GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16636 for Determination of Special Questions, pursuant to an Order of the Hon. Rhonda Winston, in *Molm v. Butera*, No. 99CA 2029 (June 14, 2000), concerning three air-conditioning compressors located within the side-yard setback of premises 4901 Quebec Street, N.W. (Square 1475, Lot 43).

HEARING DATE: September 5, 2000
DECISION DATE: September 5, 2000 (Bench Decision)

DECISION AND ORDER

This application for determination of special questions was submitted June 28, 2000 by counsel for James and Lee Butera, defendants in a civil lawsuit pending in District of Columbia Superior Court. In that lawsuit, plaintiffs John and Sue Molm allege *inter alia* that air conditioner compressors installed by defendants at the defendants' residence violate the Zoning Regulations. The plaintiffs are next-door neighbors of the defendants, who reside at 4901 Quebec Street, N.W.

By order issued June 14, 2000, the court granted the defendants' motion for a stay and directed the defendants to seek from the Board of Zoning Adjustment ("Board") "its interpretation of whether the placement of Defendants' air conditioning units violates any zoning ordinance or regulation." The application states that the lawsuit challenges actions taken by the defendants acting in good faith reliance on statements made by District of Columbia zoning officials, and that an administrative construction is needed of the relevant zoning regulations, which have not been previously construed by any agency or court.

The application asserts that the Board "has power to review and construe such 'special questions' as might be raised that implicate the zoning code," citing D.C. Code § 5-424(f)-(g) and 11 DCMR § 3105.2.[1] The citations to the Board's authority to decide appeals as a basis for asserting jurisdiction to review this application are misplaced, however, in the absence of a specific zoning regulation authorizing such a review or an administrative decision by the Zoning Administrator with respect to the air-conditioning compressors in dispute.

The Board is authorized to "hear and decide, in accordance with the regulations adopted by the Zoning Commission, requests for special exceptions or map interpretations or for decisions upon other special questions upon which the Board is required or authorized by the regulations to pass." D.C. Code § 5-424(g)(2) (emphasis added). The Zoning Regulations provide that the Board "shall have original jurisdiction to grant variances . . . [and] special exceptions . . . and to

BZA Case No. 16636 Exhibit No. 6

[1] This citation refers to a regulation in effect prior to October 1, 1999, which now appears, as amended, at 11 DCMR § 3100.1. Zoning Commission Order No. 864 and the Notice of Final Rulemaking, effective October 1, 1999, amended and consolidated Chapter 31, Board of Zoning Adjustment, and Chapter 33, Board of Zoning Adjustment: Supplemental Rules of Practice and Procedure, into a new Chapter 31 *See* 46 DCR 7956 (October 1, 1999) and 46 DCR 7853 (October 1, 1999).

Board of Zoning Adjustment
District of Columbia
CASE NO.16636
EXHIBIT NO.6

exercise all other powers authorized by the Zoning Act." 11 DCMR § 3100.1. The Board is also empowered "to hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by . . . any . . . administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to §§ 5-413 to 5-432." D.C. Code § 5-424(g)(1). Appeals may be brought to the Board by any person aggrieved by "any administrative decision based in whole or in part upon any zoning regulation or map adopted under §§ 5-413 to 5-432. . . ." D.C. Code § 5-424(f).

The Zoning Commission has not, by regulation, "required or authorized" the Board to hear any type of special question. Even if the absence of a regulation were not significant, to pass upon this special question would contravene both the letter and spirit of the District's zoning laws and regulations, which place the initial responsibilities for interpreting and enforcing the zoning regulations with the Zoning Administrator.

The Board has final administrative responsibility to interpret the zoning regulations. *Murray v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 1055 (D.C. 1990), citing D.C. Code § 5-424(g)(4) and *Keefe Co. v. District of Columbia Bd. of Zoning Adjustment*, 409 A.2d 624, 625 (D.C. 1979). However, the structure of zoning administration in the District of Columbia places initial responsibility for administration and enforcement of the zoning regulations with the Zoning Administrator. Accordingly, a party seeking enforcement of the zoning regulations in case of an alleged violation, as well as a party seeking confirmation that an alleged violation is in fact consistent with the zoning regulations, must initially seek a determination by the Zoning Administrator.

Pursuant to Reorganization Order No. 55, the Zoning Division was created, headed by the Zoning Administrator, "who shall be responsible for administratively interpreting and enforcing the Zoning regulations." The Zoning Division was made responsible for several specific functions, including the following:

a) administers and enforces the Zoning Regulations of the District of Columbia;

b) administratively interprets of the Zoning Regulations and makes administrative decisions thereon;

c) reviews applications for building permits and for certificates of occupancy, and supervises inspections of premises, buildings and other structures in connection therewith to determine if existing or proposed structures and uses comply with the provisions of the Zoning Regulations;

d) inspects intermittently all properties in the District of Columbia to determine compliance with the Zoning Regulations;

e) establishes and maintains a zoning information office for use by the public on all matters relating to the Zoning Regulations and Maps and their administration and enforcement; and

f) appears before the Zoning Commission and the Board of Zoning Adjustment to present facts, administrative interpretation, and recommendations to assist those bodies in reaching decisions.

Consistent with the structure of zoning administration in place in the District of Columbia, the Board acts in the manner of a court to decide applications for special exceptions or variances from the zoning regulations and consider appeals of decisions made in the administration or enforcement of the regulations, such as decisions made by the Zoning Administrator with respect to a particular property. The Zoning Administrator, rather than the Board, makes decisions with respect to the interpretation and implementation of the zoning regulations applicable to particular parcels of land. In this capacity, the Zoning Administrator, for example, reviews and approves plans for construction, issues building permits, advises property owners to seek a variance or special exception when necessary, and inspects new construction for compliance with applicable zoning regulations.

