

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**



Appeal No. 20072 of Marybeth and Ken DeGrave, pursuant to 11 DCMR Subtitle Y § 302, from the decision made on March 11, 2019 by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1903685 (revising building permit B1803293) to allow a three-story addition to an existing attached principal dwelling in the RF-1 Zone at 2202 1st Street N.W. (Square 3122, Lot 24).^{1, 2}

HEARING DATES: July 24, October 9, and November 6, 2019
DECISION DATES: November 6, 2019 and December 4, 2024

ORDER DISMISSING APPEAL

This appeal was submitted on May 10, 2019 by Ken and Marybeth DeGrave (the “Appellants”) to challenge a decision made on March 11, 2019 by the Zoning Administrator to issue a building permit, which revised a previously issued building permit, to allow a three-story addition to an existing attached building in the RF-1 zone at 2202 1st Street N.W. (Square 3122, Lot 24). Following a public hearing, the Board voted to dismiss the appeal as untimely.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda and letters dated June 6, 2019, the Office of Zoning provided notice of the appeal and of the public hearing to the Appellants, the Zoning Administrator and the Department of Consumer and Regulatory Affairs (“DCRA”), the Office of Planning, the Office of Advisory Neighborhood Commissions, Advisory Neighborhood Commission (“ANC”) 5E, the ANC in which the subject property is located, and to Single Member District ANC 5E08, and to the Chairman and the four at-large members of the D.C. Council as well as the Councilmember for Ward 5, the ward in which the subject property is located.³ Notice was published in the D.C. Register on June 14, 2019 (66 DCR 7144).⁴

¹ The Zoning Regulations have been amended since this appeal was filed. This order reflects the zoning provisions in effect at the time of the Board’s vote at the conclusion of the public hearing.

² As of October 1, 2022, the zoning functions formerly performed by the Department of Consumer and Regulatory Affairs were assumed by the new Department of Buildings. *See* D.C. Official Code § 10-561.01 *et seq.*

³ The Appellants provided a copy of the appeal to the Property Owners when it was filed on May 10, 2019. (Exhibit 3.)

⁴ The public hearing was originally scheduled for July 24, 2019 and was postponed at the Property Owners’ request.

Party Status. In accordance with Subtitle Y § 501.1, the following automatically had party status in this proceeding: (a) the Appellants, (b) DCRA, as the entity whose administrative decision was the subject of the appeal, (c) Lynwood Guise and Nicole Wright-Guise, the owners of the property that is the subject of the administrative decision (the “Property Owners”), and (d) the affected ANC, Advisory Neighborhood Commission 5E. The Board received no requests for party status.

Appellants’ Case. The Appellants challenged the decisions of the Zoning Administrator to issue a revised building permit to the Property Owners for changes to the building at the subject property, making numerous claims of error. (See Exhibits 2, 10.) The Appellants alleged additional zoning violations in a “supplemental information filing” submitted on July 3, 2019. (Exhibit 27.)

DCRA. The Department of Consumer and Regulatory Affairs asked the Board to dismiss the appeal as untimely or to deny it because the building permits challenged by the Appellants were correctly approved by the Zoning Administrator. DCRA asked the Board to incorporate a second revised permit, issued to the Property Owners on October 2, 2019, into the appeal. (Exhibit No. 37). According to DCRA, some of the Appellants’ claims were untimely because they were not raised until the Appellants’ supplemental submission, some claims were rendered moot after the second revised permit was issued, and the remaining claims of error were without merit because the permits complied with zoning requirements. (Exhibits 31, 38.)

Property Owners. Lynwood Guise and Nicole Wright-Guise, the owners of the subject property, appeared at the public hearing on the appeal.

FINDINGS OF FACT

1. The property that is the subject of this appeal is an interior lot on the west side of 1st Street N.W. near its intersection with W Street, with the address 2202 1st Street N.W. (Square 3122, Lot 24).
2. The subject property is rectangular, 20 feet wide and 90 feet deep. Its lot area is 1,800 square feet.
3. The subject property was improved with an attached building that was used as a principal dwelling.
4. The front portion of the building had three floors above a cellar. A two-story portion extended toward the rear of the lot. A two-story rear addition provided covered decks on the two upper floors of the building.
5. The subject property did not provide any vehicle parking spaces.
6. The Appellants owned the property abutting the subject property to the north (Lot 23 in Square 3122). Lot 23 was similar in size and shape to the subject property and was also improved with an attached dwelling. The front portion of the Appellants’ building

contained three stories, while the rear portion extended at two stories and then one story toward the rear of the lot. The roof of the two-story portion contained a deck accessible from the third story of the dwelling. A portion of the deck was occupied by a chimney. A one-story screened porch was built at the rear of the one-story portion of the Appellants' dwelling.

