

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

Appeal of Advisory Neighborhood Commission 5E, *et al.*

BZA Appeal 19106

DCRA'S PRE-HEARING STATEMENT

Appellants allege that the Zoning Administrator (the “**ZA**”) erred in approving Building Permit B1505056, issued June 19, 2015 (the “**Permit**”), as revised by B1510351, issued on July 21, 2015 (the “**Revised Permit**”, and collectively with the Permit, the “**Permits**”) to construct an addition to and renovate an existing house into a three unit residential building (the “**Project**”) at 67 V Street, N.W. (the “**Property**”), located in the R-4 Zone District.

Respondent, the District of Columbia Department of Consumer and Regulatory Affairs (“**DCRA**”), asserts that the ZA properly reviewed and approved the Permits as in compliance with the Zoning Regulations. When the ZA determined that the issued permit appeared to authorize a minor violation of the Zoning Regulations, the ZA required the Permit Holder to obtain a building permit revision to bring the Project into compliance with the Zoning Regulations, which the Permit Holder did. Appellants’ allegations of error are without merit.

Therefore, DCRA respectfully requests the Board of Zoning Adjustment (the “**Board**”) to affirm the ZA’s approval as correct and deny this Appeal.

JURISDICTION AND BURDEN OF PROOF

Appellants have filed a parallel challenge to the Permits as issued under Section 112.2.1 of the Building Code, a legal process that has started earlier this summer and is still ongoing. Alleged violations of the Building Code are not under the jurisdiction of the Board, which under Section 6-641.07(f) of the D.C. Official Code only has the authority to consider “[a]ppeals ... by any person aggrieved ... by any decision ... granting ... a building permit ... or any other administrative decision based in whole or in part upon any zoning regulation.” This limitation is repeated by Section 3100.2 of the Zoning Regulations, and confirmed by the Building Code, which clearly establishes that appeals of a building permit based on alleged violations of the Building Code must be appealed to the Office of Administrative Hearings, while alleged

violations of the Zoning Regulations must be appealed to the Board – “No provision of the Construction Codes shall be deemed to modify or amend any provision of the Zoning Regulations” (Section 102.1) and “any person adversely affected or aggrieved by a final decision or order of the Zoning Administrator may appeal to the Board of Zoning Adjustment of the District of Columbia under D.C. Official Code §6-641.07” (Section 105.6.4.2).

Under Section 3119.2 of the Zoning Regulations, it is the Appellants who have the burden of proof to justify their allegations.

APPELLANTS’ ALLEGATIONS

Appellants allege that the ZA erred in approving the Permits for the following reasons:

- 1) Closed court/trellis (Appellant’s title A, C, D, and E) - The plans approved with the Permits (the “**Approved Plans**”) included a closed court on the proposed third floor where the Building Code required a ten foot setback from the adjacent property’s chimney that does not comply with the area requirements of Section 406 of the Zoning Regulations because the trellis included in the Approved Plans (a) is a structure in violation of the Building Code and (b) is not a “roof” based on Board precedent interpreting the definition of a “building”;
- 2) Encroachment (Appellant’s title B) – the Approved Plans showed a minor underground encroachment by the footings for the proposed rear stairs;
- 3) Failure to include a Surveyor’s Office Plat (Appellant’s title F) – the Approved Plans did not include a plat issued by the Office of the Surveyor as required by the Building Code;
- 4) Determination of lower level as a “cellar” under the Zoning Regulations (Appellant’s title G); and
- 5) Floor Area Ratio (“F.A.R.”) (Appellant’s title H) – the Approved Plans permit a F.A.R. significantly higher than that permitted in an R-5-A Zone District.

ARGUMENT

The Appeal is without merit as the Permit complies with the Zoning Regulations

DCRA asserts that the plans approved by the Permit (the “**Approved Plans**”) comply with each of the provisions of the Zoning Regulations that Appellant has alleged are violated. DCRA addresses the specific allegations raised by Appellant as follows:

1. There is no closed court on the third floor, contrary to Appellants’ allegations

Section 199.1 of the Zoning Regulations defines a ‘court’ as “an unoccupied space ... open to the sky”. The trellis approved by the Revised Permit clearly blocks the sky so that the space under the trellis no longer meets the definition of “court.” The ZA has held as an established practice that a trellis attached to a building that covers an otherwise unoccupied space on a lot must count towards lot occupancy if the trellis cross-beams are set apart no more than twenty-four (24) inches on center, as this constitutes a sufficient cover to constitute part of the building. The trellis approved under the Revised Permit uses this same standard: two (2) inch beams spread out every twenty-four (24) inches on center, creating twenty-two (22) inch openings between the beams, as depicted on Sheet A2.03 (**Attachment A**). As a result, this proposed trellis extinguishes what would otherwise be a closed court, which is no longer “open to the sky” under the conservative use of the ZA’s established standard that the twenty-four (24) inch on center spacing of the cross-beams is sufficient coverage to trigger lot occupancy requirements.

Appellant erroneously cites to Board cases which addressed a different use of trellises under a different aspect of the Zoning Regulations. These Board cases addressed the minimum standard required to establish a “meaningful connection” between two buildings on the same lot that would be sufficient to classify the two buildings and connecting trellis as a single building to comply with the requirement of Section 3202.3 of the Zoning Regulations that no more than one principal structure be located on a single lot of record. For that purpose the Board agreed with the ZA’s determination that a 51% covered roof was sufficient to tie the two buildings together as a single building in compliance with Section 3202.3.¹ This analysis of compliance with Section 3202.3 is not analogous or relevant to the issue at hand in this Appeal. In this Appeal, the trellis meets the ZA’s standard for coverage that is significant enough to trigger lot occupancy requirements – which clearly is sufficient coverage to extinguish what would otherwise be a closed court since it is no longer “open to the sky”.

