

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

Appeal by Neighbors For Responsive Government- BZA Appeal No. 19895
Appeal of ANC 3C- BZA Appeal 19877

D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS’
PRE-HEARING STATEMENT
FOR
BZA APPEAL NO. 19895 AND BZA APPEAL NO. 19877

The D.C. Department of Consumer and Regulatory Affairs (DCRA) respectfully requests that the Board of Zoning Adjustment (Board) deny these appeals for the following reasons:

On or around July 23, 2018, Department of General Services’ (DGS) counsel, Meredith Moldenhauer of Cozen O’Connor, submitted a “Request for Modification of Plans Approved by the Board of Zoning Adjustment” to the Office of the Zoning Administrator (ZA).¹ On July 30, 2018, the Zoning Administrator requested clarification regarding the modifications to the side yard/deck and trash/delivery area in the revised plans.² After reviewing the revised plans and DGS’ subsequent clarification, the Zoning Administrator was correctly authorized to approve the modification request on August 7, 2018 pursuant to 11-A DCMR § 304.10.

FACTUAL AND PROCEDURAL BACKGROUND

On April 5, 2017, the Board issued a Decision and Order in BZA Application No. 19450 finding that the Applicant, DGS, met its burden of proof for its special exception request to develop an emergency shelter at 3320 Idaho Avenue, N.W. in the District.^{3,4} Approximately

¹ August 6, 2018 Letter from Meredith Moldenhauer.

² August 6, 2018 Letter from Meredith Moldenhauer.

³ BZA Application 19450 Decision and Order- Decision Date of April 5, 2017 and Final Date of August 30, 2017.

fifteen months later, on July 23, 2018, DGS submitted a “Request for Modification of Plans Approved by the Board of Zoning Adjustment” (Modification) to the Zoning Administrator.⁵ The Modification request proposed changes to reduce the building’s overall height and mass as well as changes to the playground located in the southern side yard, trash area, and delivery area.⁶ A copy of DGS’ request was served on the ANC 3C and counsel for Neighbors for Responsive Government.⁷ On August 7, 2018, the Zoning Administrator approved the modifications in accordance with 11-A DCMR § 304.10.⁸ It is worth noting that ANC 3C, Neighbors for Responsive Government and DGS were the same parties in BZA Application No. 19450 and are the same parties in the case currently pending before this Board.

On September 13, 2018, ANC 3C appealed the Zoning Administrator’s approval of the Modification.⁹ On October 5, 2018, the Neighbors for Responsive Government filed its appeal of the Zoning Administrator’s Modification approval to the BZA. In their appeal, the ANC 3C and Neighbors for Responsive Government challenge the proposed patio/deck on the south side of the emergency shelter.^{10,11} Both contend that the addition of the patio/deck was a significant deviation from the plans submitted and previously approved by the Board in BZA Application No. 19450.¹² In addition to the patio/deck, the Neighbors for Responsive Government identified approximately thirteen other architectural changes.¹³ The Neighbors for Responsive

⁴ The Neighbors for Responsive Government appealed BZA Application No. 19450 to the D.C. Court of Appeals. On October 18, 2018, the D.C. Court of Appeals affirmed the Board’s decision.

⁵ BZA Appeal No. 19895- Exhibit 1 at page 6.

⁶ August 6, 2018 Letter from Meredith Moldenhauer.

⁷ August 6, 2018 Letter from Meredith Moldenhauer.

⁸ BZA Appeal No. 19877- Exhibit 3 ZA Approval of Modifications.

⁹ BZA Appeal No. 19877- Exhibit 1 Application Form.

¹⁰ BZA Appeal No. 19877- Exhibit 2 ZA Appeal Statement.

¹¹ BZA Appeal No. 19895-Exhibit 1 NRG Appeal of Zoning Administrator Decision.

¹² BZA Appeal No. 19877- Exhibit 1 Application Form and BZA Appeal No. 19895-Exhibit 1 NRG Appeal of Zoning Administrator Decision.

¹³ BZA Appeal No. 19895-Exhibit 1 NRG Appeal of Zoning Administrator Decision at page 3 of Appeal Statement/Discussion of Issues. The fourteen issues are: 1) Addition of a new 40’ x 25’ (1000 square

Government contend that these changes were never contemplated by the Board and required Board’s approval.¹⁴

On October 29, 2018, DGS filed a Motion to Consolidate BZA Appeal Nos. 19877 and 19895 since both matters involved the construction of the patio/deck.¹⁵ The Neighbors for Responsive Government and DCRA filed a statement in support of DGS’ motion.¹⁶ As of the date of this writing, the Motion to Consolidate is pending before the Board.

