

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18938-A on the Motion for Reconsideration in the Application of Gina Eppolito and Frances Slakey, pursuant to 11 DCMR § 3104.11, for a special exception under § 223 to allow a two-story rear addition with cellar, not meeting the lot occupancy requirements of § 403, the open court requirements of § 406, and the nonconforming structure requirements of § 2001.3, at a one-family dwelling in the CAP/R-4 District a premises 325 5th Street, S.E. (Square 820, Lot 17).

HEARING DATE: April 21, 2015

DECISION DATE: April 21, 2015

ORDER ISSUANCE DATE: October 15, 2015

DECISION DATES ON MOTION FOR RECONSIDERATION: November 24, 2015 and January 19, 2016

ORDER DENYING MOTION FOR RECONSIDERATION

On October 15, 2015, the Board of Zoning Adjustment (the “Board”) issued a final order granting the application of Gina Eppolito and Frances Slakey (the “Applicant”). Specifically, the Board granted the Applicant’s request for a special exception to allow a two-story rear addition at her residence in the CAP/R-4 zone. During the hearing the Board granted party status in opposition to Robert Shelton and Mark (Clarence) Flynn, both of whom own and reside at the adjacent row dwelling to the north of the subject property. Mr. Shelton and Mr. Flynn were represented during the proceedings by Claude Bailey, Esq., and participated fully in the proceedings before the Board, urging the Board to deny the application. The Board also received reports from the Advisory Neighborhood Commission (“ANC”) 6B, and the District of Columbia Office of Planning (“OP”), both recommending approval of the application.

¹ This and all other references to the relief granted in Order No. 18938 are to provisions that were in effect the date the Application was heard and decided by the Board of Zoning Adjustment (the “1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text (the “2016 Regulations”). The repeal of the 1958 Regulations has no effect on the validity of the Board’s original decision or the validity of Order No. 18938.

The Motion for Reconsideration

On November 2, 2015, the Board received two electronic filings from Mr. Shelton and Mr. Flynn (the “Movant”): (1) A Motion for Reconsideration (“Motion”, Ex. 58) and, (2) A statement (copied to their attorney, Mr. Bailey) requesting a “5-day extension of time” because the Movant and Mr. Bailey were out of town during the days following the issuance of the Board’s Order approving the application. (Ex. 57.)

Waiver of the timely filing requirement and service requirement

The Board’s Order of approval was issued on October 15, 2015 and was served on the Movant and their counsel by email on that day. Pursuant to 11 DCMR § 3126.2, which was among the Board’s Rules of Practice and Procedure in place when the Order was issued and the Motion filed, a motion for reconsideration of any Board decision must be filed within 10 days from the date of issuance of the final written order reflecting that decision, or in this case by October 25, 2015. Thus, the Movant’s Motion for Reconsideration was eight days late. The Movant requested an “extension” of five days, but did not request a formal waiver of the rule contained in § 3126.2.

Pursuant to 11 DCMR § 3126.3, also in place when the Motion was filed, the Movant was required to serve all parties to the underlying case at the time the Motion was filed. Neither the Motion for Reconsideration nor the “extension” request contained an Affidavit of Service indicating whether the Applicant or the ANC² were served.

On November 24, 2015, the Motion for Reconsideration came before the Board at a Public Meeting. Since the Movant was in attendance at the Public Meeting³, the Board called him to the table and asked whether the Applicant or the ANC were served with the Motion for Reconsideration and the Statement Requesting an “Extension” of time. The Movant replied that he did not serve the Applicant or the ANC because he believed the electronic filing was sufficient.

Under 11 DCMR § 3100.5 (the 1958 Regulations), the Board had the authority to waive the timely filing and service requirements relating to the Motion for Reconsideration, provided there is “good cause” to do so and “the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.” The Board found that the Movant being out of town constituted “good cause” for a filing that was eight days late, and that there would be no prejudice to the Applicant on that account. Similarly, the Board waived the requirement that service on all parties occur *at the time of filing*, but directed the Movant to promptly serve the Applicant and the ANC in this case. The Board also continued the Motion for Reconsideration to the Board’s January 19, 2016 Public Meeting calendar to allow for service by the Movant and a potential Response to the Motion.

² The ANC was an automatic party to the proceeding pursuant to 11 DCMR § 3199.1(b)(2).

³ The purpose of a Public Meeting is for the Board to deliberate and render a decision. The Board is not required to hear testimony, but is not prohibited from doing so.

