

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 21049 of Gernot Brodnig and Alison Schafer, pursuant to 11 DCMR Subtitle X § 1100, from the decision made on August 11, 2023 by the Department of Buildings, Zoning Administrator to issue Building Permit No. B2305113 to allow a rear addition to an attached principal dwelling in the R-20 Zone at 2716 O Street, N.W. (Square 1239, Lot 143).¹

HEARING DATES: April 17 and 24, 2024
DECISION DATE: May 1, 2024

ORDER DENYING APPEAL

This appeal was filed on October 23, 2023 by Gernot Brodnig and Alison Schafer (together, the “Appellants”) to challenge a decision made on August 11, 2023 by the Department of Buildings to issue a building permit allowing a rear addition to an attached dwelling in the R-20 zone at 2716 O Street, N.W. (Square 1239, Lot 143). Following a public hearing, the Board voted to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda and letters dated December 1, 2023, the Office of Zoning provided notice of the appeal and of the public hearing to the Appellants; the Department of Buildings; Preservation DC, LLC, the owner of the property that is the subject of the appeal (the “Property Owner”); Advisory Neighborhood Commission (“ANC”) 2E, the ANC in which the subject property is located, and Single Member District ANC 2E06; the Office of Planning; the Department of Transportation; the Office of Advisory Neighborhood Commissions; and the Chairman and the four at-large members of the D.C. Council as well as the Councilmember for Ward 2, the ward in which the subject property is located. Notice was sent to the Zoning Administrator on December 7, 2023 and published in the *D.C. Register* on December 15, 2023 (70 DCR 15790).

Party Status. In accordance with Subtitle Y § 501.1, the Appellants, DOB, ANC 2E, and the Property Owner were automatically parties in this proceeding. The Board received no requests for intervenor status.

¹ By orders issued August 25, 2023, the Zoning Commission approved text amendments that established new zone names and amended some of the regulations applicable to the Applicant’s proposal. (See Zoning Commission Orders No. 18-16 and 19-27.) This order refers to the zoning regulations in effect at the relevant times. The subject property is now located in the R-3/GT zone district.

Appellants’ Case. The Appellants challenged the issuance of a building permit to the Property Owner for a rear addition to the attached dwelling at the subject property, which adjoined the Appellants’ properties. The Appellants asserted that the building permit was issued without a valid special exception to allow the addition on the ground that a prior special exception, issued to prior owners of the subject property, had expired by the time the Property Owner applied for the new permit. According to the Appellants, the special exception obtained by the prior owners also became null and void along with a building permit obtained by the prior owners. (Exhibits 2, 12.)

DOB. The Department of Buildings argued that the Board should deny the appeal because the application for Building Permit No. B2305113 was filed on March 28, 2023, before the Board’s order in Application No. 19548 expired on March 30, 2023, and DOB appropriately issued the permit. (Exhibit No. 13.)

Property Owner. The Property Owner argued that the appeal should be denied because “the main building permit application for the project was accepted by DOB” within the two-year period provided. According to the Property Owner, the Appellants did not provide any rationale or justification for their alternate conclusion or “any other justification for their claim that the Zoning Administrator erred” in issuing the permit. (Exhibit 15.)

FINDINGS OF FACT

1. The property that is the subject of this appeal is located on the south side of O Street, N.W. approximately mid-block between 27th and 28th Streets, with the address 2716 O Street, N.W. (Square 1239, Lot 143).
2. The subject property is improved with a two-story attached principal dwelling.
3. The Appellants own properties that abut the subject property. Gernot Brodnig owns Lot 164, which fronts on Dumbarton Street to the south and has a rear lot line in common with the subject property. Alison Schafer owns Lot 166, which abuts the subject property to the east and has a side lot line in common with the subject property. Both of the Appellants’ lots are also improved with row dwellings.
4. In 2018, the Board granted an application submitted by the then owners of the subject property, Tara Guelig and Yuri Horwitz (the “Applicants”), for zoning relief needed to allow a two-story rear addition to their dwelling. Specifically, the Board approved a special exception under Subtitle D § 1206.4 from the requirement of Subtitle D § 1206.3, known as the “10-foot rule,” to allow the rear wall of the Applicants’ dwelling to extend more than 10 feet beyond the rear wall of the attached dwelling on the adjoining lot to the east.² See Application No. 19548 (Tara Guelig and Yuri Horwitz; November 15, 2018).

