DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington D.C. 20001

Appeal of Advisory Neighbor Commission 3D and Spring Valley-Wesley Heights Citizens Association — Appeal No. 18857

DCRA'S MOTION TO STRIKE APPELLANT SPRING VALLEY'S BRIEF

Appellant Spring Valley-Wesley Heights Citizens Association (Spring Valley) filed a prehearing statement less than a week before the scheduled hearing alleging that the Zoning Administrator erred in approving permits for an underground garage. Because the brief is untimely and Spring Valley has not justified its failure to file a timely brief, the brief should be struck from the record.

ARGUMENT

1. The untimely brief should be struck.

The Zoning Regulations provide that "[n]o later than fourteen (14) days before the date of the hearing for the appeal, the appellant shall file with the Board any additional statements, information, briefs, reports (including reports or statements of expert and other witnesses), plans, or other materials that the appellant may wish to offer into evidence at the hearing." 11 D.C.M.R. § 3112.10. This language unequivocally sets a deadline for when an appellant must file materials with the Board. That deadline is 14 days before the hearing.

In this case, the hearing is scheduled for November 18, 2014. 14 days before November 18 is November 4. Yet Spring Valley did not file its brief until November 12,

2014. So the brief is clearly untimely. And Spring Valley makes virtually no attempt to explain why it could not file its brief in a timely fashion. For this reason alone, the brief should be struck.

DCRA and Intervenor are also prejudiced by the untimely brief. This is not a case where the untimely brief is only a day or two late. It is over a week late. By the time Spring Valley filed its brief, DCRA and Intervenor had already filed their briefs. In fact, Spring Valley explicitly responds to DCRA and Intervenor's arguments in the brief. The result is that instead of DCRA and Intervenor having the last word, as is contemplated by the rules, Spring Valley has attempted to do so. This is improper and another reason the brief should be struck.

2. The ZC order does not require AU to construct a one level garage.

But even if the Board accepts the brief, it should reject the arguments made in it. In the brief, Spring Valley argues that AU is required to build the garage exactly as shown on exhibits AU submitted during the Zoning Commission case. For this position, Spring Valley relies on 11 D.C.M.R. §§ 3125.7 and 3125.8. Section 3125.7 provides that "[a]pproval 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, unless the Board orders otherwise." And Section 312.58 provides that "[a]n applicant shall be required to carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board, unless the Board orders otherwise."

There are three problems with Spring Valley's argument. The first is that Sections 3125.7 and 3125.8 specifically provide that they do not apply if the order at issue provides otherwise. Here, the Order provides otherwise. The ZC Order states that

"it is ORDERED that the application for approval of a new campus plan for an extended and enlarged university use, as well as further processing of the approved plan for the development of the East Campus, an addition to Nebraska Hall, and an addition to the Mary Graydon Center, is GRANTED SUBJECT to the following CONDITIONS…" The Order then goes on to list a number of conditions. None of the listed conditions require AU to build the garage as shown on any particular exhibits. Since the ZC approved the East Campus proposal, explicitly listed a number of conditions, and those conditions do not include any requirement that the garage be built exactly as shown on any exhibits, no such requirement should be imposed.

The second shortcoming of Spring Valley's argument is that Sections 3125.7 and 3125.8 are found in Chapter 31 of the Zoning Regulations. Chapter 31 contains the Board of Zoning Adjustment rules. Chapter 30, which contains the Zoning Commission rules, has no similar provisions. Thus, Sections 3125.7 and 3125.8 do not even apply in ZC cases like the one at issue here.

Spring Valley does recognize that Sections 3125.7 and 3125.8 are BZA rules and attempts to get around this fact with 11 D.C.M.R. § 3104.5. This rule provides that "the [Zoning] Commission shall use the Board of Zoning Adjustment Rules of Practice and Procedure… in processing, reviewing, and approving all applications for special exception approval for college and university uses."

By its plain terms, Section 3104.5 requires the Zoning Commission to follow BZA rules in processing, reviewing, and approving special exceptions for college uses. The key phrase is "processing, reviewing, and approving." Here, Spring Valley is not claiming that the Zoning Commission made some procedural error in processing, reviewing, or approving the special exception. It is arguing that the ZC Order implicitly

carries with it the command that AU build the garage exactly as shown on exhibits submitted during the ZC case. Section 3104.5 does not impose any such requirement because that type of requirement has nothing to do with the processing, reviewing, or approving of the application.

Finally, Appellant's interpretation of Sections 3125.7 and 3125.8 is incorrect. According to Appellant, those rules mean that if there is any change to the submitted plans, the case must be returned to the BZA (or in this case the ZC) for further proceedings. That is not practical and not how the rules have been applied by the Office of the Zoning Administrator. It is not uncommon for parties who have been granted relief at the BZA to make minor design changes to the plans that were submitted to the BZA. If the Zoning Administrator sent every such case back to the BZA, there would be a huge increase in the BZA's docket. So, instead, what happened in this case reflects the Zoning Administrator's practice to allow such changes as long as those changes do not conflict with conditions set forth in the Order and the changes do not create any new areas of zoning relief.

CONCLUSION

Appellant's untimely brief should be stricken. But even if the Board accepts it, the arguments made in it are without merit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November 2014, a copy of the foregoing Brief was served via e-mail to:

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