

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17967 of So Others Might Eat (SOME), pursuant to 11 DCMR § 3103, for a variance from the nonconforming structure provisions of § 2001.3, and pursuant to 11 DCMR § 3104, for a special exception from the roof structure requirements under § 411, to allow the Applicant to renovate and make an addition to an existing nonconforming building, located at 1667 Good Hope Road, S.E., in the C-2-A Zone District (Square 5765, Lot 894).

HEARING DATE: September 15, 2009

DECISION DATE: September 15, 2009

DECISION AND ORDER

The owner of the subject property, “So Others Might Eat” (SOME or the Applicant), filed an application with the Board of Zoning Adjustment (the Board) on May 11, 2009 for special exception and variance relief. SOME seeks a variance from the nonconforming structure provisions of 11 DCMR § 2001.3 in order to renovate and construct an addition to a vacant three story apartment building, in order to provide affordable housing units to the elderly. It also seeks special exception relief under § 411.11 from the roof structure requirements of §§ 411.3, 411.5, and 411.2. Following a hearing on September 15, 2009, the Board voted to approve the application.

Preliminary Matters

Self-Certification. The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2. (Exhibit 5).

Authorization. The Applicant authorized the law firm of Pillsbury Winthrop Shaw Pittman, LLP to represent it in all proceedings before the Board.¹ (Exhibit 6).

Notice of Public Hearing. The Board scheduled a public hearing for September 15, 2009. Pursuant to 11 DCMR 3113.3, notice of the hearing was sent by the Office of Zoning to the

¹ The authorization actually references the Zoning Commission rather than the Board of Zoning Adjustment, but the Board is persuaded that counsel was duly authorized to appear in this proceeding.

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Applicant, all owners of property within 200 feet of the subject site, Advisory Neighborhood Commission (ANC) 8A, and the District of Columbia Office of Planning (OP).

Posting. The Applicant posted placards at the property regarding the application and public hearing in accordance with 11 DCMR §§ 3113.14 through 3113.20. It also submitted an affidavit to this effect in accordance with 11 DCMR §§ 3113.19 and 3113.20. (Exhibit 24).

OP Report. The Office of Planning filed a report recommending approval of the zoning relief requested. (Exhibit 25). In addition, OP's representative, Paul Goldstein, testified at the public hearing in support of the application.

ANC 8A. The subject site is located within the jurisdiction of ANC 8A, which is automatically a party to this application. In its report dated September 10, 2009, ANC 8A indicated that at a regularly scheduled monthly meeting with a quorum present, it voted not to support the application. (Exhibit 26). The ANC cited the following issues and concerns regarding the application: (1) The site is located in the C-2-A zone, a zone which the ANC asserts is not suitable for residential development, (2) The lot occupancy should "remain" at 60% (the maximum allowed in the zone as a matter-of-right), (3) Parking will be at a "premium" on the street due to the new library on Good Hope Road and the funeral home next door, (4) The Applicant's request for "reduced parking" will adversely affect the use of neighboring property and will not be in harmony with the Zoning Regulations and the Zoning Map,² and (5) Ward 8 is already "over saturated" with "Community Base[d] Service Facilities". The ANC also asked that the Board give "great weight" to its recommendations. ANC 8A chairman Anthony Muhammad testified at the public hearing, stating that although the ANC opposed the building, it did not oppose the special exception relief from the roof structure requirements.

The Applicant's Case The Applicant offered testimony from two witnesses: Jennifer Bremmer, the Housing Development Project Manager at SOME, and Jane Nelson, who is licensed in architecture in the District of Columbia and has twenty-six years of professional experience. Following questions from the ANC Commissioner and a review of Ms. Nelson's background and experience, the Board qualified Ms. Nelson as an expert in architecture.

FINDINGS OF FACT

The Property and the Surrounding Area

1. The property is a rectangular parcel located at the southwest corner of Good Hope Road and Fendall Street, S.E., and measures approximately 10,736 square feet in area.

² The Applicant did not request a reduction in parking, and contends that the parking spaces provided are in accordance with what is required. Since this application was self-certified, the Zoning Administrator will determine the validity of the Applicant's assertion when reviewing the plans for compliance with this and all other requirements of the Zoning Regulations.

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2. The property borders Good Hope Road S.E. to the north, Fendall Street SE to the east, a 16-foot public alley to the south, and a two-story commercial building to the west.
3. The property is located in the C-2-A zone district in Square 5765, a square that is split zoned C-2-A and R-3. In general, the area to the south of the property is characterized by one-family dwellings and multi-family residential uses, whereas the area to the north along Good Hope Road is characterized by moderate density commercial uses.
4. The property is improved with a three-story brick apartment building (with 27 units) that was constructed in approximately 1936. It was used as an apartment building from the time it was built until it fell into disrepair some time before the Applicant purchased it.
5. The existing building occupies 73% of the lot, and therefore exceeds the 60% maximum lot occupancy that is permitted in the C-2-A zone. *See*, § 403. It is roughly U-shaped with wings measuring about 40 feet in depth.

The Applicant

6. SOME is a 40-year-old interfaith community-based organization, with a mission to serve the poor and homeless of the District.
7. SOME launched an affordable housing development initiative, with a goal of building 1,000 new units of safe, affordable housing in the District. It purchased the building in December 2006, with the intent to renovate it and provide affordable housing for seniors.

The Proposed Project

8. SOME proposes an addition to an existing building to renovate and reconfigure the apartment building, converting it into an affordable residential building for approximately 49 senior citizens. The reconfigured building will contain 43 units. The renovation also includes restoration of the façade and a new elevator.
9. The existing building has limited access to outdoor space. Although there is a courtyard in the middle of the building, it is very small and provides limited opportunities for outdoor recreation. As part of the renovation, SOME will add a roof-top terrace that will provide outdoor recreation space to the residents.
10. Because of the existing stairway and the necessity of an elevator, the Applicant must provide multiple roof structures. Creating an efficient, well-designed, and accessible building would be unduly restrictive for this old structure if only one roof structure were permitted. Therefore, two new roof structures will be created: an elevator and a set of stairs. The elevator will go to the roof to make the roof-top terrace fully accessible, and an existing set of

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stairs (which does not currently go to the roof)³ will be extended and provide an additional means of access to and egress from the roof-top.

11. The additional stairway and elevator structures are necessary for safety and universal accessibility purposes. Since the building is more than 70 years old, it was constructed long before accessibility for persons with disabilities was a consideration. While the stairway locations are fixed, the proposed renovation would place the elevator bank adjacent to the building's lobby.
12. The new elevator enclosure will be 15 feet in height and the new stairway enclosure will be 8 feet 10 inches in height. The proposed elevator enclosure will be set back 14 feet three inches from the external northern wall and 10 feet from the courtyard wall. The proposed stairway enclosure will be set back 5 feet eleven inches from the courtyard wall. The configuration of the existing building makes it impossible for the elevator roof structure to be set back from all exterior walls at a distance equal to its height.
13. The Applicant also proposes to construct a trellis adjacent to the proposed elevator enclosure.

The Zoning Relief

14. The applicant proposes an addition to a structure that is non-conforming as to lot occupancy. Accordingly, the Applicant seeks an area variance from the nonconforming structure provisions of § 2001.3 of the Zoning Regulations. Although the project will not result in an increase in lot occupancy, it will cause the floor area ratio (FAR)⁴ to increase slightly.
15. The Applicant also seeks special exception relief from the roof structure requirements under §§ 770.6 and 411 of the Zoning Regulations. Since it proposes to construct two roof structures (in addition to the one existing roof structure), the Applicant requires relief from § 411.3, which requires that all roof mechanical equipment be placed in one rooftop enclosure. Since the two additional roof enclosures will vary in height (one at 15 feet, and one at 8 feet 10 inches in height) the Applicant requires relief from § 411.5, which requires that roof enclosure walls be of equal height. Since the new rooftop structures will not meet the 1:1 setback ratio required by §§ 411.2 and 760.6(b), it also requires relief under these provisions.
16. The Applicant maintains that the proposed project will comply with the parking schedule within the Zoning Regulations. According to the project manager, parking is not a concern in the area and the facility will not create significant parking demand. Although OP agrees with these assertions, the Zoning Administrator (ZA) will review the project's compliance with parking requirements when the Applicant applies for a building permit. In any event, the Applicant does not seek relief from the parking requirements. Because this application is self-

³ There will be a third rooftop structure, an existing staircase which already goes to the roof.

⁴ See, § 771.2.

certified, the issue of parking compliance is not before this Board.

Impact of the Proposed Project

17. The Board finds that the proposed project will have very negligible impact. The addition consists of only two additional roof structures and will not increase the footprint of the building. The Board accepts the architect's testimony that the roof structures will not cast shadows on or block airflow to nearby properties because they are spaced apart and are not disproportionately large. (T. p. 331).

CONCLUSIONS OF LAW

The Nonconforming Structure Variance

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat., 799; D.C. Official Code § 6-641.07(g)(3) (2008 Repl.) ("Zoning Act"), to grant variances from the strict application of the Zoning Regulations. As stated above, the applicant here seeks relief from the nonconforming structure provisions of § 2001.3.

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property has an exceptional size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the property owner will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). In order to prove "practical difficulties," an applicant must demonstrate first, that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. *Id.* at 117

Exceptional Condition

The exceptional condition affecting this property is the existing abandoned building, which is in desperate need of modernization, and which already exceeds lot occupancy. In order for the building to be useful in any manner, extensive renovations and rehabilitation will be required, but the nature of the building limits the placement of the elevator shaft and stairway. Because the building was built to a lot occupancy of 73%, almost no improvements to this building would be permitted under § 2001.3 of the Zoning Regulations. The project will not increase the lot occupancy. But for the fact that the FAR will be slightly increased, this application would be unnecessary. In addition, the Applicant is a nonprofit interfaith community-based organization dedicated to helping the poor and homeless in the District of Columbia. Accordingly, under *Monaco v. D.C. Bd. of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979), the Board may apply a more flexible standard when evaluating the exceptional condition of the property.

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Practical Difficulty

According to the Court of Appeals, increased expense and inconvenience are among the proper factors for the Board's consideration when evaluating practical difficulty. *Gilmartin*, 579 A.2d at 1171. Here, it would be unnecessarily burdensome for SOME to renovate the building without making any additions to it. SOME's programmatic needs for this particular building necessitate an addition. As stated, the target population for this project will be senior citizens. Because of this, an elevator will be necessary for the residents to reach the upper floors and the roof terrace. Thus, the addition of an elevator penthouse will be essential for this building to accommodate the senior citizen residents. Further an additional roof structure for the stairway to the roof is necessary for life safety. Without these two additional roof structures, the building would not be fully accessible, and SOME would not be able to serve the population it is aiming to help with this project. Making the building fully accessible without an addition would be impossible or would be so incredibly cost-prohibitive and burdensome that the Applicant would be unable to renovate the building.

Relief can be granted without substantial detriment to the public good and without impairing the intent, purpose and integrity of the zone plan

Again, the Board agrees with the Applicant and OP. This project will have minimal impact and will not affect the public good in any detrimental fashion. The Applicant only proposes to construct two additional roof structures. The project will not increase the footprint or extend or increase lot occupancy. As noted in the application, this building has stood in this location since 1936 without adversely impacting the intent, purpose, and integrity of the zone plan in any respect.

The Roof Structure Special Exception

The Board is authorized under Section 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) to grant special exceptions as provided in the Zoning Regulations. Pursuant to § 3104 of the Zoning Regulations, the Board is authorized to grant special exceptions where, in its judgment, the relief will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property. Certain special exceptions must also meet the conditions enumerated in the particular sections pertaining to them. In this case, along with the general requirements of § 3104, the Applicant also had to meet the criteria of § 411.11.

This Applicant seeks a special exception to have multiple roof structures of varying heights, with three enclosures, which do not meet the setback requirements of §§ 411 and 770.6. This application meets the standards in § 3104. The Board agrees with OP that the special exception use will be in harmony with the purpose and intent of the Zoning Regulations and Zoning Maps and will not adversely affect the use of neighboring properties.

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In addition to meeting the general standards for special exception approval under § 3104, the Applicant has demonstrated that it meets the criteria under § 411.11 for relief from the roof structure requirements; specifically, [w]here [compliance is] *impracticable because of operating difficulties, size of building lot, or other conditions relating to the building or surrounding area*” [and would be] *unduly restrictive, prohibitively costly or unreasonable.*”

The Board agrees with OP that relief is needed from the single-enclosure and uniform height requirements for roof structures. In order to satisfy § 411.3, the Applicant would either need to reconfigure the locations of the stairways and elevator, envelop the three rooftop structures in one large enclosure, or abandon rooftop access altogether. Based on the building design, it would be prohibitively expensive or impractical to comply with this provision. (Exhibit 25). As stated, § 411.5 requires that “enclosing walls from [the] roof level shall be of equal height, and shall rise vertically to a roof...” The three enclosures proposed are of varying heights: 15 feet, 8 feet 10 inches, and 8 feet 9 inches. In order for the three enclosures to be a uniform height, the shorter stairway structures would each need to be raised several feet. Not only would this result in unreasonable costs, there would be no real purpose. The result would likely produce more obtrusive structures of no benefit to SOME or to the public. (OP Report, Exhibit 25, *See also*, testimony of Ms. Nelson, T. p. 327 - 328).

