

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



Appeal No. 20026 of the Arboretum Neighborhood Association, pursuant to 11 DCMR Subtitle Y § 302, from the decision made on January 27, 2017 by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue an unpublished zoning certification in response to a request to certify that a community-based institutional facility (adult rehabilitation center) is a matter-of-right use in the PDR-1 Zone at premises 3400 New York Avenue, N.E. (Parcel 173/118).

HEARING DATE: October 16, 2019
DECISION DATE: November 6, 2019

ORDER DISMISSING APPEAL

This appeal was filed on March 15, 2019 on behalf of the Arboretum Neighborhood Association (the “Appellant”) to challenge a decision made on January 27, 2017 by the Zoning Administrator, Department of Consumer and Regulatory Affairs¹ to issue a zoning certification letter certifying that a community-based institutional facility (adult rehabilitation center) is a matter-of-right use in the PDR-1 zone at 3400 New York Avenue, N.E. (Parcel 173/118). Following a public hearing, the Board voted to dismiss the appeal for lack of jurisdiction.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda and letters dated August 15, 2019, the Office of Zoning provided notice of the appeal and of the public hearing to the Appellant; Jemal’s Academy LLC, the owner of the property that is the subject of the appeal (the “Property Owner”); the Zoning Administrator; Advisory Neighborhood Commission (“ANC”) 5C, the ANC in which the subject property is located, and Single Member District ANC 5C04; the Office of Planning; 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 5, the ward in which the subject property is located. Notice was published in the *D.C. Register* on August 16, 2019 (66 DCR 10522).

Party Status. In accordance with Subtitle Y § 501.1, the Appellant, DCRA, the Property Owner, and ANC 5C were automatically parties in this proceeding. There were no requests for party status.

¹ 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.*

Appellant's Case. The Appellant challenged the Zoning Administrator's "unpublished 01/27/17 Zoning Certification and the process related thereto," asserting that the certification was "being used as ... proof of matter of right determinations without formal government review and without any notice" to the affected ANC and citizens about the use of a vacant building as "a 300-bed residential reentry facility (also known as a community-based institutional facility or adult rehabilitation center)." According to the Appellant, the Zoning Administrator's practice "potentially circumvents the BZA's jurisdiction and deprives potentially affected citizens and residents of the Arboretum community (as well as other similarly situated residents) of appropriate notice thereby impeding their rights to protect their respective properties." (Exhibit 1.)

DCRA. The Department of Consumer and Regulatory Affairs asked the Board to dismiss the appeal for lack of jurisdiction because the appeal failed to identify any error by the Zoning Administrator in issuing the zoning certification. (Exhibit No. 21.)

Property Owner. The Property Owner, Jemal's Academy LLC, also asked the Board to dismiss the appeal, indicating no objection to DCRA's motion and arguing that the appeal was moot.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 3400 New York Avenue, N.E. (Parcel 173/118).
2. The subject property is improved with a building that is currently vacant.
3. The subject property is located in a Production, Distribution, and Repair (PDR) zone, PDR-1. The PDR zones provide for (a) heavy commercial and light manufacturing activities employing large numbers of people and requiring some heavy machinery under controls that minimize any adverse effect on other nearby, more restrictive zones; and (b) areas suitable for development as heavy industrial sites, where industrial developments are protected from non-industrial uses that would impede the full utilization of properly located industrial sites. (Subtitle J § 100.1.) The provisions of the PDR zones are intended to (a) regulate the use of land and structures and the erection and modification of structures in areas characterized by PDR uses, typically with heavy truck traffic and loading and unloading operations; (b) encourage the retention of viable land to accommodate production, warehousing, distribution, light and heavy industrial, and research and development activities; (c) allow compatible office and retail uses and development; (d) minimize encroachment by uses that are incompatible with PDR uses, including residential uses, which could impair existing PDR activities; (e) manage transitions between PDR-zoned areas and surrounding neighborhoods; and (f) ensure the environmental performance of development. (Subtitle J § 100.2.)
4. The uses that are permitted as a matter of right in a PDR zone include an adult rehabilitation home, which is defined as a "facility providing residential care for one (1) or more individuals sixteen (16) years of age or older who are charged by the United States Attorney

with a felony offense, or any individual twenty-one (21) years of age or older, under pre-trial detention or sentenced court orders.” (Subtitle B § 100.2; Subtitle U § 801.1(f).)