In this case, the applicants (defendants in the lawsuit) contend that their air conditioning compressors were installed in October, 1999 following statements by zoning officials that placement in the side yard would not offend zoning regulations. Application at 4. If the plaintiffs believed that the compressors in fact violated the zoning regulations, they should have sought a determination to that effect by the Zoning Administrator and requested enforcement if a violation was found. If the Zoning Administrator had made an administrative determination that the compressors did not violate any zoning regulation, the plaintiffs could have appealed that determination to the Board, which has final administrative responsibility for the interpretation of the zoning regulations.

Alternatively, the defendants could have requested from the Zoning Administrator an administrative determination that the compressors are in compliance with the Zoning Regulations. That determination would also have been subject to Board review if appealed. The Board does not agree with the applicants' statement that, because the plaintiffs "bypassed the Zoning Administrator and this Board, the [applicants] were not in a position to seek administrative review and the Board's interpretation." Application at 4.

The Board's conclusion that the Zoning Administrator is initially responsible for interpreting the zoning regulations with respect to a particular property, subject to Board review, is consistent with the zoning scheme established by statute and regulation, and with prior appellate court decisions. In *Brawner Building, Inc. v. Shehyn*, 143 U.S.App. D.C. 125, 442 F.2d 847 (D.C. Cir. 1971), the appellate court concluded that the lower court should not have ordered a permanent injunction "without requiring recourse to the administrative remedies available to the parties that would have provided the guidance of administrative expertise which the courts should require." 442 F.2d at 852. "Over and above the substantive contentions of the parties are issues and contentions relating to the proper roles of the court and of the executive officials and agencies concerned with the formation and application of the zoning regulations." *Id.*

In that case, the lower court heard testimony from the Zoning Administrator about his duties administering and interpreting the Zoning Regulations, and his decision to issue a certificate of occupancy for the premises involved in the dispute. However, the district court erred in deciding the merits of the case before "resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. . . ." 442 F.2d at 856. In light of the doctrine of primary jurisdiction, the appellate court concluded that:

> There is no doubt of the right of property owners to seek to enjoin a use or proposed use of nearby or neighboring land that is both unlawful and adversely affects their interests. The problem is the appropriateness of the District Court's deciding on the merits a claim that a use authorized by a certificate of occupancy unlawfully contravenes the zoning regulations in the absence of an appeal from the granting of the certificate of occupancy, and a decision by the Board.

442 F.2d at 854 (citations omitted, emphasis added).

Similarly, the structure of zoning administration in the District of Columbia does not vest the Board with the jurisdiction to decide zoning disputes, such as the one described in the application for determination of special questions, before action by the Zoning Administrator to investigate an alleged violation at a particular property, consistent with his responsibilities with respect to the administration and enforcement of the zoning regulations. The operation of this structure of zoning administration is apparent in many zoning disputes that are ultimately resolved by the court of appeals. *See, e.g., Wallick v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 1183 (D.C. 1985) (court affirmed Board order upholding Zoning Administrator's finding that clinic is not "residential use," where petitioners had asked Zoning Administrator to interpret zoning regulations to include clinics under "apartment house or other residential use" for purpose of zoning regulation setting floor area ratios); *C & P Building Limited Partnership v. District of Columbia Bd. of Zoning Adjustment*, 442 A.2d 129 (D.C. 1982) (court affirmed Board order upholding Zoning Administrator's decision to deny petitioner's application for new certificate of occupancy for nonconforming use without first obtaining use variance); *Ass'n for Preservation of 1700 Block of N Street, N.W. and Vicinity v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 668 (D.C. 1978) (court affirmed Board order upholding Zoning Administrator's decision that proposed building was private club within meaning of zoning regulations); and *Keefe Co. v. District of Columbia Bd. of Zoning Adjustment, supra*, (court affirmed Board order upholding Zoning Administrator's decision to deny application for certificate of occupancy because petitioner was not "similar professional person" within meaning of zoning regulations).

The Board has no authority to pass upon this type of special questions in the absence of a regulation permitting it to do so. The nature of the question itself is one that initially belongs before the Zoning Administrator. The Board therefore has no jurisdiction to take up the question. The application is therefore dismissed.

For the reasons stated above, the Board concludes that the application for determination of special questions should be dismissed. It is hereby **ORDERED** that the application be **DISMISSED.**

VOTE: 3-0 (Sheila Cross Reid, John Parsons and Anne Renshaw to **DISMISS**).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

FINAL DATE OF ORDER: SEP - 8 2000

UNDER 11 DCMR 3125.9, "NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6".

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO: 16636

As Director of the Office of Zoning, I certify and attest that on SEP - 8 2000, a copy of the order entered on that date in this matter was mailed first class, postage prepaid, to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Stephen C. Leckar, Esquire
Butera & Andrews
Attorneys At Law
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Adam Lipton & Benny Kass, Esquire
1050 17th Street, N.W.
Suite 11000
Washington, D.C. 20036

Michael D. Johnson, Zoning Administrator
Department of Consumer and Regulatory Affairs
941 North Capitol Street, NE, Suite 2112
Washington, D.C. 20002

Attested by: _____
JERRILY R. KRESS, FAIA
Director

Attest No. 16636/poh