Regarding relief from § 411.2, the Board concurs with the Applicant’s position. Moving the locations of the roof structures such that they have a 1:1 setback ratio would be unreasonable and unduly restrictive given the building’s configuration. The location of the proposed stair enclosure over the existing stair is predetermined, and no feasible structure for the stairs could be set back from the court wall at a 1:1 ratio in this location. The location of the elevator structure is linked to the need for an elevator location which is convenient to the lobby. Otherwise the residents with limited mobility would have to maneuver down the corridor to an elevator and make their way down the corridor again on an upper floor. Furthermore, there is not enough depth on the roof to have a 1:1 setback from every exterior wall.

ANC Issues and Concerns

Section 13(b) (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)(3)(B)) requires that the Board’s written orders give “great weight” to the issues and concerns raised in the recommendations of the affected ANC. Specifically:

The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

Id.

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As noted, the ANC opposed the application and raised several concerns. However, most of the issues and concerns raised in the ANC report are not legally relevant to this proceeding. The issues and concerns mostly concern the use of the property (i.e., the location in the C-2-A zone, and the over-saturation of community based service facilities in Ward 8). These objections are not related to the zoning relief sought (area variance for an addition and roof structure special exception) but to the use of the building. Therefore, the objection as to use is not a relevant “issue” or “concern” to be given great weight. *Wheeler v. District of Columbia Bd. of Zoning Adjustment*, 395 A.2d 85, 91 (D.C. 1978).

The ANC also asserts that the lot occupancy should “remain” at 60%. However, this is impossible. The existing building is already at 73% lot occupancy and there is no requirement that it be demolished in whole or in part.

Regarding the parking concerns, the Applicant has not sought to reduce its parking requirement, as suggested by the ANC. The Board understands that the ANC believes that such a request should have been made as part of this self-certified application, but the Applicant apparently believes otherwise. The Board need not resolve the issue in order to dispose of this application. No building permit for this project will issue unless the ZA determines that the project complies with all of the applicable requirements of the Zoning Regulations for which relief has not been sought, including the minimum parking space requirements of Chapter 21. Should the ZA find compliance, and the ANC disagrees, it may appeal that determination to this Board. At this point, the issue is neither relevant nor ripe for determination.

It appears from the ANC’s testimony that its primary concern was that the building is too small to accommodate 43 units. The ANC suggested that the renovation include only 30 units. (See, T. p. 339). However, this issue too is beyond the purview of the Board. Unit size is only relevant in the R-4 zone and only when new units are being added. In general, the minimum size of habitable rooms is determined by § 402 of the District’s Housing Regulations (Title 14 DCMR).

It should be noted, finally, that the ANC had no objections to the special exception relief for the proposed roof structures. (T. p. 342). It objected only to the proposed addition to the building. As discussed above, with the possible exception of parking concerns, these objections were not related to the zoning relief that was actually sought. In sum, the Board has not given great weight to most of the ANC’s written recommendations but, nevertheless, has addressed some of its issues and concerns in this decision.

The Board is also required under D.C. Official Code § 6-623.04 to give “great weight” to OP recommendations. For the reasons stated in this Decision and Order, the Board agrees with the advice received from OP.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application is hereby **GRANTED**, pursuant to Exhibit No. 10, Plans, to allow zoning relief from the requirements under § 2001.3 and § 411.

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VOTE: 4-0-1 (Marc D. Loud, Shane L. Dettman, Meredith H. Moldenhauer, and Anthony J. Hood to Approve; one Mayoral appointee (vacant) not present)

BY ORDER OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT
A majority of Board members approved the issuance of this Order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: **MAR 18 2010**

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE 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 SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

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

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ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED.
VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

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As Director of the Office of Zoning, I hereby certify and attest that on MAR 18 2010, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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