

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18888 of Adams Morgan for Reasonable Development, pursuant to 11 DCMR §§ 3100 and 3101¹, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to approve Building Permit No. B1309151 for construction of a mixed-use building at 1700 Columbia Road, N.W. and located in the C-2-B Zone District (Square 2565, Lot 52).

HEARING DATE: January 13, 2015
DECISION DATE: February 10, 2015

ORDER GRANTING MOTION TO DISMISS APPEAL

This appeal was submitted to the Board of Zoning Adjustment (“Board” or “BZA”) on September 24, 2014, by Christopher Otten on behalf of Adams Morgan for Reasonable Development (“AMFRD” or “Appellant”). The appeal purported to challenge the issuance of Building Permit No. B1309151 (“Building Permit”) on July 24, 2014, for construction of a new six-story residential building with ground floor retail and a below-grade garage (“Building”) at 1700 Columbia Road, N.W. (“Property”). As noted in the caption above, the Board determined that the appealable decision was the Zoning Administrator’s approval of the issuance of that permit. AMFRD initially alleged that the proposed construction violated the rear yard requirements of § 774 of Title 11, D.C. Municipal Regulations (“Zoning Regulations”). AMFRD amended its appeal on December 30, 2014, to allege that the rooftop structures violate §§ 411.3, 411.5, 411.6, 411.7, and 411.8 of the Zoning Regulations.

On December 30, 2014, Ontario Residential LLC (“Ontario”, the owner of the property, and therefore an automatic party², filed a motion to dismiss the appeal (“Motion”) because it was not timely filed and it failed to state a claim for which relief could be granted.

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraphs, are to provisions that were in effect on the date this appeal was filed, but which were repealed as of September 6, 2016 and replaced by new text. Also, all zone districts described in this order were renamed as of that date. The repeal and replacement of the 1958 Regulations and the renaming of the zone districts has no effect on the validity of the Board’s decision or the validity of this order.

² See 11 DCMR § 3199, Definition of “Party, subparagraph (a)(3). As such, it was unnecessary for Ontario’s motion to also request it to be granted intervenor status.

BZA APPLICATION NO. 18888
PAGE NO. 2

The Board held a hearing on the timeliness issue and the merits on January 13, 2015, after which the Board closed the record and scheduled its decision for February 10, 2015. At the Board's public meeting on that date it voted 5-0 to grant the portion of the Motion that sought dismissal on timeliness grounds, to deny the portion of the Motion that sought dismissal based upon an assertion that the Appeal, as filed, failed to state a claim upon which relief could be granted and, in the alternative, to sustain the Zoning Administrator's decision. The findings of facts and conclusions of law that support the Board's decision follow.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on January 13, 2015. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, Advisory Neighborhood Commission ("ANC") 1C (the ANC in which the property is located), the property owners, and the Department of Consumer and Regulatory Affairs ("DCRA"). (Exhibits 3-11.)

Parties

The Appellant in this case is Adams Morgan for Reasonable Development, represented by Mr. Otten. DCRA is the Appellee, as the "person" whose administrative decision is the subject of the instant appeal, pursuant to 11 DCMR § 3199.1(a)(2). As noted, Ontario Residential LLC, the owner of the property and developer of the Building, was automatically a party to the proceeding as was the ANC. However, the ANC did not participate in this proceeding.

FINDINGS OF FACT

The Property and the Project

1. The Property that is the subject of this appeal is located at 1700 Columbia Road, N.W. (Square 2565, Lot 52). (Exhibit 1.)
2. The Property is located in the C-2-B Zone District in the Adams Morgan neighborhood. (Exhibit 14E, Exhibit 16A.)
3. DCRA issued Building Permit No. B1309151 ("Building Permit") on July 24, 2014, for construction of a new six-story residential building with ground floor retail ("the Project") on the Property.
4. The Project will provide a rear yard with a depth of at least 15 feet. (Exhibit 15.)
5. A garage ramp is located at-grade, within the 15-foot setback and leads to the Building's below-grade garage. (Transcript, p. 84; Exhibit 1.)