DCRA asserts that the Zoning Administrator was authorized and correctly approved the Modification pursuant to 11-A DCMR § 304.10.

ARGUMENT

Contrary to the Appellants’ (ANC 3C and Neighbors for Responsive Government) assertions, the Zoning Administrator reviewed the Modification and correctly determined that he was authorized to grant DGS’ Modification.

feet), 62-person patio/deck on the south side of the Proposed Shelter, in close proximity to the single-family homes that are adjacent to the shelter; 2) Reduction of the distance between the Proposed Shelter building and the newly constructed parking garage for the existing police station that is co-located on this site, from 29’ to 17’ 7””; 3) Relocation of the Trash Area closer to the front of the Proposed Shelter building and apparently shrinking it; 4) Significantly shrinking (or eliminating) the Delivery Area for the Proposed Shelter; 5) Shrinking the proposed playground to the West of the Proposed Shelter by at least 1,110 square feet, or 30.8%; 6) Converting the south yard of the Proposed Shelter building, which was intended to be an unused buffer area because it is closest to neighboring single-family homes to the south of the Property, into a storm water retention area to receive run-off from the parking garage, which is expected to include oil and other automotive chemicals; 7) Reducing the size of the first floor, and, contrary to the representation by DGS in the Cover Letter to its Modification Request, reducing or eliminating program areas, including significantly reducing the size of the Dining Room; 8) Eliminating the basement, including a large planned storage area; 9) Removing the front entry area; 10) Enlarging the proposed driveway by 25%; 11) Moving the proposed walkway from the northeast side of the building to the southeast side and reducing its width from 25’ to 10’ 6””; 12) Reducing the Proposed Shelter’s footprint; 13) Reducing the gross square footage of the Proposed Shelter and making certain changes to floors 2 through 6; and 14) Revising the building elevation and facades.

¹⁴ BZA Appeal No. 19895-Exhibit 1 NRG Appeal of Zoning Administrator Decision.

¹⁵ BZA Appeal No. 19895- Exhibit 4 Intervenor’s Motion to Consolidate Appeals.

¹⁶ BZA Appeal No. 19895- Exhibit 5 Response to Motion to Consolidate from Neighbors for Responsive Government and Exhibit 20 DCRA’s Statement in Support of Motion to Consolidate BZA Appeal No. 19877 and Appeal No. 19895.

Under Title 11 Chapter 3 of the D.C. Municipal Regulations (DCMR), the Zoning Administrator is permitted to approve modifications to plans approved by the Board of Zoning Adjustment. Section 11-A DCMR § 304.10 states:

For building permits that are authorized by an order of the Board of Zoning Adjustment (the Order), the **Zoning Administrator**, following receipt of a request made pursuant to Subtitle A § 304.11, **is authorized to permit modifications to approved plans in addition to those modifications specifically authorized pursuant to flexibility granted by the Order if the Zoning Administrator determines that the proposed modifications are consistent with the intent of the Board of Zoning Adjustment** and the modifications would not:

- (a) Violate any condition of approval included in the Order;
- (b) Increase, expand, or extend any area of relief granted by the Order;
- (c) Create any need for new relief;
- (d) Change a principal use from that approved in the Order;
- (e) Increase the number of stories;
- (f) Increase by more than two percent (2%) the building gross floor area, the percentage of lot occupancy, building height, or penthouse height; provided that the permitted increase of two percent (2%) or less must be the direct result of structural or building code requirements;
- (g) Increase by more than two percent (2%) the number of dwelling units, hotel rooms, or institutional rooms within the approved square footage; or
- (h) Increase or decrease by more than two percent (2%) the number of parking or loading spaces depicted on the approved plans.

(emphasis added.) The approved modifications are consistent with the intent of the Board and do not violate 11-A DCMR § 304.10.