7. The subject property is located in a Residential Flat (RF) zone, RF-1, where a two-unit flat is permitted as a matter of right. The RF-1 zone limits building height to 35 feet and three stories. (Subtitle E § 303.1.)
8. The Property Owners undertook a project to renovate and enlarge their building for use as a two-unit flat. As originally proposed, the Property Owners intended to remove the existing rear decks, construct a new rear addition on the cellar, first, and second floors, extend the rear wall of the third floor by eight feet, and install a new roof deck on the roof of two-story portion of the building accessible from the third floor. A new dwelling unit would be created in the cellar.
9. In February or March 2018 the Property Owners visited the Appellants' residence to discuss their building plans. The Appellants stated their belief that "their planned addition was too tall" based on the building height measuring point and roof measuring point, but the Property Owners "did not address the issue." (Exhibit 42.)
10. In February 2018, the Appellants received a neighbor notification form submitted by the Property Owners. The Appellants submitted an "adjoining owner's response" to the neighbor notification form, dated March 18, 2018. The response reflected the Appellants' objection "to the proposed work plan on the grounds that the work plan will not protect [their] adjoining property...." (Exhibit 41A, Exhibit 1.)
11. The Appellants reviewed the documents they received and submitted technical objections but did not receive a response from the Property Owners or DCRA. (Exhibit 2.) DCRA received the Appellants' objections, which included allegations that the Property Owners' project would violate Zoning Regulations with respect to building height and because of the proximity of the proposed third-floor addition to a chimney on the Appellants' property. Exhibit 41A, Exhibit 2.)
12. On November 14, 2018, DCRA issued Building Permit No. B1803293 (the "Initial Permit") to the Property Owners. The description of work was stated as: "Enclose the existing rear porch on basement, first floor and second floor, renovate the entire first second and third floor. extend the third floor level and add a roof deck. *****DEMO, ADDITION POP UP, ALTERATION LEVEL 2, ROOF DECK." The existing and proposed use of the property was shown as "single family dwelling – R-3." (Exhibit 11.)

13. After the Initial Permit was issued, the Appellants filed a freedom of information (“FOIA”) request to DCRA to obtain copies of the Property Owners’ plans.⁵ The Appellants contacted DCRA about issues allegedly raised by the Initial Permit.
14. On December 11, 2018, a DCRA inspector visited the subject property and placed a stop work order after determining that the Initial Permit had been issued without approval by the Historic Preservation Review Board, in violation of the Construction Code. (Exhibit 41A, Exhibits 3-5.) The stop work order was posted at the subject property. (Transcript of November 6, 2019 at 74, 79.)
15. The Zoning Administrator testified that the Initial Permit remained effective, although “construction was ceased with the stop work order” and was not allowed to resume until issuance of a revised permit. (Transcript of October 9, 2019 at 80.)
16. The Property Owners applied for a permit revision on December 26, 2018. (Exhibit 41.) The Appellants indicated that they were not notified or provided copies of revised permit documents.
17. The stop work order was lifted as of December 26, 2018, although the notice may not have been removed from the subject property until later.
18. The Appellants filed a second FOIA request on February 11, 2019 and submitted additional comments to DCRA but did not receive a response.
19. On March 11, 2019, DCRA issued Building Permit No. B1903685 (the “first revised permit”) to the Property Owners. The description of work was stated as “Revision to the existing building permit B1803293. Reduce the size of the 2nd floor overhang per zoning requirements.” The existing and proposed use of the property was again shown as “single family dwelling – R-3.” (Exhibit 12.)
20. The Zoning Administrator testified that the purpose of the first revised permit was to “cure” an issue relating to lot occupancy created by an overhang – a portion of the second-floor addition that, as initially planned, would extend approximately 2.5 feet further toward the rear of the lot than the lower level. The revision eliminated the cantilevered portion so that the addition would be flush with the rear wall at the first level, thereby avoiding the attendant increase in lot occupancy. (Transcript of October 9, 2019 at 80.)
21. The Appellants filed a third FOIA request on March 11, 2019 in connection with the approved permit revisions pertaining to the first revised permit. The Appellants received

⁵ According to DCRA, a FOIA request was not needed to view a permit or related documents, which were publicly available on-line and at DCRA’s offices by identifying the type of permit and address. (Transcript of October 9, 2019 at 96.) In this case, the Property Owners submitted their plans by uploading them electronically through DCRA’s electronic plan processing system, ProjectDox; as a result, the documents were readily accessible at least by November 2018. (Transcript of October 9, 2019 at 98.)

documents on April 1, 2019 that were “the basis for the appeal” that the Appellants filed on May 10, 2019. (Exhibits 2, 41.)

