be considered Zoning Regulations and any error regarding their interpretation is beyond this Board's jurisdiction to consider. The District of Columbia Court of Appeals has consistently held that "The Board's limited function is to assure that the regulations adopted by the Zoning Commission are followed; it has "no authority to implement the Comprehensive Plan." *French v. Board of Zoning Adjustment*, 658 A.2d 1023, 1034 (D.C. 1995) quoting *Tenley & Cleveland Park Emergency Committee v. District of Columbia Board of Zoning Adjustment*, 550 A.2d 331, 341 (D.C. 1988), *cert. denied*, 489 U.S. 1082, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989).

ANC 4B, to whose issues and concerns the Board must give great weight, pursuant to D.C. Official Code § 1-309.10(d) (2001), adopted a resolution in support of the appeal. 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**.

BZA APPEAL NO. 18460

PAGE NO. 4

VOTE: **3-0-2** (Lloyd J. Jordan, Jeffrey L. Hinkle, and Peter G. May to Dismiss; Nicole C. Sorg not present, not participating; one Board seat vacant.)

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT

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

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: March 11, 2013

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO.18460

As Director of the Office of Zoning, I hereby certify and attest that on March 11, 2013, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail or delivered by electronic mail in the case of those ANC's and SMD's that have opted to receive notices thusly, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning