GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 19777 of Hilary Dove and Ranieri Cavaceppi, pursuant to 11 DCMR Subtitle Y § 302, from the decision made on March 6, 2018, by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to authorize Building Permit No. B1805695 to allow relocation of air conditioning units to the side yard of a principal dwelling unit in the R-1-B zone at premises 4400 Albemarle Street, N.W. (Square 1590, Lot 43).

HEARING DATES: July 1, September 26, November 14 and 28, and December 5, 2018
DECISION DATE: December 5, 2018

ORDER DENYING APPEAL

On April 25, 2018, Hilary Dove and Ranieri Cavaceppi (the "**Appellants**") filed this appeal (the "**Appeal**") with the Board of Zoning Adjustment (the "**Board**") alleging that the decision of the Zoning Administrator ("**ZA**") of the Department of Consumer and Regulatory Affairs ("**DCRA**") to approve Building Permit No. B1805695 (the "**Permit**") allowing the relocation of three air conditioning compressor units to the side yard of Lot 43 in Square 1590, with an address of 4400 Albemarle Street, N.W. (the "**Property**") violated:

- Section 2701.1 of Title 20 (Environmental Regulations) of the District of Columbia Municipal Regulations ("**DCMR**"),

and the following provisions of Title 11 of the DCMR (Zoning Regulations of 2016, the "**Zoning Regulations**," to which all references are made unless otherwise specified):

- Subtitle B § 323.9, and
- Subtitle D § 307.1.

For the reasons stated below, the Board hereby **DENIES** the Appeal and affirms the decision of the ZA.

FINDINGS OF FACT

Notice

1. The Office of Zoning sent a Notice of Appeal and Public Hearing by a May 18, 2018, memorandum (Exhibits ["**Ex.**"] 5-18) to:
    - Advisory Neighborhood Commission ("**ANC**") 3E, which covers the Property and therefore is the "affected ANC" as defined by Y-101.8,
    - ANC Single Member District 3E01 and the Office of the ANCs.
    - the Office of Planning ("**OP**"),
    - the ZA at DCRA,
    - the Councilmember for Ward 3, which includes the Property, as well as the four At-Large Councilmembers and the Chair of the Council,

- the owners of the Property, Emma Chanlett-Avery and Peter Ogden (the "**Owners**"), and
- the Appellants.

2. Notice was published in the *D.C. Register* on May 25, 2018. (65 DCR 5797)

Parties

3. In addition to the Appellants and the ZA, the Owners and ANC 3E were parties in this case, pursuant to Subtitle Y § 501.1. No requests to intervene were filed.

The Property

4. The Property abuts the eastern lot line of the Appellants' property at 4404 Albemarle Street, N.W.

5. The Property is improved with a detached principal dwelling unit (the "**Building**").

6. The Building has an existing three-foot nonconforming side yard abutting the Appellants' property (the "**Side Yard**").

7. The Property is in the R-1-B zone, which requires a minimum eight-foot side yard on each side of a detached dwelling per Subtitle D § 307.1.[1]

8. The Property does not abut any Mixed-Use (MU) or Production, Distribution, and Repair (PDR) zones.

The Permit

9. On March 6, 2018, DCRA issued the Permit, which revised Building Permit No. B1711060 (the "**Initial Permit**," and collectively with the Permit, the "**Permits**"), issued on October 31, 2017, authorizing the construction of a first- and second-story rear addition to the Building and a rear deck.

10. The Permit included the relocation of three ground-mounted air conditioning compressor units (the "**AC Units**") from the Property's rear yard, as approved by the Initial Permit, to the Side Yard. (Exhibits 2 and 2A.)

11. Pursuant to the Permit and prior to the filing of the Appeal, the Owners relocated the AC Units to the Side Yard.

12. The AC Units are affixed to the ground with supports. (Transcript of the December 5, 2018, Public Hearing ["**Dec. Tr**."] at 43.)

[1] Subsequent to the Permit's issuance, the Zoning Commission deleted this section and moved it to the current Subtitle D § 206.2 in Z.C. Case No. 17-23, effective on February 22, 2019. Pursuant to Subtitle A § 301.4, the Permit was required to comply with the provisions of the Zoning Regulations in effect at the date of issuance of the Permit.

13. On March 19, 2018, Appellants contacted the ZA's office at DCRA to request a review of the Permit's authorization of the relocation of the AC Units, which the Appellants asserted violated the zoning setback regulations. (Exhibit 2.)

14. On March 20, 2018, the ZA's office responded by email stating that the Zoning Regulations allow AC Units that are less than four feet in height above grade to occupy any open space on a property and that the ZA's staff would research the Permits to determine if the location of the AC Units were approved correctly. (Exhibit 2.)

15. On April 4, 2018, DCRA conducted an inspection of the Property and measured the AC Units to be two feet and five inches above grade. (Dec. Tr. at p. 32.)

16. On April 6, 2018, the ZA's office responded by email (the "**April email**") to the Appellants reporting the results of the DCRA inspection. The April email confirmed that the AC Units are exempt from the setback rules as they are less than four feet above grade and that no cause for zoning enforcement action therefore exists. (Exhibit 2.)

The Appeal - Alleged Errors by ZA

17. The Appeal (Exhibit 2) alleged that the ZA erred in approving the Permit, which the Appeal asserted violated the following regulations by authorizing the relocation of the AC Units to the Property's nonconforming side yard:[2]

    a) Noise – the AC Units cause noise that exceeds the 60-decibel daytime limit and the 55-decibel nighttime limit in the Environmental Regulations at 20 DCMR § 2701.1.

    b) Projections into Required Open Spaces – the AC Units violate Subtitle B § 323.9's limit on self-contained air conditioners projecting more than two feet into a required yard such as the Property's side yard. The Appeal notes that Subtitle D § 307.1 requires an eight-foot side yard on each side of a detached dwelling in the R-1-B zone.

    c) Side Yard – the AC Units violate Subtitle B § 324.1's requirement that a required yard be open and unobstructed from the ground to the sky, except for structures under four feet above grade. The Appeal asserted that Subtitle B § 100.2 defines "structure" to explicitly exclude "mechanical equipment," which the Noise Control Ordinance of the Environmental Regulations (20 DCMR § 2801.2) defines to include air conditioning compressor units.

Responses to the Appeal - ZA

18. The ZA asserted that the AC Units, as authorized by the Permit, do not violate the Zoning Regulations for the following reasons:

[2] Although the Appellants had alleged that the Permit violated Subtitle B § 327.2 (Table B § 329.2 [*sic*]) in their correspondence with the ZA's office prior to filing the Appeal, they did not include this alleged violation in the statement of the Appeal or their case at the public hearing. (Exhibit 2, at 4; Dec. Tr. at 18.)

(a) Projections into Required Open Spaces – the AC Units are not "projections," as used in Subtitle B § 323.9, which the ZA has consistently interpreted as a horizontal projection from a building wall above grade such as a window air conditioner. The ZA testified that Subtitle B § 323.9's other examples of permitted projections, including cornices, eaves, sills, and awnings, project horizontally out from buildings into required yards, and not vertically from the ground up in a required yard, which are separately regulated by Subtitle B § 324. The ZA also noted that Subtitle B § 100.1(g) provides that words not defined in the Zoning Regulations shall have the meaning given in Webster's Unabridged Dictionary. The ZA asserted that his interpretation of "projection" is consistent with that of Webster's, which defines a "projection" as "a jutting out; or, a part that juts out." (Exhibit 26; Dec. Tr. at 32-33.)

(b) Side Yard – the AC Units qualify as "structures" because they are permanently affixed to the ground with supports. The ZA asserted that if he deemed the AC Units as mechanical equipment, the AC Units would be exempt from any height limit. The ZA testified that to avoid this "absurd result," he has consistently interpreted AC units in required yards as "structures" in order to ensure that they are subject to the four-foot height limitation. The ZA testified that this interpretation relies on the AC units being affixed to a ground-mounted support base that does qualify as a "structure" under Subtitle B § 100.2's definition. In the ZA's interpretation, this attachment to the ground-mounted base/structure effectively converts the mechanical equipment to be deemed a "structure." Therefore, since the AC Units measure less than four feet above grade, the ZA determined that they complied with Subtitle B § 324.1's exception for structures less than four feet tall from obstructing the Property's side yard required by Subtitle D § 307.1. (Exhibit 26; Dec. Tr. at 31-36, 42.)