² In accordance with Subtitle D § 1206.3, “a rear wall of an attached or semidetached building shall not be constructed to extend farther than ten feet (10 ft.) beyond the farthest rear wall of any principal residential building on any adjoining property.” In accordance with Subtitle D § 1206.4, the Board was authorized to grant relief from the 10-foot rule as a special exception: “In the R-20 zone a rear wall of an attached or semi-detached building may extend

5. The Appellants participated in the Board's proceeding as parties in opposition to the application.
6. The addition approved in Application No. 19548 would extend 14 feet, four inches from the existing rear wall of the applicants' dwelling. Because the rear wall of the Applicants' existing dwelling extended approximately 11.5 feet beyond the rear wall of the residential building on the abutting property to the east, the planned addition would extend approximately 26 feet from the rear wall of the adjoining dwelling.
7. The Board's order in Application No. 19548 noted that, pursuant to Subtitle Y § 604.10, approval of the special exception was in accordance with plans shown as Exhibits 7 and 12, as revised by Exhibit 90, in the record of that proceeding.³
8. The order in Application No. 19548 became final when it was issued, on November 15, 2018.⁴
9. The Appellants filed a timely appeal of the Board's order in Application No. 19548 at the District of Columbia Court of Appeals.
10. The Applicants filed an application for a building permit at the Department of Consumer and Regulatory Affairs ("DCRA") around March 22, 2019.⁵ On April 9, 2019, DCRA accepted the permit application as complete. (Exhibits 12, 13.)
11. On March 30, 2021, the Court of Appeals issued an opinion affirming the Board's order in Application No. 19548. *See Schafer et al. v. District of Columbia Bd. of Zoning Adjustment*, No. 18-AA-1323, Memorandum Opinion and Judgment decided March 30, 2021.

farther than ten feet (10 ft.) beyond the farthest rear wall of any principal residential building on any adjoining property if approved as a special exception pursuant to Subtitle X, Chapter 9 and as evaluated against the criteria of Subtitle D §§ 5201.3(a) through (d) and §§ 5201.4 through 5201.6."

³ Pursuant to Subtitle Y § 604.9, approval of an application includes approval of the plans submitted with the application for the construction of a building or structure (or addition thereto) or the renovation or alteration of an existing building or structure, unless the Board orders otherwise. An applicant is required to carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board, unless the Board orders otherwise. (Subtitle Y § 604.10.) The Zoning Administrator may not approve a permit application for zoning compliance unless the plans conform to the plans approved by the Board (as those plans may have been modified by any guidelines, conditions, or standards that the Board applied, subject to the minor deviations permitted by Subtitle Y § 703). (Subtitle Y § 702.8.)

⁴ A final order of the Board becomes final when the order is filed in the record and served on the parties, the date of which is stated at the conclusion of each order. (Subtitle Y § 604.7.)

⁵ 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.*

12. DCRA issued Building Permit No. B1907228 to the Applicants in June or July, 2022. (Exhibits 12, 13.)
13. Later in 2022, the Applicants sold the subject property to the Property Owner.
14. Neither the Applicants nor the Property Owner notified DCRA of the change in ownership of the subject property. As a result, Building Permit No. B1907228, issued to the Applicants, became null and void by operation of a provision in the Construction Code.⁶
15. The Property Owner filed an application for a new building permit, which DOB accepted on March 28, 2023. (Exhibit 12.)
16. On August 11, 2023, DOB issued Building Permit No. B2305113 to the Property Owner for the subject property. The description of work was stated in part as “Permit scope: existing single-family dwelling, rear addition and renovations with rear terrace, knee wall and steps. ****Resubmission for expired DOB Permit B1907228 to reflect new owner Preservation DC LLC and reinstate ongoing construction.” (Exhibit 3.)
17. Following the Board’s approval of an application, the applicant may file an application for a building permit with the proper authorities. (Subtitle Y § 702.7.)
18. Pursuant to Subtitle Y § 702.1, an order granting a special exception where the establishment of the use is dependent on the erection or alteration of a structure is valid for a period of two years, within which time an application must be filed for a building permit for the erection or alteration approved.
19. In the event a petition to review an order of the Board is filed in the District of Columbia Court of Appeals, the time limits of Subtitle Y § 702.1 begin to run from the decision date of the court’s final determination of the appeal. (Subtitle Y § 702.3.)
20. Unless the Board’s order is stayed by the Board or by a court of competent jurisdiction, an applicant may proceed pursuant to the Board’s order prior to the court’s final determination. (Subtitle Y § 702.3.)