5. The Office of the Zoning Administrator issued a “Zoning Certification” letter signed on behalf of the Zoning Administrator on January 25, 2017. The certification was a printed form with handwritten information provided in blanks. As completed (with the handwritten portion shown in underline), the certification letter stated that:

A request was made to certify the proposed use of the property located at premises 3400 New York Ave. NE (address) for the purpose of operating a/an Comm. Based Inst. Facility AKA (Adult Rehab Center)² (proposed use). The property is situated on lot(s) 0022 in Square 5584.³

This is to certify that, as of 1-25-2017 (date), the above stated address is zoned PDR-1 and the above stated proposed use of the subject premises would comply with the D.C. Zoning Regulations.

Certificate of the proposed use upon the indicated date DOES NOT imply Future approval of building plans and/or certificates of occupancy.

6. The zoning certification was stamped with a statement that “DCRA/Office of the Zoning Administrator/complies with the requirements of DC Zoning Regulations (11 DCMR).” (Exhibit 21A.)
7. The Appellant alleged that, on November 1, 2018, the federal Bureau of Prisons (“BOP”) awarded a five-year contract to CORE D.C., LLC for a 300-bed residential re-entry management center (“RRMC”), commonly known as a halfway house, and that BOP and CORE expected to locate the RRMC at the subject property. According to the Appellant, CORE obtained two zoning certifications to satisfy a requirement of the contract to demonstrate that CORE “secured local government ‘approval’ of its zoning for the intended location.” (Exhibits 3, 27.)

² The use categories stated in the Zoning Regulations include a “community-based institution facility,” which is:

(1) A use providing court-ordered monitored care to individuals who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living; have been assigned to the facility; or are being detained by the government, other than as a condition of probation;

(2) Examples include, but are not limited to: adult rehabilitation home, youth rehabilitation home, or detention or correctional facilities that do not fall within the large-scale government use category; and

(3) Exceptions: This use category does not include uses which more typically would fall within the emergency shelter or large-scale government use category. This use category also does not include residential or medical care uses that were previously defined as community residence facilities, health care facilities, substance abuser's homes, or youth residential care homes.

(Subtitle B § 200.2(h), which was later renumbered to Subtitle B § 200.2(g).)

³ The zoning certification misidentified the square and lot designations of the subject property but correctly indicated its address.

8. The Appellant stated that “the affected community” did not know about the zoning certification until almost two years after its execution, when the Appellant learned of its existence indirectly as the result of a decision made on February 21, 2019 in connection with a bid protest related to the BOP contract.

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, or by any officer or department of the government of the District of Columbia or the federal government affected, by any decision of [an administrative officer] granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision 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 X § 1100.2, Subtitle Y § 302.1.)

The Appellant challenged the issuance of a zoning certification with respect to both its contents – that an adult rehabilitation home was permitted as a matter of right at the subject property – and to the practice of the Zoning Administrator to issue such certifications without public notice. The Appellant argued that the Zoning Administrator’s practice “potentially circumvents the BZA’s jurisdiction and deprives potentially affected citizens and residents of the Arboretum community (as well as other similarly situated residents) of appropriate notice thereby impeding their rights to protect their respective properties.” (Exhibit 1.) The Appellant referred to the certification as a means “to demonstrate the D.C. Government’s approval of matter of right determinations without formal government review and without any notice whatsoever to the affected Advisory Neighborhood Commissions and/or affected citizens.” According to the Appellant, the lack of public notice of a zoning certification deprived potentially affected citizens of “attempted zoning status verifications thereby impeding their rights to protect their respective properties” and meant that “a developer or property user can effectively circumvent public scrutiny.” The Appellant contended that the lack of notice and the absence of an opportunity to challenge the zoning certification violated the due process rights of its members. (Exhibit 3.)

The Board lacks jurisdiction to rule on the merits of the Appellant’s constitutional claims. *See, e.g.,* Appeal No. 17504 (JMM Corp.; order issued October 1, 2007) (Board has “no jurisdiction to decide questions of constitutionality, as its authority is limited to hearing appeals alleging error in the administration and enforcement of the Zoning Regulations”) and Appeal No. 19334 (Shahid Qureshi; order issued January 16, 2019) (Board declined to consider, as outside the scope of its jurisdiction, an argument that the Zoning Administrator’s decision to revoke a certificate of

occupancy constituted a taking of real property and of business property without just compensation in violation of the due process clause of the U.S. Constitution).

With respect to the Appellant's other arguments, the Board agrees with DCRA that the appeal must be denied for failure to state a claim of error by the Zoning Administrator in issuing the certification. The Appellant commented on aspects of the Zoning Regulations, pointing out perceived deficiencies such as vagueness and suggesting that some text amendments might be warranted, but these are matters outside the scope of the Board's jurisdiction. The Board of Zoning Adjustment "shall not have the power to amend any regulation or map." (D.C. Official Code § 6-641.07(e) (2008 Repl.)) The Zoning Commission is the exclusive agency vested with power to enact zoning regulations for the District of Columbia. *Spring Valley Wesley Heights Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 644 A.2d 434, 436 (D.C. 1994) (If the Board attempted to proscribe a matter-of-right use, it would be exercising powers reserved to the Zoning Commission) (internal citations omitted).