Responses to the Appeal - the Owners

19. The Owners submitted a letter urging the Board to deny the Appeal based on the Owners' reliance on the ZA's decision and the Owners' assertion that it is common to locate air conditioning units in side yards in the immediate neighborhood of the Property. (Exhibit 24.)

Responses to the Appeal - ANC

20. Although ANC 3E received notice of the Appeal, it did not submit a written report or otherwise participate in the proceeding.

Cited Regulations

21. Subtitle B § 324, "Structures in Required Open Spaces"

B-324.1 *Every part of a yard required under [the Zoning Regulations] shall be open and unobstructed to the sky from the ground, except as follows:*

(a) structure, not including a building no part of which is more than four feet above grade at any point, which may occupy any yard required under [the Zoning Regulations] …

(b) A fence or retaining wall …

(c) Stairs leading to the ground …

22. Subtitle B § 100, "Definitions"
B-100.2 *Structure - anything constructed, including a building, the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground and including, among other things, radio or television towers, reviewing stands, platforms, flag poles, tanks, bins, gas holders, chimneys, bridges, and retaining walls. The term structure shall not include mechanical equipment, but shall include the supports for mechanical equipment. …*

23. Subtitle B § 323, "Projections Into Required Open Spaces"
B-323.9 *A self-contained air conditioner may project into any required yard or court a distance not to exceed two feet (2 ft.).*

24. Subtitle B § 100, "Definitions"
B-100.1(g) *Words not defined in this section shall have the meanings given in Webster's Unabridged Dictionary.*

25. Webster's Unabridged Dictionary
"*Projection*: *a jutting out; or, a part that juts out.*"

CONCLUSIONS OF LAW

1. The Board is authorized by Section 8 of the Zoning Act, effective June 20, 1937 (52 Stat. 799, ch. 534, § 8, the "**Zoning Act**"); D.C. Official Code § 6-641.07 (2018 Repl.); *see* Subtitles X § 302.1 and Y § 302.1) 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.

2. The Appellants have the burden of proof to justify the granting of the Appeal. (Subtitle X § 1101.2.) In meeting its burden of proof, the Appellants must show that the decision of the ZA was clearly erroneous or inconsistent with the Zoning Regulations.

3. In interpreting the Zoning Regulations, "it is the Board, not the Zoning Administrator, which has final administrative responsibility. The Board's interpretative responsibility is, therefore, *de novo*" and requires "more of the [Board] than deference to the ZA, particularly when the ZA's interpretation … is not obvious … [although the Board] may consider the ZA's views in arriving at its own *de novo* interpretation." *Ward 5 Imp. Ass'n v. D.C. BZA* 98 A.3d 147, 154-55 (D.C. 2014) (quotation and citations omitted).

Timeliness of the Appeal

4. Subtitle Y § 302.2 requires that an appeal be filed "within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision … or reasonably should have had notice of knowledge, whichever is earlier."

5. Subtitle Y § 302.5 provides that an appeal may only be taken from the "first writing" that reflects the administrative decision being appealed of which the appellant had notice, and that no subsequent document may be appealed unless the document modifies or reverses the original decision or reflects a new decision. "Ordinarily, 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. D.C. BZA*, 946 A.2d 356, 364 (2008).

6. The Board concludes that, although the Appellants challenged the April email from the ZA's office that there was not a cause for zoning enforcement action, that email did not reverse or modify the ZA's prior decision to approve the Permit. The Board therefore concludes that the decision challenged in the Appeal is the issuance of the Permit on March 6, 2018, of which the public is deemed to have notice unless evidence is provided otherwise.

7. As a result, the Board concludes that the Appellants timely filed the Appeal on April 25, 2018, within the 60-day period from the March 6, 2018 issuance of the Permit.