22. On March 25, 2019, the Property Owners asked DCRA for a follow-up inspection. On April 10, 2019, DCRA confirmed compliance. (Exhibit 41.)
23. On October 2, 2019, DCRA issued Building Permit No. B1912522 (the “second revised permit”) to the Property Owners. The description of work was stated as: “Revision to Permit B1803293 to remove roof deck and correct application proposed use for change of use from single family to two family flat.” The existing use of the property was shown as “single family dwelling – R-3” and the proposed use was “two-family flat – R-3.” (Exhibit 38C.)
24. The Zoning Administrator testified that the “primary change” created by the second revised permit was the elimination of a planned roof deck; the “major change” was “that the roof deck...is removed in the latest approval.” According to the Zoning Administrator, the second revised permit maintained the planned extension of the third floor – “that is the same as in the original permit and the latest...permits....That extension’s the same. What’s been changed is on that portion of the roof, which sits atop the second floor now, there was going to be a deck [and that] deck is now gone.” The Property Owners also modified the design to eliminate a door that was to provide access to the deck and replaced it with a window. (Transcript of October 9, 2019 at 94.)

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act 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 in the administration or enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1) (2008 Repl.). Appeals to the Board of Zoning Adjustment “may be taken by any person aggrieved, or organization authorized to represent that person,...affected by any decision of an administrative officer...granting or withholding a certificate of occupancy...based in whole or part upon any zoning regulations or map” adopted pursuant to the Zoning Act. D.C. Official Code § 6-641.07(f) (2008 Repl.). *See also* Subtitle Y § 302.1.

A zoning appeal may be taken only from the first writing that reflects the administrative decision complained of, to which the appellant had notice; no subsequent document may be appealed unless the document modifies or reverses the original decision or reflects a new decision. (Subtitle Y § 302.5.) A zoning appeal must be filed within 60 days “from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.” (Subtitle Y § 302.2.) The Board may extend the 60-day deadline for the filing of a zoning appeal only if an appellant demonstrates that (a) exceptional circumstances, which were outside the appellant’s control and could not have been reasonably anticipated, substantially impaired the appellant’s

ability to file a zoning appeal and (b) the extension of time would not prejudice the parties to the zoning appeal. (Subtitle Y § 302.6.)

In this case, DCRA issued an initial building permit and two revised building permits to the Property Owners for a project at the subject property. The Appellants filed their appeal within 60 days of the issuance of the first revised permit and asserted that the appeal was timely because the first revised permit “superseded” the initial permit. (Exhibit 2.) The Appellants made a number of claims of error, arguing that the first revised permit authorized a three-story addition to a structure that was nonconforming with respect to height and lot occupancy, allowing the enclosure of an existing two-story deck and patio as well as an addition at the third level of the building. According to the Appellants, the first revised permit violated the following zoning provisions: (a) Subtitle A § 302, because no certificate of occupancy had been issued to allow use of the subject property as a two-unit flat; (b) Subtitle C § 701.5, because the subject property did not meet the minimum requirements for number of vehicle parking spaces for a flat; (c) Subtitle E § 206.1(b), because the Property Owners’ planned upper floor addition would block or impede the function of a mechanical vent and gas furnace exhaust pipe on the Appellants’ property; (d) Subtitle C § 1502.1, because a penthouse on the planned third-floor deck would not meet setback requirements; (e) Subtitle C §§ 202.1 and 202.2(b), because the planned expansion of the third floor would impermissibly increase the nonconforming height of the Property Owners’ building; and (f) Subtitle C §§ 201.1 and 306.1, because the Property Owners’ nonconforming structure was used as the basis for an otherwise unpermitted structure that did not meet lot occupancy or rear yard requirements. DCRA’s response countered the Appellants’ arguments on each claim of error and urged the Board to deny or dismiss the appeal. DCRA also objected that new issues, relating to building height and penthouse setbacks, were not raised by the Appellants until their supplemental submission and therefore were untimely.