BZA APPLICATION NO. 18888
PAGE NO. 3

6. The walls surrounding the garage ramp are less than four feet in height.
7. The Project's generator is not located within the required rear yard.
8. The platform upon which the generator sits is in the required rear yard and is less than four feet in height.
9. There is no louver located in the required rear yard. (Exhibit 14E, Attachment 13.)
10. The rooftop structures are connected with a trellis at a uniform height. (Transcript pp. 69-70 and Exhibit 22, RTE 3.)
11. The mechanical equipment on the roof is less than four feet in height. (*Id.*)
12. The floor area ratio ("FAR") of the rooftop structures is .13 FAR.

Events leading to the filing of this Appeal

13. AMFRD has carefully followed the development of the Project since at least February of 2013 when it requested and received party status in Application No. 18506 in which the BZA granted relief from the parking, loading, and roof structure requirements for the Project. After the Court of Appeals found no basis for the Board to have granted the roof structure relief, Ontario re-designed the roof structure to meet matter of right standards and withdrew its request for roof structure relief. (Exhibit 14E.)
14. After Ontario filed its request for a building permit to construct the project, AMFRD closely monitored the progress of the permit through the DCRA approval process using DCRA's Property Information Verification System ("PIVS"), which provided the real-time approval status of building permit applications.
15. The Zoning Administrator ("ZA") reviewed and approved the Project on July 14, 2014 and simultaneously entered the approval on the PIVS website. (Exhibit 14B.)
16. AMFRD accessed the PIVS after July 14th and as a result became aware of the ZA's approval, as evidenced by its July 24th email to the ZA in which it stated "[w]e have checked the PIVS webpage at the DCRA website for information and we see that Building Permit #B1309151 has not yet been approved, as it is still under review by some DCRA disciplines." (Exhibit 14A.)
17. The Building Permit was issued on July 24, 2014. (Exhibits 2, 14B.)
18. AMFRD filed this appeal on September 24, 2014, more than 60 days after it became aware of the ZA's decision.

CONCLUSIONS OF LAW

The Board is authorized by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. An appeal must be filed within 60 days after the date the appellant “had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.” (11 DCMR § 3112.2 (a).) Although this deadline is a “claims processing rule” and therefore not jurisdictional in nature, *see Gatewood v. District of Columbia Water and Sewer Authority*, 82 A.3d 41 (2013) (WASA deadline to file appeal of water bill is non-jurisdictional), the failure to adhere to the rule will result in the dismissal of an appeal unless the 60-day deadline is extended under circumstances stated at 11 DCMR § 3112.2(d).

The Motion to Dismiss

As noted, the Owner filed a motion to dismiss asserting that the appeal did not state a claim upon which relief can be granted and was not timely filed. As to the first ground, the Board’s rules do not specify the level of pleading that must be made when an appeal is filed. The Board’s rules only require that an “appeal shall be made on the appropriate form provided by the Board” and that all “information required by such form shall be furnished by the appellant at the time of filing the appeal.” (11 DCMR § 3112.5.) Since the Appellant clearly met this requirement, its appeal cannot be dismissed for not meeting a non-existent specificity standard.

With respect to the timeliness grounds, 11 DCMR § 3112.2(a) provides that an appeal must be filed within 60 days from the date the person filing the appeal first had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier. The first question therefore is what is the “decision complained of.” The Appellant asserts the decision was DCRA’s issuance of the building permit. But in the circumstances presented here, the Board concludes that the decision on appeal was the ZA’s July 14, 2014 determination that the Project complied with the Zoning Regulations, which he posted on the PIVS webpage that same day.

In *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008), the Court of Appeals noted its prior precedent recognizing that a building permit or certificate of occupancy were not the only types of decision that started the time for filing an appeal, noting that:

[T]he zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specified type of notice ... our case law specifically recognizes that a letter from DCRA or the Zoning Administrator conveying a zoning decision may be an appealable decision, and may start the time for appeal by a person who has notice of the letter.

BZA APPLICATION NO. 18888
PAGE NO. 5

Thus, in *Basken*, the Court of Appeals held that a DCRA letter stating an intent to issue a certificate of occupancy notwithstanding the illegality of the proposed use was the appealable decision and not the subsequently issued certificate of occupancy. In *Appeal No. 18300 of Lawrence and Kathleen Ausubel*, the Board applied the principle to the building permit stage, holding that a Zoning Administrator email and not the subsequently issued building permit started the time for filing an appeal. And in *Appeal No. 18469 of Susan Lynch*, the Board found that the ZA's approval for zoning compliance as entered in the PIVS website started the time for filing an appeal, and not the subsequently issued permit. The Board reasoned that:

The word 'approved' next to zoning in PIVS, without any qualifications, whatsoever was unequivocal: the permit had been cleared by zoning for issuance. Thus, any member of the public accessing this information, including the Appellant, knew that the ZA had approved the revised permit applications for zoning purposes. And, like the Appellants in *Basken* and *Ausubel*, Ms. Lynch's knowledge of the approval gave her the first notice of the zoning decision being complained of.