The Appellant did not dispute the information presented in the zoning certification; that is, that the subject property is located in a PDR-1 zone and that an adult rehabilitation home is permitted as a matter of right in that zone. Nor did the Appellant identify any provision in the Zoning Regulations that requires public notice of the issuance of a zoning certification.

Contrary to the Appellant's assertions, the zoning certification did not constitute a means to "circumvent public scrutiny" or avoid compliance with applicable zoning requirements. The certification itself indicated that the document "DOES NOT imply Future approval of building plans and/or certificates of occupancy" for an adult rehabilitation home at the subject property. Accordingly, the Board concludes that the zoning certification did not reflect any decision or determination about a specific project at the subject property and did not authorize the establishment of a particular adult rehabilitation home at the Property Owner's site. Although other writings may be appealable depending on the circumstances, "[o]rdinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure, and its intended use as described in the permit application, conform to the zoning regulations." *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008), affirming the Board's order in Appeal No. 17411 (Paul A. Basken and Joshua S. Meyer; order issued March 23, 2006). The zoning certification at issue in this case did not reflect a zoning decision about whether the structure at the subject property or any potential intended use of the property complied with all applicable zoning requirements.

The Board credits the testimony of the Zoning Administrator that the zoning certification at issue in this case merely reflected that the specified use was permitted at the subject property in light of its location in the PDR-1 zone and did not reflect "any sort of final determination" or approval of the zoning requirements applicable to any specific project at the subject property. The Zoning Administrator testified that DCRA issued "probably two to four [zoning certifications] per month" and that their "most frequent use" was by applicants who needed an indication that "a particular location is in a zone that ... allows for the sale or service of alcohol" to submit to the Alcoholic

Beverage Regulation Administration as part of an application for a liquor license. The Zoning Administrator explained that a zoning certification is “not sent out to ANCs or any other outside party” because the document “provides simply an indication to an applicant, or a prospective applicant, as to whether that use is allowed in that zone. It’s ... just a statement restricted to only the use, not any other zoning standard” such as parking, loading, or whether a building meets applicable zoning requirements. In preparing a zoning certification, an applicant states a prospective use and provides the address of a potential location for that use; as the Zoning Administrator testified, the Office of the Zoning Administrator would then determine the zone district where the property is located and look up the permitted uses: “we look at what is asked of us, we look at the regulations, and if the regulations say this can be built as a matter of right, then the zoning certification just sums up what’s already written in the regulations.” (Transcript of October 16, 2019 Public Hearing at 9-10, 13-14, 36-37.)

The Property Owner argued that the Board should dismiss the appeal as moot because “there is no case or controversy before the Board for this property concerning the CBIF use that is purportedly being challenged by the appeal” since the building at the subject property is not presently occupied and “there is no contract or agreement or authorization on behalf of the property owner for the use of the subject site as a community based institutional facility (‘CBIF’) (‘Adult Rehabilitation Center’)...” (Exhibit 26.) DCRA did not state a position on the motion but noted that it had not found “any pending applications for a building permit to construct a community based institutional facility at 3400 New York Avenue, N.E.” (Exhibit 21.) The Appellant opposed the Property Owner’s motion, asserting that “the issue is still ripe” because “CORE still intends to use property under the same Zoning status to operate the property as a matter of right” and “an application with a new address for the slated purpose would once [again] implicate the zoning...” (Exhibit 27.)

Pursuant to Subtitle Y § 101.6, the Board may not consider requests for advice or moot questions. The Board agreed with the Property Owner that the appeal should be dismissed as moot in light of the absence of any current use or documented plans for future use of the subject property, and the failure of the appeal to state an error in the administration of the zoning regulations within the Board’s jurisdiction to address in an appeal.

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 5C, 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 within the Board’s jurisdiction in an appeal attendant to the decision of the Zoning Administrator to issue a zoning certification indicating that an adult rehabilitation home is a use permitted as a matter of right in the PDR-1 zone at 3400 New York Avenue, N.E. (Parcel 173/118). Accordingly, it is therefore **ORDERED** that the **APPEAL** is **DISMISSED**.


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VOTE: 4-0-1 (Frederick L. Hill, Carlton E. Hart, Lorna L. John, and Robert E. Miller to DISMISS; one Board seat vacant)

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: May 11, 2023

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.