

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

BZA Appeal No. 18857

Hearing Date: November 18, 2014

STATEMENT OF APPELLANT
SPRING VALLEY-WESLEY HEIGHTS CITIZENS ASSOCIATION

Appellant Spring Valley-Wesley Heights Citizens Association (“SVWHCA”) respectfully submits this statement in support of its appeal of the decision of the Zoning Administrator to issue Permit No. (No. FD1400058) (the “Permit”) to applicant and intervenor American University (the “University”).¹ The Permit improperly amends plans submitted to and approved by the Zoning Commission (the “Commission”) without the Commission’s approval, and should be revoked.

SVWHCA submits that this appeal raises a simple issue of jurisdiction and proper procedure: where the University wishes to amend or depart from the plans approved by the Commission in a campus plan proceeding, can the University obtain such approval from the *Zoning Administrator* rather than the *Commission*? The answer is clearly no: if the University wishes to amend its plans, it should obtain permission from the zoning authority that approved them. It is not the province of the Zoning Administrator to make amendments, even amendments it might consider minor, to plans approved by the Commission.

For this sensible principle the Board need only look to its own regulations. 11 DCMR §3125.7 expressly states that “[a]pproval of an application shall include approval of the plans

¹ SVWHCA respectfully request permission to file this statement beyond 14th day prior to the November 18 hearing date specified by the Board in its notice of hearing; SVWHCA’s request for consolidated appeals is pending and SVWHCA was not given a hearing notice.

submitted with the application for the construction of a building or structure (or addition thereto) or the renovation or alteration of an existing building or structure, unless the Board orders otherwise.” The implied rule – that approval of an application is understood to be approval *only* to build in accordance with the plans submitted – is so basic a feature of practice that the Board reminds applicants of it in large capital letters appearing at the end of its more recent orders as a matter of course:

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION **ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.**

See, e.g., BZA Order No. 18782 (June 26, 2014) (emphasis added).²

The same rules that apply to the Board in this regard also expressly apply to campus plan proceedings before the Commission. 11 DCMR §3104.5 makes clear that “the Commission *shall use the Board of Zoning Adjustment Rules of Practice and Procedure in this chapter*” – which includes 11 DCMR § 3125.7 – “in processing, reviewing, and approving all applications for special exception approval for college and university uses, such that wherever a particular

² There is no basis to consider the extra story of underground construction here a “minor” change to the approved plans, but in any event 11 DCMR § 3129.2 further specifies that even “minor” modifications are not an exception to this rule. Under this regulation the Board – not the Zoning Administrator – considers such amendments:

The Board shall consider requests to approve minor modifications to plans approved by the Board, as set forth in §§ 3125.7 and 3125.8. The request shall be in writing, shall state specifically the modifications requested and the reasons therefore and include a copy of the plans for which approval is now requested.

provision in this chapter refers to the Board of Zoning Adjustment, the word ‘Board’ shall mean Zoning Commission” (emphasis added). Thus, as is the case before the Board, approval plans submitted to the Commission means approval *only* of the submitted plans.

The rule that the zoning authority which approves submitted plans must also give permission for any amendments to submitted plans embodies obvious procedural protections and benefits that should be recognized here. Plans approved by a zoning authority are often detailed and elaborate. It would be a terrible waste of resources to require a zoning authority to specify in express *conditions* to approval all those aspects of the plans which the zoning authority believed to be important. Moreover, it creates ambiguity, confusion and error to invite the Zoning Administrator to speculate – as it wrongly did here -- as to whether plans were merely “illustrative” or whether “there may be contradictory information in other exhibits.” These consequences are avoided by a sensible procedural rule that holds an applicant to its plans as submitted, unless and until a variation from those plans is approved.

Here, the University submitted its plans for the Further Processing of the East Campus on March 18, 2011 (Exhibit 8, Commission Case 11-07) which included narrative stating in Section 9.1.3(b) that the site would include a "single below grade level of parking." The University submitted diagrams of the East Campus site that included the single level story of parking (Exhibit 50); which were accompanied by testimony reiterating that the underground parking garage would be one level and supplementing their comments with drawings and plans (Exhibit 242). The Commission’s final order references those same exhibits in Paragraph 145. The order contains no information that would suggest approval of anything other than a single level parking garage.

If the University wishes to amend its plans, therefore, it should obtain approval not from the Zoning Administrator, but from the Commission.³ The process for doing so need not be lengthy or detailed, but it should be *followed*. It defies common sense for the University to urge the contrary on the grounds that “the number of levels of parking was never a contested issue.” University Statement in Opposition at p.3. Why would there be any “issue” to “contest” when the University never raised it? Nor does it matter that the Commission’s order “does not include a Condition” that limits the parking to one story. *Id.* The Commission plainly did not need to include a condition that the University follow its own stated plans. Just the opposite is true: the Commission’s order expressly granted flexibility to *depart* from the approved plans in limited respects, because it understood that otherwise, the University would indeed be bound by those plans as submitted.⁴

³ The University relies on an unpublished and irrelevant prior “determination” of the Zoning Administrator for the proposition that the Zoning Administrator has the power to make amendments to approved plans. University Statement in Opposition at p.4. The letter it cites flies in the face of the requirements of 11 DCMR § 3125, and is no kind of authority before this Board in any event. First, it certainly did not arise in a “similar case”: it addresses a requested variance from the requirement for a number of offstreet parking spaces for a development in the SP-2 District, not a campus plan in a residential zone. Second, it concerns an entirely moot point; the change to parking garage was never carried out, because this Board instead approved a change in the number of spaces as requested. *See* BZA Order 18227-A (July 5, 2012). Finally, of course, a Zoning Administrator determination is entitled to no deference or persuasive authority before this Board. *See, e.g., Ward 5 Improvement Association v. BZA*, No. 12-AA-1444 (D.C. Court of Appeals, August 21, 2014) (Slip Op. at pp. 16-17 (holding that “[i]t is the Board, not the Zoning Administrator, which has final administrative responsibility to interpret the zoning regulations” and that “[t]he BZA’s interpretive responsibility, therefore, is de novo” (internal quotations and citations omitted))).

⁴ It is similarly strained for the Zoning Administrator to argue here that the Commission “approved a 150-space garage, not a one level garage.” DCRA Prehearing Statement at p.3. The Commission approved the Campus Plan and Further Processing in accordance with the plans submitted to it; nothing less, and nothing more, except to the extent its conditions indicated otherwise.

It is not clear why, if the University wished to add another underground story to the parking garage plans it submitted to the Commission, it did not ask the Commission itself. If the change raises no issue, the Commission would presumably readily approve. But there may be concerns with such an amendment: in particular, as the University concedes, “regarding potential adverse impacts on the flow of underground water, or the possibility of perchlorate contamination, that may occur as a result of deeper excavation.” University Statement in Opposition at p.4. The Commission may wish to consider such issues; and affected residents have a right to be heard on the matter. The Zoning Administrator should not be allowed to circumvent such proper procedures, and its issuance of the Permit should be vacated.

Respectfully submitted.

A handwritten signature in black ink, appearing to read 'Michael Mazzuchi', written in a cursive style.

Michael A. Mazzuchi
President, Spring Valley-Wesley Heights Citizens Association

November 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2014, I caused one copy of the foregoing Statement of Appellant Spring Valley-Wesley Heights Citizens Association to be served by first class mail, postage prepaid, to the following persons at the following addresses:

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