

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 19115 of ANC 1C, pursuant to 11 DCMR §§ 3100 and 3101¹, from a June 23, 2015 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1509180 to alter, repair, and remove a cellar and install a retaining wall in the R-5-B District at premises 1636 Argonne Place, N.W. (Square 2589, Lot 460).

HEARING DATE: December 1, 2015
DECISION DATE: December 1, 2015

DISMISSAL ORDER

PRELIMINARY MATTERS

On August 17, 2015, Advisory Neighborhood Commission (“ANC”) 1C (the “Appellant”) filed this appeal with the Board of Zoning Adjustment (the “Board”). The Appellant appealed the granting of Building Permit No. B1509180 (the “Permit”) by the Department of Consumer and Regulatory Affairs (“DCRA”) to Greg Keats on behalf of District Design and Development Argonne LLC (the “Property Owner”). The permit authorized the construction of a retaining wall, embedded within the rear wall of the building, and installation of a 12% gradient in the parking space, replacing the flat grade parking space currently in existence at premises 1636 Argonne Street, N.W. (Square 2589, Lot 460) (the “Subject Property”). ANC 1C alleged that the issuance of permit B1509180 failed to correctly assess grade measurements in determining Floor Area Ratio (“FAR”), in violation of 11 DCMR § 402.4 and violates the definition of grade and its meaning in relation to basement, cellar, gross floor area (“GFA”), FAR, and rear yard in § 199. The ANC also argued that the approval of alterations in the parking plan did not comply with the Zoning Regulations. (Exhibit 1.)

The Property Owner filed a motion to dismiss on the grounds of collateral estoppel, lack of standing, and mootness. (Exhibit 21.) DCRA also filed a motion to dismiss under the legal doctrines of claim and issue preclusion. (Exhibit 22.) On December 1, 2015, after deliberating upon the motions to dismiss, the Board granted the motions on the basis that the Board has already heard and decided the issues of this appeal in Appeal No. 18980 of Concerned Citizens of Argonne Place, in which ANC 1C was a party.

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 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 decision or the validity of this order.

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Notice of Appeal and Notice of Hearing. By memorandum dated September 2, 2015, the Office of Zoning ("OZ") provided notice of the appeal to DCRA, and specifically to the Zoning Administrator ("ZA") at DCRA, the D.C. Office of Planning, Advisory Neighborhood Commission ("ANC") 1C, the ANC within which the Subject Property is located, Single Member District 1C05, the Councilmember for Ward One, and the owner of the Subject Property. On September 8, 2015, the Office of Zoning mailed a Notice of Public Hearing to the Appellants, DCRA, ANC 1C, and the owner of the Subject Property.

Party Status. Consistent with 11 DCMR § 3199.1, the parties in this proceeding were ANC 1C ("Appellant"), DCRA, and District Design and Development Argonne LLC ("Property Owner").

ANC Report. By letter dated August 17, 2015, ANC 1C indicated that it had considered a resolution to file the instant appeal at a duly noticed public meeting, with a quorum present, and approved the resolution by a vote of 6-0. (Exhibit 16.) In the resolution, the ANC challenged the issuance of permit B1509180, alleging that the revised permit does not solve the FAR, building height, GFA and parking regulation violations that the previous permits for the Subject Property contained. In the report, ANC 1C maintained that it has unanimously passed several resolutions in support of enforcement of current zoning regulations and building codes that are specifically raised in the permits issued in 1636 Argonne Place N.W., and therefore resolves to file an appeal of B1509180.

DCRA. The Department of Consumer and Regulatory Affairs ("DCRA") filed a motion to dismiss the appeal based on claim and issue preclusion, and asserted that the Board has already heard and ruled on Appellant's appeal of Building Permit No. B1509180 in Appeal No. 18980. (Exhibit 22.) DCRA asserted that the Appellant in this Appeal was a party in Appeal No. 18980. DCRA also contended that the claims in this Appeal were raised in Appeal No. 18980, precluding the Appellant from raising these issues again in this appeal.

Property Owner. District Design and Development Argonne LLC, the owner of the Subject Property, also filed a motion to dismiss based on claim preclusion. (Exhibit 21.) The Property Owner asserted that the challenge had already been argued, considered, and decided by the Board.