Appellant also errs in citing the Building Code – as stated above, the Building Code is separate from the Zoning Regulations and not within the jurisdiction of the Board to enforce. Appellants have appealed the Permits for alleged violations of the Building Code to the Office of

¹ BZA Appeal 19106, Exhibit 21P (Appellant’s Pre-Hearing Statement: Exhibit 16), at 11.

Administrative Hearings, which has the sole jurisdiction under the Building Code to hear appeals.

This allegation is therefore without merit and should be dismissed by the Board.

2. The Revised Permit corrected the minor underground encroachment

The minor underground encroachment of two footings shown on Sheet S0002² of the plans approved by the Permit was corrected by the Revised Plans as shown on Sheet A2.01 (**Attachment B**). Therefore this allegation is moot and should be dismissed by the Board.

3. The Zoning Regulations do not require a building plat from the Surveyor's Office

Appellant cites a requirement in the Building Code, which is not under the jurisdiction of the Board. The only relevant requirement in the Zoning Regulations is Section 3202.2(b), which provides:

“To determine compliance with the provisions of this title, each application for a building permit shall be accompanied by any of the following that is deemed necessary:

- (a) Scaled drawings ... and
- (b) An official building plat ... prepared by the Surveyor of the District of Columbia, upon which the applicant shall indicate in ink and to the same scale dimensions ...” (underscoring added)

As the underlined section clearly provides, the ZA has the discretion to require a building plat, let alone one provided by the Surveyor, if the ZA deems it necessary for review of an application for compliance. Furthermore, the Surveyor's role is limited to depicting the boundaries of a particular lot and does not include the depiction of existing or proposed buildings which is the responsibility of an applicant for a building permit.

In this case, the Permit Holder provided a scaled plat stamped by a professional surveyor licensed in the District of Columbia that was based on the records in the Surveyor's Office as Sheet C00001 of the plan set. This plat was reviewed and approved by the ZA as sufficient to demonstrate compliance with the Zoning Regulations as certified by the ZA's stamp.³

Therefore this allegation is without merit and should be dismissed by the Board.

² BZA Appeal 19106, Exhibit 21I (Appellant's Pre-Hearing Statement: Exhibit 9).

³ BZA Appeal 19106, Exhibit 21A (Appellant's Pre-Hearing Statement: Exhibit 1).

**4. The ZA correctly determined that the lower level is
a cellar under the Zoning Regulations**

Appellants appear to allege that the absence of a Surveyor's Office building plat prevented the ZA from correctly determining whether the lower level of the Project is a basement or a cellar under the Zoning Regulations. This allegation is without merit since a Surveyor's plat only includes the lot boundaries, and the applicant – not the Surveyor – has the responsibility to draw the location of the existing and proposed structures within those lot boundaries. Moreover, a building plat shows only the horizontal dimensions of a lot and its structures and does not include any elevations – the measurements required to determine whether a lower level is a basement or a cellar under the Zoning Regulations.

Section 199.1 of the Zoning Regulations define a 'basement' as a story where the ceiling is "four feet (4 ft.) or more above the adjacent finished grade" while a 'cellar' is a story where the ceiling is less than "four feet (4 ft.) or more above the adjacent finished grade" (underscoring added). The clear text of this definition explicitly permits a property owner to adjust the grade adjacent to a structure in order to change the definition of a lower level of a building. The ZA does not have the authority or discretion to overrule the explicit text of the Zoning Regulations. In this case, the ZA reviewed the plans that showed the lower level's ceiling to be less than four feet above the adjacent finished grade and so determined that the lower level was a cellar under the Zoning Regulations.

Therefore this allegation is without merit and should be dismissed by the Board.

**5. The Property is not in a R-5-A Zone District and so
is not subject to any F.A.R. requirements**

The Property is in an R-4 Zone District which does not have an F.A.R. requirement. Furthermore, the only provision of the Zoning Regulations cited by Appellants to support their allegation, Section 330.3, explicitly allows for "conversion of existing structures ... as controlled by minimum lot area per family requirement." This is precisely what the Permits permitted.

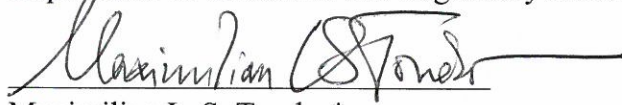
Thus this allegation is meritless and should be dismissed by the Board.

CONCLUSION

For the reasons stated above, DCRA asserts that the allegations stated in the Appeal are without merit and that the Appellants failed to meet their burden of proof of establishing a valid reason to overrule the ZA's approval of the Permits. DCRA therefore respectfully requests that the Board affirm that the Zoning Administrator correctly applied the Zoning Regulations to evaluate and approve the Permits, and therefore deny this Appeal.

Respectfully submitted,
CHARLES THOMAS
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Date: Nov. 12, 2015



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Attachment A

Sheet A2.03 of the plans approved by the Revised Permit

Attachment B

Sheet A2.01 of the plans approved by the Revised Permit

CERTIFICATE OF SERVICE

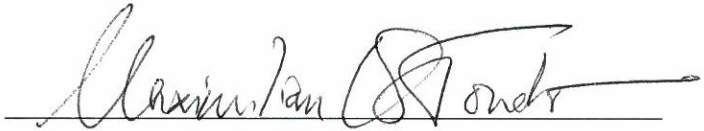
I hereby certify that on this 12th day of November 2015, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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A handwritten signature in black ink, appearing to read "Maximilian L.S. Tondro", written over a horizontal line.

Maximilian L.S. Tondro