BZA APPLICATION NO. 18938-A
PAGE NO. 3

On November 24, 2015, the Movant submitted a statement indicating he had delivered the Motion for Reconsideration to the Applicant and her architect, Jennifer Fowler, and had delivered the Motion to the ANC chair at her residence. The statement also indicated that the Motion was sent by regular mail to the ANC at its business address, and to the Board, and OP. (Ex. 60.) The Movant submitted an additional statement indicating that on November 25, 2015, he served the ANC at its web-described email address and the ANC chair at her email address. (Ex. 61.) The Applicant filed a Response to the Motion on January 4, 2016. (Ex. 62), and the Movant submitted a “Further Clarification of Motion for Reconsideration”. (Ex. 63.)

Waiver of the timely filing of a “Response”

Pursuant to 11 DCMR § 3126.5 under the 1958 Regulations, a Response to a Motion for Reconsideration must be filed within seven days after the Motion was filed and served. As explained above, although the Motion was filed on November 2, 2015, it was not served until November 24, 2015 after the Board directed that the Applicant be served. Thus, the Applicant’s Response (filed on January 4, 2016) was untimely. Given that the Board waived the rules for the Movant -- both timely filing and service rules -- and the Applicant relied upon her architect for the preparation of a Response, the Board finds that “good cause” exists to waive the rule and extend the Applicant’s time for filing a Response. Moreover, the Movant did not complain of any prejudice to him that would result from the waiver of this requirement. In fact, the Movant had ample time to address the Response and even submitted an additional filing before the Board’s continuation date. (Ex. 63.) Therefore, the Board finds that the rule requiring the filing of a Response within seven days may be waived pursuant to the criteria in 11 DCMR § 3100.5.

Acceptance of Movant’s “Further Clarification of Motion for Reconsideration”

As noted, on January 11, 2017, the Movant submitted an additional filing titled “Further Clarification of Motion for Reconsideration by Parties in Opposition” (Ex. 63.) The Board’s Rules of Practice and Procedure provide only for the filing of a Motion for Reconsideration and a Response. However, for the most part, this additional filing repeats the same points made in the Movant’s initial Motion. Therefore, the Board will allow it into the record.

Merits of the Motion for Reconsideration

Subsection 3126.4 of the 1958 Regulations requires that a motion for reconsideration must “state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion and the relief sought.” The Movant asserts several claims of error, none of which have merit.

The Movant first alleges that there were “four inaccuracies” in the Applicant’s filings. He cites, for example, inaccuracies and errors in the Applicant’s measurements of the existing and proposed structure and the Applicant’s calculations of the existing and proposed lot occupancy at the property. However, the Board considered all relevant evidence when making Findings of Fact

BZA APPLICATION NO. 18938-A
PAGE NO. 4

concerning measurements and lot occupancy calculations, and does not agree that these findings were in error. Regarding the measurements, in Finding of Fact No. 16, the Board found:

The Applicant filed revised site plans (Exhibit 43) and revised architectural plans (Exhibit 53) to correct certain measurements in the original drawings that understated the length of the planned addition relative to the adjacent property at 523 5th Street. The proposed addition will extend the length of the dwelling 21 feet 11 inches beyond the rear of the adjacent property at 523 5th Street, owned by the Opposition Party.

Likewise, regarding lot occupancy calculations, in Finding of Fact No.11, the Board found:

Section 403 of the Zoning Regulations requires that each structure in an R-4 zone have a maximum lot occupancy of 60%. The proposed addition will increase the existing lot occupancy from 60.8% to 63.6%. Therefore, the proposal requires relief from the requirements of § 403.

The measurements and lot occupancy calculations were certified by Jennifer Fowler, a licensed architect, and were also reviewed by the OP staff. Thus, the Board's findings on these issues were based on substantial evidence in the record.

Second, the Movant contends that it was error for the Board to rely on the Applicant's sun study when it evaluated the project impacts on the neighbor's light and air.⁴ The Movant disputes the "foundation" of the sun study, stating it looked only at the impact of an additional four feet of structure, rather than examining the impact of the addition in its entirety. (Motion, p. 3.) However, as even the Movant acknowledges, OP's representative testified that the sun study showed the *entirety* of the proposed wall (Hearing Transcript "Tr." of April 21, 2015, p. 50; Motion, p. 3). Also, the Board's findings make clear that it was assessing the impact of the proposed addition *in its entirety*. (Findings of Fact 14-20.)

Third, the Movant also disputes that the Board was required to give great weight to the ANC's issues and concerns. (Motion, p. 5-6.) However, the District of Columbia Court of Appeals has consistently held that the "BZA is required by the D.C. Code and its own organic regulations to give issues and concerns raised by the ANC 'great weight,'" *Concerned Citizens of Brentwood v. D.C. Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C. 1993), *quoting, Levy v. District of Columbia Board of Zoning Adjustment*, 570 A.2d 739, 746 (D.C. 1990).