FINDINGS OF FACT

1. The property is located at 1636 Argonne Place N.W. (Square 2589, Lot 460) (the "Subject Property"). The Subject Property is currently improved with a one-family dwelling.
2. The Subject Property is located in the R-5-B Zone District.
3. The Property Owner applied for a building permit to convert the dwelling into a four-unit apartment house at the Subject Property on March 5, 2014. That application, for Building Permit No. 1404813, ("Original Permit") was approved by the Zoning Division of DCRA on

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March 19, 2014, and the permit was issued on September 9, 2014. The permit type was “addition alteration repair” and the description of work included “Renovation of existing single family masonry veneer structure, 1 story wood framed addition with mezzanine” and “change of use from single-family dwelling to 4-unit condo building”. (Exhibit 22D in Appeal No. 18980.)

4. Beginning in October 2014, residents living near the Subject Property, including some who later became members of the group Concerned Citizens of Argonne Place contacted DCRA staff to raise concerns about potential violations of FAR and lot occupancy limitations. (Exhibit 31 in Appeal No. 18980.)
5. On December 3, 2014, a Stop Work Order was issued on the ground that the project would exceed the maximum floor area ratio permitted in the R-5-B zone because of a recalculation of the Gross Floor Area (“GFA”) on the lower level of the building. (Exhibits 22G and 25, in Appeal No. 18980.) The Property Owner filed an application for a new building permit to revise the Original Permit to allow the installation of a retaining wall extending from the rear-building wall that would alter the rear adjacent finished grade.
6. Building Permit No. 1502210 was issued March 24, 2015, as a revision of B1404813 with “plans to reflect new grade”. (“Revised Permit”) (Exhibit 22Q in Appeal No. 18980.)
7. On February 13 2015, Appeal No. 18980 was filed by Concerned Citizens of Argonne Place to challenge the Original Permit and the Revised Permit. The appeal asserted two errors: incorrect designation of the lower level as a cellar (thus excluding this square footage from GFA and FAR) and incorrect GFA building area calculations (which affect FAR and lot occupancy determinations).
8. The Subject Property, at issue in Appeal No. 18980, was located within the jurisdiction of ANC 1C.
9. Subsection 3199.1(a)(4) of Title 11 DCMR defines the parties to a BZA appeal as including the “ANC for the area within which the property that is the subject of the appeal is located.”
10. Through a memorandum dated February 6, 2015, the Office of Zoning advised ANC 1C of the filing of the case. (Exhibit 7 in Appeal No. 18980.)
11. By report dated April 6, 2015, and with a subject line of “BZA Appeal #18980,” ANC 1C indicated that at a public meeting on April 1, 2015, it voted 6-0 to adopt a resolution in support of the appeal because the “failure to enforce zoning and building code regulations on the subject property will set a flawed precedent for similar and identical properties in Adams Morgan and other neighborhoods in the District of Columbia.” (Exhibit 18 in Appeal No. 18980.)

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12. In its report, ANC 1C authorized Commissioner Alan Gambrell to represent the ANC before the Board in the proceeding for Appeal No. 18980.
13. The Zoning Administrator subsequently made a site visit to the Subject Property and discovered that the Revised Permit was in violation of the Zoning Regulations.
14. After a second Stop Work Order was placed on the Subject Property on May 20, 2015, the Property Owner submitted a new building permit application to further amend the Revised Permit.
15. Building Permit No. B1509180 was issued on June 23, 2015. ("Second Revised Permit")(Exhibit 3). The Building Permit lists the description of work as "revision to B1404813 to remove approximately 73 square feet of cellar and install retaining wall."
16. On June 25, 2015, Concerned Citizens of Argonne Place submitted a Revised Pre-Hearing Statement to include claims regarding the Second Revised Permit in Appeal No. 18980. The statement alleged that Permit No. B1509180 incorrectly designated the lower level as a cellar, impermissibly altered the building height, disregarded the interrelationship of zoning definitions, incorrectly calculated GFA, and violated multiple parking regulations. (Exhibit 31 in Appeal No. 18980.)
17. The Board heard Appeal No. 18980 on July 7, 2015 and decided the case on July 7 and September 15, 2015. Commissioner Alan Gambrell participated in the public hearing as the representative of the Appellants and as the authorized representative of ANC 1C.
18. With regard to the Second Revised Permit claims, the Board found that the lower level would be a cellar under the definition of that term in § 199.1; the lower level would not be included in the calculation of GFA or FAR, in keeping with the definitions of those terms in § 199.1. The Board further held that the parking area of the Subject Property may be provided at a maximum grade of 12% in accordance with § 2117.8 because the Board did not find that the minimum size requirement precludes the approval of a 12% grade, specifically permitted for a driveway, to a parking area as well.
19. The Board's decision was memorialized in an order dated July 13, 2016. (Exhibit 47 of Appeal No. 18980.)
20. ANC 1C filed the current appeal of the Second Revised Permit with the Office of Zoning on August 17, 2015.
21. In the current appeal, ANC 1C alleges that, in approving Permit No. B1509180, the ZA erred by incorrectly designating the lower level as a cellar; disregarding Zoning Regulations for determination of lower level FAR; and creating multiple non-compliant parking conditions with the installation of a 12% grade parking slope. (Exhibit 1.)