- i. *The Zoning Administrator’s approval of the deck/patio did not violate 11-A DCMR § 304.10.*

In BZA Application No. 19450, DGS submitted revised plans to the Board, which showed the relocation of the outdoor playground.¹⁷ The revised plans, approved by the Board, moved the approximately 84’ 8” x 38’ 9” playground from the southern side of the shelter to the western side of the shelter; the revised plans depicted a planted side yard that extended

¹⁷ BZA Application No.19450-Exhibits 165 and 165A at page 4.

approximately 39’ 2” from the shelter’s southern wall to the pre-existing brick wall and a planted area that extended approximately 23 feet from the pre-existing brick wall to the property line abutting the single-family homes.¹⁸ DGS’ Modification request portrayed an outdoor deck/patio that extended approximately 39’ 2” south from the end of the playground toward the pre-existing brick wall leaving an approximate distance of 23 feet from the pre-existing brick wall, and the property line abutting the single-family homes.¹⁹ In sum, the Modification changed the distance between the playground/deck and the property line from 63 feet to approximately 23 feet.

Appellants’ argument that the Zoning Administrator erred by approving the patio/deck is without merit. In BZA Application No. 19450, the ANC 3C expressed concern about the noise from the shelter program.²⁰ In response to the ANC’s concern, DGS relocated the playground from the south side of the building to the rear of the building.²¹ Now, ANC 3C argues that the proposed patio/deck is a significant change because the location of the patio/deck has the potential for noise.²² However, ANC 3C’s concern does not mean that 11-A DCMR § 304.10 was violated.

The Zoning Administrator approved the patio/deck because the change did not violate 11-A DCMR § 304.10. DGS stated that the activities in the common areas, including the use of the playground and deck, are monitored by staff, accessible only during certain times of the day and that the shelter staff would ensure that any noise generated from the playground and deck would be limited.²³ Moreover, as the project evolved, DGS recognized the need for a space for

¹⁸ BZA Application No.19450-Exhibits 165 and 165A at page 4. See generally BZA Application No. 19450- Exhibit 7 at page 7; BZA Application No. 19450 April 5, 2017 Decision and Order at page 5; August 6, 2018 Letter from Meredith Moldenhauer at page 5.

¹⁹ BZA Appeal No. 19877- Exhibit 2 at page 4.

²⁰ BZA Application No. 19450 April 5, 2017 Decision and Order at page 23.

²¹ BZA Application No. 19450 April 5, 2017 Decision and Order at page 23.

²² BZA Appeal 19877 Exhibit 2 at page 5.

²³ August 6, 2018 Letter from Meredith Moldenhauer at page 3.

residents to adequately supervise their children.²⁴ The Zoning Administrator was persuaded that the ongoing monitoring of activities would ensure minimal disruption to the neighbors to the south.

Furthermore, a review of the criteria enumerated in 11-A DCMR § 304.10 supports the Zoning Administrator’s decision:

11-A DCMR 304.10(a) Violate any condition of approval included in the Order;

The BZA Application No. 19450 April 5, 2017 Decision and Order did not impose any specific conditions on the proposed project; thus, the patio/deck did not violate any condition of approval in the Order.

11-A DCMR 304.10 (b) Increase, expand, or extend any area of relief granted by the Order;

The DGS application to the Board, in BZA Application No. 19450, sought special exception under the RA-use requirements and variances from the number of primary structures, loading requirements, and the height and number of stories.²⁵ The approval of the patio/deck did not increase, expand, or extend any area of relief DGS initially sought and ultimately received from the Board.

11-A DCMR 304.10 (c) Create any need for new relief;

The creation of the patio/deck does not require any new relief, that is, a special exception or variance from the Board.

11-A DCMR 304.10 (d) Change a principal use from that approved in the Order;

The principle use is unchanged as the property will continue to serve as an emergency shelter.

11-A DCMR 304.10 (e) Increase the number of stories;

The patio/deck would not increase the number of stories.

²⁴ August 6, 2018 Letter from Meredith Moldenhauer at page 3.

²⁵ BZA Application No. 19450 April 5, 2017 Decision and Order.

11-A DCMR 304.10 (f) Increase by more than two percent (2%) the building gross floor area, the percentage of lot occupancy, building height, or penthouse height; provided that the permitted increase of two percent (2%) or less must be the direct result of structural or building code requirements;

The patio/deck does not change the gross floor area, lot occupancy, building height, or penthouse height.

11-A DCMR 304.10 (g) Increase by more than two percent (2%) the number of dwelling units, hotel rooms, or institutional rooms within the approved square footage;

The patio/deck does not increase the number of dwelling units, hotel rooms, or institutional rooms.