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 the Director of the Department of Buildings … or any other administrative officer or body

⁶ The Appellants cited 12A DCMR § 105.12, Change in Permit Holder, which states that “Where a change in the permit holder of a valid, unexpired permit is proposed or occurs, whether as the result of a transfer of the premises or other circumstances, the permit shall be deemed null and void unless, within 30 days after the date on which the change of permit holder occurs: (1) The permit holder of record notifies the code official of a change in permit holder; and (2) The new permit holder submits information required by the code official on an approved form.”

in the carrying out or enforcement” of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2012 Repl.).) Appeals to the Board “may be taken by any person aggrieved ... by any decision of the Director of the Department of Buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map [adopted pursuant to the Zoning Act].... There shall be a public hearing on appeal.” (D.C. Official Code § 6-641.07(f) (2012 Repl.).) *See also* Subtitle Y § 302.1.

The Appellants argued that DOB improperly issued a building permit to the Property Owner without first requiring the Property Owner to obtain zoning relief for the planned construction. The Board does not agree, since zoning relief – including the zoning relief obtained by the Applicants as prior owners of the subject property – must run with the land. *See, e.g., National Black Child Development Institute, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 483 A.2d 687, 691-692 (D.C. 1984), citing *Dexter v. Town Board of Town of Gates*, 36 N.Y.2d 102, 104, 365 N.Y.S. 506, 508, 324 N.E.2d 870, 871 (1975) (discussion of “the fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it”; while a zoning board may impose appropriate conditions on a grant of a special exception, “such conditions ... must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it.”) and *Vlahos Realty Co. v. Little Boar’s Head District*, 146 A.2d 257, 260 (N.H. 1958) (zoning conditions and restrictions are designed to regulate the land itself and its use and not the person who owns or operates the premises by whom such use is to be exercised) as well as 3 R.M. ANDERSON, AMERICAN LAW OF ZONING 2D § 18.69 (1977) and 6 P.J. ROHAN, ZONING AND LAND USE CONTROL § 43.03 (1984). For that reason, the District of Columbia Court of Appeals has held that no valid public purpose is served by confining zoning relief to an individual entity and therefore any personal condition imposed by the Board – in an attempt to limit zoning relief to an applicant, for example – would be unlawful *per se* because personal conditions would impermissibly regulate the business conduct of the owner, rather than the use of the property.⁷ *National Black Child Institute* at 691. *See also French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023 (D.C. 1995) (like the variance itself, any condition imposed on the grant of a variance must run with the land and could not lawfully have been applied only to a prospective tenant on whose behalf the property owner sought zoning relief; therefore, Board’s order granting zoning relief was not moot even though the prospective tenant later decided not to occupy the property since “any tenant, now or in the future,” could occupy the building consistent with the conditions included in the Board’s order).

An application for a special exception must be filed by the “owner of property for which zoning relief is sought, or an authorized representative.”⁸ (Subtitle Y § 300.4.) Pursuant to Subtitle Y §

⁷ By contrast, the Board may impose conditions structured to run with the land. *National Black Child Institute* at 691-692.

⁸ For purposes of an application for a special exception, the authorized representative of the owner might be a lessee or contract purchaser of the property on whose behalf the owner (i.e. the applicant) requests a special exception for a specific use. *See* Subtitle Y § 300.5 and, *e.g.*, Application No. 20472 (The River School) (filed by the owner of the subject property on behalf of a contract purchaser) and Application No. 21004 (District Dogs) (filed by the owner on behalf of a tenant).