Merits of the Appeal

Violation of Environmental Regulations – 20 DCMR § 2701.1

8. The Board concludes that its jurisdiction is limited to claims of error in any decision "in the carrying out of or enforcement of" the Zoning Regulations. (Zoning Act, § 8; *see* Subtitles X § 302.1 and Y § 302.1.) The Board therefore concludes that it has no authority to consider the AC Units' alleged violation of the 60-decibel limit in the Environmental Regulations found in 20 DCMR § 2701.1, as requested by the Appeal. *See BZA Appeal No. 19477 of Kingman Park Civic Association* (holding that an appeal which alleges violations of construction codes and environmental laws but not the zoning regulations, must be dismissed).

9. The Board notes that the ZA stated that DCRA, in its non-zoning capacity, would monitor and enforce the noise regulations at the Property. (Dec. Tr. at p. 29.)

Violation of Limits on Projections into Required Open Spaces – Subtitle B § 323.9

10. The Board concludes that the AC Units are not "projections" subject to Subtitle B § 323.9 because the Board agrees with the ZA that this subsection applies only to horizontal projections from buildings, consistent with the examples provided in Subtitle B § 323 and with Webster's definition of "projection." The Board therefore concludes that Subtitle B § 323.9's reference to a "self-contained air conditioner" applies to an air conditioner mounted in a window or projecting out from the wall of a building.

Violation of Limits on Structures in Required Yards - Subtitle B § 324.1

11. The Board concludes that the AC Units qualify as "mechanical equipment," in agreement with both the Appellant and the ZA. (Exhibit 2 and 26; Dec. Tr. at 31-32, 42.)

12. The Board concludes that the AC Units, as "mechanical equipment" do not qualify as "structures" since the definition of "structure" in Subtitle B § 100.2 explicitly excludes "mechanical equipment." The Board is not persuaded by the ZA's interpretation that being attached to structures converts mechanical equipment into a structure despite the explicit exclusion of mechanical equipment from the definition of structure.

13. The Board concludes that the prohibition on obstructions in required yards of Subtitle B § 324.1 only applies to buildings or structures because Subtitle B § 324 is entitled "Structures in Required Open Spaces." The Board is not persuaded by the Appellants' interpretation that this section prohibits any object that is not a building or structure from being located in a required yard, as that would effectively, and illogically, prevent the location of a picnic table or potted plant or other non-structure or building in a required yard.

14. The Board therefore concludes that the AC Units, as mechanical equipment, are permitted to be located in the Side Yard and that the ZA therefore did not err in approving this aspect of the Permit.

15. Although not directly applicable to this decision, the Board finds reasonable the ZA's longstanding interpretation that mechanical equipment in required yards should be subject to the height limitations of structures, given that mechanical equipment is fixed to the ground on supports that are regulated as structures. The Board strongly recommends that the ZA's interpretation be published as written guidance. (Dec. Tr. at 37, 42-44.)

"Great Weight" to the Written Report of the ANC

16. The Board must give "great weight" to the issues and concerns raised in a written report of the affected ANC that was approved by the full ANC at a properly noticed meeting that was open to the public pursuant to § 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) (2012 Repl.) and Subtitle Y § 406.2). To satisfy the great weight requirement, the Board must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. *Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016). The District of Columbia Court of Appeals has interpreted the phrase "issues and concerns" to "encompass only legally relevant issues and concerns." *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted)."

17. As the ANC did not submit a written report in this case, the Board has nothing to which it can give "great weight."

DECISION

Based on the findings of fact and conclusions of law, the Board concludes that the Appellants have failed to satisfy their burden of proof that the ZA erred in authorizing Building Permit No. B1805695 that allowed the location of three air conditioning units to the side yard at 4400 Albemarle Street, N.W. (Square 1590, Lot 43), and therefore orders that the appeal is **DENIED** and the determination of the Zoning Administrator is **SUSTAINED**.

VOTE (Dec. 5, 2018): **4-0-1** (Frederick L. Hill, Lesylleé M. White, Lorna L. John, and Anthony J. Hood to **DENY**; Carlton E. Hart not participating.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: December 12, 2019

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.