The Board concludes that the appeal must be dismissed as untimely because the first writing of the zoning decisions challenged by the Appellants was made in the Initial Permit, to which the Appellants had notice, and those decisions were not modified or reversed in the subsequently issued revised permits. The findings of fact reflect that the Initial Permit authorized certain construction at the Property Owners’ dwelling. The scope of the project was apparent from the description of work stated on the Initial Permit, which referred to a rear addition on three levels and extension of the third floor.⁶ The Appellants were aware of the Property Owners’ plans even before the Initial Permit was issued and, living on an adjoining lot, the Appellants were aware of construction activities undertaken at the subject property. The Appellants acknowledged that they were aware of that the Initial Permit had been issued and believed then that zoning violations may have occurred. Instead of filing a zoning appeal within 60 days of notice of the zoning decisions

⁶ The Board notes that the Initial Permit did not reflect the planned use of the subject property as a two-unit flat, which was not indicated until the second revised permit. Although a two-unit flat is permitted as a matter of right in the RF-1 zone, the Appellants alleged that issuance of the first revised permit violated the zoning regulations requiring a certificate of occupancy to authorize use of the subject property as a flat. The Board agrees with DCRA that this claim of error was “premature” because a “permit holder is not required to have a Certificate of Occupancy until after the construction has passed the final building inspection” and the Property Owners’ construction was not yet completed. (Exhibit 38.)

complained of, however, the Appellants opted to pursue their concerns with DCRA, including by contacting the Zoning Administrator and filing FOIA requests to obtain copies of the Property Owners' publicly available plans.

The Appellants submitted this appeal within 60 days of the issuance of the first revised permit. However, the Appellants did not appeal the determinations made in the first revised permit with respect to the second-floor overhang (or the elimination of the originally planned roof deck in the second revised permit). Instead, their claims of error arose from zoning decisions made in connection with the issuance of the Initial Permit.

The Initial Permit was revised twice but was not revoked or superseded.⁷ The stop work order did not automatically revoke the Initial Permit, because the permit holder (*i.e.* the Property Owners) had the opportunity to come into compliance by correcting the errors specified in the stop work order. (See Transcript of November 6, 2019 at 113.) The two revised permits made relatively limited, discrete changes to the Property Owners' project that was approved in the Initial Permit; the first revision modified a portion of the project on the second floor and the second revision eliminated a planned roof deck. Both revised permits were specifically termed revisions of the Initial Permit, and neither revised permit modified or reversed the aspects of the Initial Permit that the Appellants challenged in this appeal. A revised building permit is appealable only to the extent that the new permit reflects a new zoning decision different from the zoning decisions made in the initial permit. *See, e.g.*, Appeal No. 18499 (Advisory Neighborhood Commission 6A; June 19, 2013), Appeal No. 18980 (Concerned Citizens of Argonne Place; July 13, 2016), and Appeal No. 19550 (Advisory Neighborhood Commission 6C; August 11, 2021).

In this case, the Initial Permit was issued on November 14, 2018 and was modified March 11, 2019 to reduce the size of the second-floor overhang. The appeal was filed on May 10, 2019 – within 60 days of the first revised permit but almost six months after the initial permit was issued. The Appellants, who own and reside in a dwelling on an abutting property, were aware of the Property Owners' project at least by February 2018, when the Appellants received a neighbor notification form as well as a visit from the Property Owners to discuss their project. The Appellants were aware that the Initial Permit had been issued and knew that DOB issued a stop work order about a month later, when the Appellants undertook efforts over several months to obtain copies of plans and to address issues and concerns about the Property Owners' project. In this proceeding, the Appellants objected that the Property Owners' plans were insufficient to assess matters related to building height. However, based on a comparison of plans provided by DCRA from the Initial Permit and subsequent revisions (Exhibits 45, 45A), the Board concludes that the plans were sufficient to provide notice to the Appellants that a zoning decision had been made with respect to

⁷ As DCRA explained at the hearing, the revised permits did not supersede the Initial Permit. Instead, the Initial Permit (known as the "parent permit") was modified by the two subsequent revisions, which affected only a second-floor overhang and a third-floor deck, but otherwise "the other proposed changes to 2202 1st Street remain[ed] the same" and the parent permit was unchanged. (Transcript of October 9, 2019 at 64-65.) That is, the Initial Permit remained in effect, as modified. The second revised permit also revised the Initial Permit, another indication that the Initial Permit remained in effect and was not superseded by the first revised permit. The description of work stated on the second revised permit included "Revision to Permit B1803293" – that is, the Initial Permit.

building height in connection with the issuance of the Initial Permit, thereby providing the first writing of the zoning decision later complained of in connection with the Appellants' appeal of the first revised permit, more than 60 days later.