702.7, “Following approval of an application by the Board, the applicant may file an application for a building permit or certificate of occupancy with the proper authorities of the District of Columbia.” The use of “the applicant” in Subtitle Y § 702.7 does not mean that *only* the applicant who obtained a special exception is authorized to file an application for a building permit, given that the zoning approval runs with the land and the applicant who originally sought zoning relief might no longer own the subject property. No such restriction or limitation is stated elsewhere in the Zoning Regulations, including in Subtitle A § 301.7, which applies to “[a]ll applications for building permits authorized by orders of the Board of Zoning Adjustment” and states that applications “may be processed in accordance with the Zoning Regulations and Zoning Map in effect on the date the vote was taken to approve the … application, to the extent the proposed building or structure is depicted on any plans approved by the Board....” Similarly, with some exceptions not relevant here, any construction authorized by a permit may be carried to completion pursuant to the zoning regulations in effect on the date that the permit is issued, provided that the *permit holder* (not necessarily an applicant who obtained zoning relief) begins construction work within two years of the date on which the permit is issued (Subtitle A § 301.4) and *any person* who erects, constructs, owns, controls, occupies, maintains, or uses any building must comply with any condition to the issuance of a building permit for the building (Subtitle A § 303.5).

The Appellants acknowledge that the two-year period of validity of the Board’s order in Application No. 19548 began on March 30, 2021, when the Court of Appeals issued its decision. The Appellants emphasized a provision in the order stating that it was not valid for more than two years unless, during that two-year period, *the applicant* filed plans for the structure at DCRA for the purpose of securing a building permit. According to the Appellants, that provision “makes clear that the vesting of the BZA decision is limited to the applicants, i.e. the previous owners” and “implies that the fact that the current owners also applied within the prescribed timeframe is irrelevant.” (Exhibit 12.) According to the Appellants, the special exception never vested because the building permit obtained by the Applicants was rendered null and void: “Permits that have expired, were revoked, or become null and void require the applicants to start afresh, including agency review.” (Exhibit 12.)

For the reasons discussed above, the Board does not agree that the vesting of the zoning relief approved by the Board in its order in Application No. 19548 was limited to the Applicants. Nor did the lapsing of the Applicants’ building permit have any effect on the validity of the Board’s order, which remained in effect for two years following issuance of the decision in the appeal of the Board’s order to the Court of Appeals, see Subtitle Y § 702.1 and Subtitle Y § 702.3. The Board agrees with DOB that the Board’s order in Application No. 19548 had not expired before the Property Owner filed an application for a building permit, that the order runs with the property as opposed to the owner, and that the order did not become null and void when a prior building permit associated with the property became null and void. (Exhibit 13.)

In this case, the Applicants applied for and obtained a building permit for the addition at issue in Application No. 19548. That permit lapsed after neither the Applicants nor the Property Owner informed DCRA of the change in ownership, as required under the Construction Code. However, the lapsing of the building permit had no effect on the zoning relief approved by the Board, because the Board’s order in Application No. 19548 remained valid by operation of Subtitle Y § 702.3 until

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two years after the date of issuance of the Court of Appeals decision. For those reasons, the Board was not persuaded by the Appellants' argument that only the Applicants could obtain a building permit, and that once their permit was rendered null and void, the zoning relief obtained by the Applicants was also rendered null and void, thereby precluding a subsequent application for a new permit by the Property Owner. Instead, the Property Owner filed a new application for a building permit while the Board's order was still in effect.

The Appellants do not argue that the building permit issued to the Property Owner was otherwise defective; *e.g.*, for not conforming to the plans approved by the Board's order in Application No. 19548. The Board agrees with the Property Owner that the Appellants did not provide any "rationale or justification for their alternate conclusion" or "any other justification for their claim that the Zoning Administrator erred" in issuing the permit to the Property Owner. (Exhibit 15.) Accordingly, the Board finds no basis to determine that the building permit was impermissibly issued to the Property Owner or that the Property Owner should have been required to obtain new zoning relief for the planned rear addition.

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 2E, did not submit a report and therefore did not state any issues or concerns to which the Board can give great weight.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not shown an error in the decision made on August 11, 2023 by the Department of Buildings, Zoning Administrator to issue Building Permit No. B2305113 to allow a rear addition to an attached principal dwelling in the R-20 zone at 2716 O Street, N.W. (Square 1239, Lot 143). Accordingly, it is therefore **ORDERED** that the **APPEAL** is **DENIED**.

VOTE: 4-0-1 (Lorna L. John, Carl H. Blake, Chrishaun S. Smith, and Tammy M. Stidham to DENY the appeal; Frederick L. Hill 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: June 6, 2024

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PURSUANT TO 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, 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.