11-A DCMR 304.10 (h) Increase or decrease by more than two percent (2%) the number of parking or loading spaces depicted on the approved plans.

The patio/deck does not change the number of parking or loading spaces depicted on the approved plans.

ii. Additional Plan Modifications Raised by Neighbors for Responsive Government Were Permissible Under 11-A DCMR § 304.10.

In addition to the proposed patio/deck, the Neighbors for Responsive Government raised a list of thirteen additional issues; however, as demonstrated below, the Zoning Administrator was authorized to approve the Modification pursuant to 11-A DCMR § 304.10. Within its appeal, the Neighbors for Responsive Government allege the following additional thirteen issues:

- 2) Reduction of the distance between the Proposed Shelter building and the newly constructed parking garage for the existing police station that is co-located on this site, from 29’ to 17’ 7”;
- 3) Relocation of the Trash Area closer to the front of the Proposed Shelter building and apparently shrinking it;
- 4) Significantly shrinking (or eliminating) the Delivery Area for the Proposed Shelter;
- 5) Shrinking the proposed playground to the West of the Proposed Shelter by at least 1,110 square feet, or 30.8%;
- 6) Converting the south yard of the Proposed Shelter building, which was intended to be an unused buffer area because it is closest to neighboring single-family homes to the

- south of the Property, into a storm water retention area to receive run-off from the parking garage, which is expected to include oil and other automotive chemicals;
- 7) Reducing the size of the first floor, and, contrary to the representation by DGS in the Cover Letter to its Modification Request, reducing or eliminating program areas, including significantly reducing the size of the Dining Room;
 - 8) Eliminating the basement, including a large planned storage area;
 - 9) Removing the front entry area;
 - 10) Enlarging the proposed driveway by 25%;
 - 11) Moving the proposed walkway from the northeast side of the building to the southeast side and reducing its width from 25’ to 10’ 6”;
 - 12) Reducing the Proposed Shelter’s footprint;
 - 13) Reducing the gross square footage of the Proposed Shelter and making certain changes to floors 2 through 6; and
 - 14) Revising the building elevation and facades.²⁶

These thirteen additional issues are without merit. Throughout the underlying case, BZA Application No. 19450, the Neighbors for Responsive Government was “*concern[ed] about the size and scope of the proposed shelter,*” and the impact of its size and scope on the neighbors and community at large.²⁷ (emphasis added.) Here, the modifications, with the exception of one, approve a reduction, not an expansion, of the proposed shelter. Now, inexplicably, the Neighbors for Responsive Government disagree with DGS’ *proposed reduction in the size and scope of the proposed shelter*. The Board should reject these claims.

Only one claim— No. 10- Enlarging the proposed driveway by 25%²⁸—would result in an expansion of the proposed shelter. The Board-approved plans from BZA Application No. 19450 depicted a driveway width of 16 feet; however, the Modification approved a new driveway width of 29 feet. According to DGS’s counsel and the proposed plans, the width of the driveway was increased to accommodate the D.C. Department of Transportation’s (DDOT) statutory requirement for a two-way drive,²⁹ which falls outside the purview of the Zoning Administrator and this Board. Consequently, none of the cited claims trigger any of the criteria set forth in 11-A DCMR § 304.10, and the Zoning Administrator’s approval of DGS’ Modification request did not violate 11-A DCMR § 304.10.

²⁶ BZA Appeal No. 19895-Exhibit 1 NRG Appeal of Zoning Administrator Decision.

²⁷ BZA Application No. 19450 April 5, 2017 Decision and Order at page 4.

²⁸ BZA Appeal No. 19895-Exhibit 1 NRG Appeal of Zoning Administrator Decision.

²⁹ See August 6, 2018 Letter from Meredith Moldenhauer at Exhibit 4- August 3, 2018 E-mail thread between DDOT and the law firm Cozen O’Connor.

CONCLUSION

For the foregoing reasons, DCRA respectfully requests that the Board (1) affirm that the Zoning Administrator correctly approved the Modification; and (2) deny these appeals.

Respectfully submitted,
/s/ Esther Yong McGraw
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CERTIFICATE OF SERVICE

I certify that on this 2nd day of January 2019 a copy of “DCRA’s Pre-Hearing Statement” was served via electronic mail to:

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