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Application No. 17276-A of Phillips Park, LLC, pursuant to 11 DCMR 3104.1, for a special exception from section 2516 of the Zoning Regulations to allow the construction of a theoretical lot subdivision for thirty-five single-family homes in the R-1-A zone district at 2101 Foxhall Road, NW, Square 1346, Lot 822.

HEARING DATES: February 15, 2005; February 22, 2005 and March 8, 2005
DECISION DATE: April 5, 2005
DATE OF DECISION OF MOTION FOR RECONSIDERATION: September 13, 2005

ORDER DENYING RECONSIDERATION

On August 5, 2005, Friends of Whitehaven (FOW)[1] moved for reconsideration of the Board of Zoning Adjustment's (Board) July 26, 2005 order granting a special exception for a theoretical lot subdivision to Phillips Park, LLC (the Applicant). FOW alleged specific errors in the Board's order pursuant to 11 DCMR § 3126.4 and requested that the administrative record be re-opened and supplemented. On August 12, 2005, the Applicant filed its opposition to the request for reconsideration. *See*, 11 DCMR § 3126.5. At a decision meeting on September 13, 2005, the Board voted to deny FOW's motion for reconsideration.

FOW sets forth two specific errors allegedly made by the Board: (1) the Board lacked a factual basis upon which to conclude that the property contained three acres of non-natural or "artificial" wetlands (para.5, Findings of Fact); and (2) the Board's decision to strike the "Declaration of Julie Moore" and "Addendum Clarification" after the record was closed was improper, and its decision not to strike "extra-record materials" within FOW's proposed findings of fact and conclusions of law was unclear. As a result, claims FOW, the record must be re-opened and supplemented. For reasons that will be explained below, the Board disagrees and denies the motion for reconsideration.

I. The Board had substantial evidence to find that artificial wetlands existed at the property.

The Court of Appeals has held that:

[1] FOW was a party in opposition to the special exception request.

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> An agency such as the BZA must make "findings on 'each contested issue of fact.'" *Citizens Sass's. of Georgetown,* 402 A.2d at 41 (quoting D.C. Code § 1-1509(e) (1981))[2]. The Board need not provide its reasons for adopting one or another position on the "basic" or "underlying" facts which were themselves disputed by the parties. *Id.* at 44-46. Nevertheless, the Board must reach sufficiently detailed findings on basic factual issues to demonstrate that it has considered and ruled upon each of the party's contentions.

Draude, v. District of Columbia Board Of Zoning Adjustment, 527 A.2d 1242, 1251 (D.C. 1987).

FOW alleges that the Board's record contained "no factual basis" to find that "non-natural or artificial" wetlands existed at the property (*Motion for Reconsideration* at 1). This assertion is incorrect. The Board possessed ample evidence to make this finding.

As outlined in the opposition to this motion (Exhibit 72), the Board heard testimony to this effect from James Ingram, an expert in environmental science whose testimony was credited by the Board. And, contrary to FOW's statement, the Board also heard testimony to this effect from a representative of the DC Department of Health, Tim Karikari (Technical Review Chief for Erosion and Sediment Control).

In addition, the Board possessed persuasive documentary evidence delineating the "natural" and "artificial" wetland areas. The Applicant submitted a Phase I Environmental Site assessment for the property which identified both the natural wetlands in the southern portion of the site and the artificial wetlands "created. . . due to a water main leak" in the center of the site (Exhibit P appended to the special exception application). The Board also received a wetlands mapping prepared by the US Army Corps of Engineers. This document (appended as Exhibit Q to the special exception application) identified the natural wetlands area over which the Army Corps has jurisdiction. This "Jurisdictional Determination" identified the natural wetlands only in the "southern portion of the tract flowing from west to east", consistent with the Environmental Site Assessment submitted by the Applicant.

The Jurisdictional Determination made by the Army Corps, and Mr. Ingram's testimony regarding the process by which the Army Corps delineates jurisdictional wetlands, was not countered with the testimony of any qualified expert in environmental science. FOW did present testimony from two witnesses, Julie Moore and Kent Slowinski, both of whom disputed the existence and/or designation of the "artificial"

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[2] Now codified at D.C. Official Code § 2-509e) (2001).

wetlands. However, neither Ms. Moore nor Mr. Slowinski was certified as an expert in the field of wetlands, environmental science, or any other field.

As set forth in *Draude, supra,* the Board need not explain why it adopted Applicant's position over FOW's. It is sufficient that the Board had a factual basis for its findings on the wetlands. In this case that factual basis is set forth in the testimony of applicant's witnesses and the documentary evidence described above.

II. The Board's decisions regarding the motions to strike were clear and proper.

FOW argues that the Board's oral decision to strike certain post-hearing submissions was incorrect. It also claims that the decision not to strike "extra-record materials" within FOW's proposed findings of fact and conclusions of law was unclear. The Board finds to the contrary.

The decision to strike the "Declaration of Julie Moore" (the Declaration) and an "Addendum Clarification" (the Addendum) was proper. The Board closed the record, with the exception of proposed findings of fact and conclusions of law (which were to have been submitted by all parties), at the conclusion of the public hearing on March 8, 2005. FOW submitted the Declaration and Addendum after the record had been closed. Accordingly, at its April 5, 2005 decision meeting, the Board granted the Applicant's motion to strike the Declaration and Addendum. It denied the request to strike "extra-record materials" within FOW's proposed findings of fact and conclusions of law, stating that it would disregard any statements that were not germane or went beyond the scope of the administrative record. FOW maintains that the latter decision was confusing because "[i]t was not clear from the BZA Order where the motion to strike being granted ended and where the motion to strike being denied began".

However, the Board's decision was straightforward: the motion to strike that was granted addressed the documents referenced above; *i.e.*, the Declaration and the Addendum. The motion to strike that was denied addressed matters that were interwoven through FOW's proposed findings of facts and conclusions of law that were not based on the evidence of record.

FOW claims that the decision to strike was incorrect because the record was incomplete regarding environmental issues. This claim lacks merit. The Board conducted three days of public hearing in which the Applicant and the three parties in opposition presented evidence and argument on all issues raised, including the environmental issues. Moreover, the Board deliberated on and made findings regarding the environmental issues on which FOW seeks a rehearing.

FOW has presented no basis for a rehearing on the wetlands issue.

FOW claims, finally, that the Board should "supplement the record for the limited purpose of obtaining accurate information on [the] wetlands in question". In effect, FOW requests a rehearing on the wetlands issue, and specifically requests that the Board consider records from the DC Department of Health. However, FOW has presented no basis for a rehearing on the wetlands issue. As stated previously, the Board did hear testimony from the Department of Health at the original hearing; and FOW states no reason why any new evidence it seeks to offer now could not have been presented at that time.

Section 3126.6 of the Zoning Regulations (11 DCMR) provides that "[n]o request for rehearing shall be considered by the Board unless new evidence is submitted that could not reasonably have been presented at the original hearing." FOW has offered no new evidence in its Motion for Reconsideration that could not reasonably have been presented during the original hearing.

For these reasons, it is hereby **ORDERED** that the Motion for Reconsideration is **DENIED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann, II to deny; John G. Parsons to deny by absentee ballot)

Vote taken on September 13, 2005

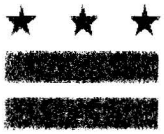
BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: NOV 0 3 2005

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17276-A

As Director of the Office of Zoning, I hereby certify and attest that on NOV 0 3 2005, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

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