Fourth, the Movant asserts that he was not afforded adequate time to review and rebut the ANC report, which was dated April 20, 2015 and hand delivered during the public hearing on April 21, 2015. The Board must give great weight to an ANC report whenever it is received prior to the

⁴ Finding of Fact No.20 states that "The Applicant's sun study demonstrated that there would only be slight increases to the shadow cast on the rear of the property to the north that would be of limited duration on both a daily and annual basis. (Ex.45)."

BZA APPLICATION NO. 18938-A
PAGE NO. 5

commencement of deliberations. See D.C. Official Code § 1-309.10 (d) (d)(3)(A). (“The issues and concerns raised in the recommendations of the Commission shall be given great weight during the deliberations by the government entity”). While the Movant did suggest that the Board defer its decision on the matter, he never requested a continuance to respond to the ANC report. (Tr., p. 34.) Moreover, the ANC report merely reported the vote of the ANC and the fact that the ANC supported the application. (Ex.49.) There was nothing of substance which the Movant could have rebutted which was crucial to the Board’s decision. Therefore, the Movant was not prejudiced by the fact that the ANC report – which was barely more than a paragraph – was received into the record during the public hearing.

Fifth, the Movant asserts that it was error to give “great weight” to the recommendations of the Office of Planning. (Motion, p. 6.) However, the Board was required under D.C. Official Code §6-623.04(2012 Repl.) to give “great weight” to OP’s recommendations. See, *Neighbors Against Foxhall Gridlock v. D.C. Bd. of Zoning Adjustment*, 792 A.2d 246, 253 (2002). In this case, OP recommended approval of the requested special exception because the proposed addition would comply with the requirements for special exception relief, would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps, and would not tend to affect the use of neighboring property adversely. It should be noted that the Movant attempted to challenge OP’s findings and opinions throughout the public hearing. However, OP continued to believe that the addition would not unduly affect the light or air available to the abutting property or compromise the privacy of use and enjoyment of neighboring properties.

Finally, the Movant makes two opposite claims regarding the addition of a trellis wall that was imposed as a condition of approval by the Board.⁵ First, the Movant claims that the Applicant did not consult with him regarding the screening, despite the fact that the Board’s approval required such consultation. Second, the Movant requests a remedy that would have the Board change the condition. The Movant states: “We much appreciate the suggestion of a trellis with a planting. We would prefer, however, to attend to this ourselves if it seems appropriate over the course of time. (Motion, p. 7.)

Neither of the Movant’s claims relate to any alleged error by the Board. Regarding the consultation issue, the Applicant clarifies that the revised plans submitted to the Board provided for a wall trellis. (Applicant’s Response, citing Finding of Fact 10 of Order.) Thus, the Movant had ample opportunity to review the proposed trellis design, but chose not to weigh in. Further, even if the Applicant were in noncompliance with the Board condition, that fact would not represent an error by the Board, but a violation for which the Movant may request the Department of Consumer and Regulatory Affairs to address.

Regarding the second point raised by the Movant, the Board’s condition provides for the Applicant to construct the trellis wall. It does not provide for the Movant to choose whether and when to construct a trellis wall on someone else’s property. The trellis condition was based upon OP’s

⁵ Condition No.1 actually states: “The Applicant, in consultation with the party in opposition, shall provide suitable screening on the first floor that is acceptable to the Office of Planning.”

BZA APPLICATION NO. 18938-A
PAGE NO. 6

suggestion during the hearing that the Applicant might install a “green screen wall” on the north side of the addition, so as to mitigate the impact of the addition on their neighbor. (Decision and Order, p. 2.) As noted above, the Board is required to give great weight to OP’s recommendations, and in this instance the Board agreed that a trellis wall would soften the appearance of the addition wall. (Finding of Fact 10.) Thus, there is no reason to find that the Board erred when it imposed this condition.

In conclusion, the Motion does not state any specific respects in which Board’s final decision was erroneous, but merely restates the Movant’s (then Party in Opposition’s) grounds for opposing the application. The Party in Opposition participated fully in the public hearing in this matter, and the Board carefully considered his testimony and evidence as part of the record on which its decision was based. While the Party in Opposition remains opposed to the requested special exception, he has not presented grounds which require reconsideration of the Board’s decision.

For the reasons stated above, it is **ORDERED** that the Motion for Reconsideration is **DENIED**.

VOTE: 4-0-1 (Marnique Y. Heath, Jeffrey L. Hinkle, Frederick L. Hill, and Marcie I. Cohen to DENY the Motion for Reconsideration; one Board seat vacant).

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: June 14, 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.