BZA Appeal No. 18469, p.8.

Since there is nothing to distinguish the *Susan Lynch* precedent from the circumstances involved here, the Board holds that the ZA's July 14th determination of zoning compliance was the decision complained of. The next question is whether the Appellate filed this appeal within 60 days after it knew or should have known of that decision.

The ZA posted his July 14th approval on the PIVS webpage that same day. Ten days thereafter, on July 24th, Mr. Otten, on behalf of AMFRD, emailed the ZA and stated "[w]e have checked the PIVS webpage at the DCRA website for information and we see that Building Permit #B1309151 has not yet been approved, as it is still under review by some DCRA disciplines." The Board concludes that this statement, and particularly its allusion to "some DCRA disciplines" is clear evidence that Mr. Otten knew on or before July 24th of the ZA's July 14th decision. Even if the Board uses the latest possible notice date of July 24th, the 60-day period for filing this appeal expired on September 22, 2014. AMFRD filed its appeal on September 24, 2014.

Subsection 3112.2 (d) provides that the Board may extend the 60-day deadline for the filing of an appeal if the appellant demonstrates that:

- (1) There are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and
- (2) The extension of time will not prejudice the parties to the appeal, as identified in § 3199.1.

AMFRD did not identify any exceptional circumstances that substantially impaired its ability to timely file this appeal. Therefore, the 60-day period for doing so is not tolled, the appeal is untimely, and the motion to dismiss is granted on that ground.

The Merits

As previously discussed, the untimeliness of this appeal did not deprive the Board of subject matter jurisdiction over the case. Therefore, the Board's vote to dismiss the appeal did not eliminate its ability to also decide the merits. Although the Board hopes that its decision to dismiss the appeal will withstand any petition for review that might be filed, deciding the merits now could prevent a later unnecessary remand. The Board's then Chair therefore moved to both dismiss the appeal and, in the alternative, deny the appeal on its merits. As noted, the motion carried.

The appeal initially challenged the issuance of the Building Permit on the basis that the garage ramp and the below-grade garage are located in the required rear yard. AMFRD's appeal states "the Ontario project impedes onto the rear yard requirements as shown on the record, and noted by the Office of Planning, that half of the rear yard is taken up by the ramp structures leading down to the subterranean garage."

AMFRD subsequently supplemented its appeal on December 30, 2014, to argue that the Building Permit was issued in error because the roof structures violate the Zoning Regulations. AMFRD argues that: (1) there is more than one rooftop enclosure and that a trellis is not sufficient to connect the structures to create a single structure; (2) the roof structure is of varying heights; (3) the mechanical equipment is not fully enclosed; (4) the roof structures exceed permitted floor area ratio; and (5) the roof structures assume more than one third of the total roof area.

At the hearing, Ontario raised additional issues with respect to the rear yard. It argued that the platform on which the generator sits, the generator, the louver, and the walls surrounding the garage ramp were improperly located in the rear yard.

The Board finds that these claims are without merit as explained in further detail below.

1. The Rear Yard Issues

A. The Garage and its Ramp and Ramp Structures.

The required rear yard of the Project is not occupied by the garage ramp or the below-grade garage it leads to.

Yard is defined in the Zoning Regulations as:

an exterior space, other than a court, on the same lot with a building or other structure. A yard required by the provisions of this title shall be open to the sky from the ground up, and shall not be occupied by any building or structure, except

as specifically provided in this title. No building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title. (11 DCMR § 199.1.)

Rear yard is defined as:

a yard between the rear line of a building or other structure and the rear lot line, except as provided elsewhere in this title. The rear yard shall be for the full width of the lot and shall be unoccupied, except as specifically authorized in this title. (11 DCMR § 199.1.)