The Appellants did not allege any circumstances that would warrant extension of the 60-day deadline for the filing of a zoning appeal or demonstrate that an extension of time would not prejudice the other parties. The Appellants' efforts to pursue their claims at DCRA did not provide a basis to extend the 60-day deadline. *See, e.g.*, Appeal No. 19627 (Advisory Neighborhood Commission 7F; July 16, 2019) (appellant's communications with DCRA did not negate the applicability of the 60-day deadline for filing an appeal with the Board); Appeals No. 16451 and 16452 (Waste Management of Maryland, Inc.; May 22, 2000) (a long interval between a zoning decision and an appeal of that decision does not become reasonable merely because an appellant initially chooses to pursue other options instead of preserving its appeal rights by filing a timely appeal); *affirmed, Waste Management of Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1122-1123 (D.C. 2001) (deadlines for appeals serve important ends and should not be extended without good cause; the fact that an appellant chose to concentrate on avenues that reasonably may have appeared more promising than an appeal does not excuse delay in filing an appeal).

Great weight. The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. 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)). In this case, the affected ANC, ANC 5E, did not submit a report or otherwise participate in the proceeding.

Exceptions to the Proposed Order. Because a majority of the Board members participating in the issuance of this order did not personally hear the evidence in this appeal, a proposed order dismissing the appeal was provided to the parties to afford them an opportunity to present written exceptions, in accordance with D.C. Official Code § 2-509(d). Comments were received only from the Appellants, who submitted a filing on September 11, 2024 (Exhibit 51). The Appellants argued that the "'original writing' of the permit...should never have been issued" because it "did not address the technical objections" or "the historic district designation." Citing a provision of the Construction Code, the Appellants asserted that adequate grounds existed for revocation because "these permits were issued in error..." The Appellants also urged the Board to "reconsider" the first-writing rule.

The Board concludes that none of the Appellants' assertions warrants any change in the proposed order because the exceptions merely restate arguments already considered by the Board or are outside the scope of the Board's jurisdiction in this proceeding. The Board's jurisdiction in an appeal is limited to claims of error made in the administration or enforcement of the Zoning Regulations; an appeal must be based on the zoning regulations or map adopted pursuant to the Zoning Act. D.C. Official Code §§ 6-641.07(f), 6-641.07(g)(1) (2008 Repl.). Accordingly, the Board lacks jurisdiction to consider claims of error based on the Construction Code. The Board

also lacks jurisdiction to modify or reconsider the first-writing rule.⁸ The Board's Rules of Practice and Procedure specify that a zoning appeal generally must be filed within 60 days from the date of the decision being appealed, and that an appeal may be taken only from the first writing that reflects the administrative decision complained of, to which the appellant had notice. (Subtitle Y §§ 302.2, 302.5.) For the reasons discussed above, the Board concludes that the appeal must be dismissed as untimely.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellants did not meet the requirements for a timely appeal in challenging the decision made on March 11, 2019 by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1903685 (revising building permit B1803293) to allow a three-story addition to an existing attached principal dwelling in the RF-1 Zone at 2202 1st Street N.W. (Square 3122, Lot 24). Accordingly, it is therefore **ORDERED** that the appeal is **DISMISSED** and the Zoning Administrator's determination is **SUSTAINED**.

VOTE: 3-1-1 (Frederick L. Hill, Carlton E. Hart, and Lorna L. John voting to dismiss the appeal; Peter G. May opposed; one Board seat vacant)

VOTE 4-0-1 (Frederick L. Hill, Chrishaun S. Smith, Carl H. Blake, and Tammy M. Stidham voting to issue this Order; Lorna L. John not present, not participating)

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

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

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: December 9, 2024

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.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION,

⁸ The Board's jurisdiction is defined by statute and does not extend to the authority to amend any regulation. D.C. Official Code § 6-641.07(e) (2012 Repl.).

FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.