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. Under the legal doctrines of claim and issue preclusion, “once a claim has been fully adjudicated, the doctrine of claim preclusion, or res judicata, prevents the same parties from relitigating the same claim, including any issue that either was or might have been raised in the first proceeding. The doctrine of issue preclusion prevents the same parties from relitigating an issue actually decided in a previous, final adjudication, whether on the same or a different claim.” *Rhema Christian Center v. District of Columbia Board of Zoning Adjustment*, 515 A.2d 189, 194 (D.C. 1986).

Both DCRA and the Property Owner filed motions to dismiss on the grounds of res judicata based on prior proceedings in Appeal No. 18980. The Board is barred from consideration of an appeal by the doctrine of res judicata when it finds that: (1) the parties are the same, and (2) the claims are the same. If the Board finds that both criteria are met, it must dismiss the appeal. For reasons stated below, the Board finds that res judicata bars it from considering the appeal at hand.

Regarding the first criterion, the Board finds that the parties are the same in the prior and current appeals. In Appeal No. 18980, the parties were the Concerned Citizens of Argonne Place, DCRA, ANC 1C, and the Property Owner. In this case, the parties are the ANC 1C, DCRA, and the Property Owner. ANC 1C argued that it was not a party in Appeal No. 18980 because Concerned Citizens of Argonne Place, not ANC 1C, was the Appellant in that appeal. The ANC argued that, because it did not request party status in that proceeding, it cannot be considered a party for the purpose of claim preclusion. However, there is no need for the ANC within which a subject property is located to request party status because, as noted in the findings of facts, such an ANC is an automatic party. The ANC clearly understood its status as an automatic party, as it authorized Commissioner Alan Gambrell to represent ANC 1C in the proceedings for Appeal No. 18980. Gambrell actively participated in the public hearing for Appeal No. 18980, both as a representative of the Appellant and as the authorized representative of ANC 1C. The Board finds that the first part of the criteria for res judicata is met.

The second and final criterion of the res judicata test is that the claims raised in the appeal must be the same. In Appeal No. 18980, the Appellant’s claims with regard to the Second Revised Permit were that there is an incorrect designation of lower level as cellar for FAR, the decision to grant the permit represents a disregard of Zoning Regulations for determination of lower level FAR, and multiple non-compliant parking conditions were created with safety problems by the installation of a 12% grade parking slope. (Exhibit 31 in Appeal No. 18980.) In this case, the Appellant raises the same arguments and requests that the Board review the same alleged defects with the Second Revised Permit. Specifically, the Appellant argues that the ZA disregarded the Zoning Regulations

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for determination of lower level FAR, incorrectly designated the lower level as cellar for FAR, approved multiple noncompliant parking conditions, and approved a 12% gradient contrary to the requirement for parking spaces to be accessible. (Exhibit 1.) Accordingly, the Board finds that the claims raised in this appeal were raised in Appeal No. 18980, and this criterion is met.

The Board is required to give “great weight” to the issues and concerns raised by the affected ANC in its written report. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)). The great weight requirement only “extends only to those issues and concerns that are ‘legally relevant.’” *Wheeler v. Board of Zoning Adjustment*, D.C. App., 395 A.2d 85, 91 n.10 (1978); *Bakers Local Union No. 118 v. D.C. Bd. of Zoning Adjustment*, 437 A.2d 176, 179 (D.C. 1981). The ANC 1C’s resolution in this case raises issues already adjudicated by the Board, and for the reasons explained above, are no longer legally relevant.

Based on the findings of fact, the Board concludes that the Board has already heard and decided the issues of the current appeal in Appeal No. 18980. Accordingly, it is hereby **ORDERED** that the appeal is **DISMISSED**.

VOTE: **3-0-2** (Marnique Y. Heath, Frederick L. Hill, and Robert E. Miller to Dismiss; Jeffrey L. Hinkle not present, not voting; one Board seat vacant).

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT

The majority of the Board members approved the issuance of this order.

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: August 4, 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.