The definition of a rear yard requires that it be open to the sky “from the ground up.” The garage ramp and the garage do not violate this requirement. There is no dispute that the garage ramp is located at grade and that the garage is located below grade. Neither the ramp nor the garage “occupy” the rear yard as that term is defined in the Zoning Regulations; thus, each may be located along the property line. Further, it cannot be said that both occupy more than 50% of the rear yard since they do not occupy the rear yard at all. The walls that surround the garage ramp are less than four feet above grade, and are therefore permissible with the required rear yard by virtue of 11 DCMR § 2503.2, which states:

A structure, not including a building no part of which is more than four feet (4 ft.) above the grade at any point, may occupy any yard required under the provisions of this title.

As stated in Finding of Fact No. 9, there is no louver located in the rear yard.

As to the Project’s generator and platform, AMFRD alleged that the platform upon which the generator sits is located in the rear yard but that the generator itself is not located in the rear yard. Like the garage ramp walls, the platform is less than four feet above grade and therefore also is permitted pursuant to § 2503.2.

For these reasons the Board concludes that all the rear yard violations asserted by AMFRD are without merit.

B. The Roof Structures.

Similarly, AMFRD has proven no violation of the roof structure provisions of § 411.

AMFRD states five violations of the roof structures: (1) there is more than one rooftop enclosure and that a trellis is not sufficient to connect the structures to create a single structure; (2) the roof structure is of varying heights; (3) the mechanical equipment is not fully enclosed; (4) the roof structures exceed permitted floor area ratio; and (5) the roof structures assume more than one third of the total roof area. The Board will discuss each allegation in turn.

AMFRD claims that there is more than one roof structure because a trellis is not sufficient to connect the structures and to create a single structure. AMFRD ignores the clear precedent of this

BZA APPLICATION NO. 18888
PAGE NO. 8

Board that accepts trellises as proper elements to connect structures. In BZA Application No. 18263-B, the Board agreed with the Zoning Commission that “a trellis may constitute such a connection between separate portions of a structure that creates one building under the Zoning Regulations.” BZA Application No. 18263-B of Stephanie and John Lester, p. 11. *See also* BZA Application No. 17331 of JPI Apartment Development LP, where the Board found that “the trellis provides an adequate connection between the existing single-family house and the addition to the rear to constitute one building under the Zoning Regulations.” Accordingly, AMFRD’s claim that a trellis is not sufficient to connect the roof structures to create single structure is unfounded.

Because AMFRD does not accept that the trellis is a part of the roof structure, it believes the structures are of varying height. Nevertheless, during the hearing for the motion to dismiss, AMFRD conceded that if the trellis was accepted as a part of the roof structure, the structure would be of a uniform height. Since the Board has so decided, AMFRD’s claim that the roof structure is of varying heights is without basis.

AMFRD next argues that the mechanical equipment on the roof is not fully enclosed. AMFRD conceded at the hearing and the Board independently concludes that the mechanical equipment was less than four feet in height. Subsection 411.17 provides, “Roof structures less than four feet (4 ft.) in height above a roof or parapet wall shall not be subject to the requirements of this section.”

Because the mechanical equipment is less than four feet in height, the structure is not subject to the roof structure restrictions.

AMFRD’s fourth alleged violation of the roof structures is that the roof structure exceeds the floor area ratio permitted in § 411.8, which states, “Solely for the uses designated in this section, an increase of allowable floor area ratio of not more than thirty-seven hundredths (0.37) shall be permitted.”

DCRA submitted evidence into the record that the rooftop structure consists of .13 FAR, which the Board concludes is correct.

Finally, AMFRD testified that it acknowledged that § 411.8 is inapplicable in this case since the Zoning Regulations do not impose a limitation on the number of stories for the Property; AMFRD abandoned this complaint.

DECISION

For reasons discussed above, the Board DENIES the Motion to Dismiss to the extent it asserts that the appeal, as filed, stated no basis upon which relief can be granted, finds that the appeal was untimely filed and therefore GRANTS the Motion to Dismiss on that basis, and, in the alternative, sustains the Zoning Administrator’s decision to approve the building permit application for zoning compliance and therefore DENIES the appeal.

BZA APPLICATION NO. 18888
PAGE NO. 9

VOTE: 3-0-2 (Lloyd J. Jordan, Marnique Y. Heath, and Anthony J. Hood (by absentee ballot) to DISMISS THE APPEAL as untimely and alternatively, SUSTAIN the decision of the Zoning Administrator; S. Kathryn Allen and Jeffrey L. Hinkle not participating or voting.)

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: October 18, 2017

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.