

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18090 of M. Sikder, pursuant to 11 DCMR § 3103.2, for a variance from the lot area and lot width requirements of § 401, a variance from the lot occupancy requirements of § 403, and a variance from the side yard requirements of § 405, to allow the construction of a new one-family detached dwelling in the R-1-B District at premises 3158 Monroe Street, N.E. (Square 4309, Lot 26).

HEARING DATES: July 27, August 3, September 21, and November 2, 2010
DECISION DATES: November 2, 2010, March 1, 2011

DECISION AND ORDER

This application was submitted on April 23, 2010 by Mohammed Sikder, (“Applicant”), the owner of the property that is the subject of this application (“subject property”). The application was originally advertised for several area variances and a use variance to permit the construction of a semi-detached one-family dwelling on a nonconforming lot in an R-1-B District. During the proceedings on the application, the plans were amended to depict a one-family detached dwelling, obviating the need for a use variance as a detached dwelling is a matter-of-right use in the R-1-B Zone.¹

The Board of Zoning Adjustment (“Board”) properly noticed a hearing on the application for July 27, 2010, but due to the lack of a quorum, re-scheduled the hearing to August 3, 2010. The hearing was continued on September 21, 2010, and continued again, and completed, on November 2, 2010. At the conclusion of the hearing, the Board decided to enter into deliberations and vote on the application, but was deadlocked with two 2-2-1 votes. Because, according to § 8 of the Zoning Act, D.C. Official Code § 6-641.07(h) (2008 Supp.), the concurring vote of a majority of Board members is necessary for any decision, the Board initially decided to hold in abeyance the decision on this application pending the appointment, and participation, of a fifth member.

With no time certain, however, for the appointment of a fifth Board member, the Board re-thought its initial decision, and decided instead to issue a Procedural Order requesting further

¹ The caption has been changed accordingly and now-unnecessary relief deleted.

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information from the Applicant and Advisory Neighborhood Commission (“ANC”) 5A, the opposition party, in order to attempt to break the tie vote. The Procedural Order was issued on December 1, 2010 and the requested information was received, allowing the Board to review it and re-deliberate and re-vote on the application on March 1, 2011. On that date, the Board voted 4-0-1 to grant the application. The factual and legal bases for the Board’s conclusion follow.

Notice of Application and Notice of Hearing. By memoranda dated April 28, 2010, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation, ANC 5A, the ANC within which the subject property is located, Single Member District 5A11, and the Councilmember for Ward 5. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing date in the *D.C. Register*, and on May 14, 2010, sent such notice to the Applicant, ANC 5A, and all owners of property within 200 feet of the subject property.

Requests for Party Status. ANC 5A was automatically a party to this application and appeared as a party-opponent. There were no requests for party status.

Applicant’s Case. The Applicant testified as to how the subject property met the three-part variance test. He also explained that he had attempted to purchase the vacant lot next to the subject property, in order to enlarge the subject property, but had been unable to do so.

Government Reports. OP filed two reports with the Board regarding this application. The first, dated July 20, 2010, addressed the original plans for a semi-detached dwelling, and recommended partial approval and partial denial of the relief then requested. (Exhibit 27.) OP’s second report, dated October 26, 2010, addressed the revised plans for the detached dwelling, and recommended approval of all the relief requested. (Exhibit 41.)

ANC Report. ANC 5A made five filings in this case. The first (Exhibit 23) was dated July 16, 2010 and set forth in some detail the reasons that the ANC opposed the relief requested. This first filing addressed the original plans for a semi-detached dwelling, but several of the concerns expressed therein continue to be relevant to the revised plans and are discussed below. The second ANC filing (Exhibit 31) requested a continuance of the August 3, 2010 hearing date. The third ANC filing was received by the Board on November 2, 2011, after the plans had been changed to those for a detached dwelling. (Exhibit 45.) This filing continued to vehemently oppose the application and it also took exception to the Board’s handling of the proceedings. The last two ANC submissions were received by the Board in response to the Procedural Order. (Exhibits 48 and 50.) Both of these, of course, addressed the final plans and both are adamantly opposed to the application.

The ANC’s concerns are briefly set forth here, but are addressed at greater length in this order in the “Great Weight” section of the Conclusions of Law. The ANC has consistently opposed the proposed project as not meeting any of the three prongs of the variance test. The ANC claims that there is no exceptional characteristic of the property and the fact that it is small and

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nonconforming was known to the Applicant before he purchased it. The ANC's filings also allege that there is no practical difficulty suffered by the Applicant. As to the third prong of the variance test, the ANC opines that the proposed dwelling is out of character with the neighborhood, will negatively affect light and air to the neighboring dwelling, and will adversely affect the environment and property values.

FINDINGS OF FACT

The Property and the Surrounding Neighborhood

1. The subject property is a small, interior, rectangular lot located at address 3158 Monroe Street, N.E. (Square 4309, Lot 26), in an R-1-B Zone District.
2. The subject lot is vacant and bounded by federal parkland on one side and a 25-foot-wide vacant lot on the other side, and abuts a 15-foot-wide public alley at its rear.
3. A lot width of 50 feet and a lot area of 5,000 square feet are required in the R-1-B Zone. (11 DCMR § 401.3.)
4. The subject lot is 100 feet long and 20 feet wide, for a lot area of 2,000 square feet, making it nonconforming for both lot width and lot area.
5. After purchasing the subject lot, the Applicant attempted to purchase all or a portion of the adjacent vacant lot, which is approximately 2,500 square feet in area, but was unable to consummate the purchase because the owner of the vacant lot decided not to sell it.

The Applicant's Proposal

6. The Applicant proposes to construct a two-story² with basement one-family detached dwelling on the subject lot.
7. The dwelling will be 54 feet long and 14 feet wide, leaving on each side a side yard of three feet, when eight feet is required, necessitating variance relief from § 405.9.
8. The lot occupancy of the proposed dwelling will be 54%, over the maximum of 40% permitted in this R-1-B Zone, thus requiring relief from § 403. (See also, § 199.1, definitions of "Building area" and "Percentage of lot occupancy."³)

² Within the record of this case are references to both a two-story structure and a three-story structure. Indeed, the *final* plans submitted by the Applicant, with Exhibit 39, refer to a "three-story" building on their third page, but depict a two-story building on their first and fourth pages. As explained by the OP representative at the hearing, the proposed building is a two-story building with a walk-out basement, which appears as three stories at the rear, due to the slope of the property. (Hearing Transcript of November 2, 2010, at 150, lines 4-8.) The building approved by this order is that depicted on the first and fourth pages of Exhibit 39, *to wit*, a two-story building.

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9. The dwelling will have a single-gabled roof, with a gutter and downspout on both sides, and will be clad in HardiePlank[®] siding and concrete with a masonry finish.
10. The dwelling will also have a small front porch and a single-vehicle parking pad at the rear of the property, accessed from the alley.

The Variance Test

Extraordinary situation or condition

11. The subject property is a properly surveyed and platted lot in the District of Columbia, but is nonconforming and is less than half the size required by the Zoning Regulations in order to permit construction as of right.
12. It is the smallest and narrowest in the Square.
13. Nothing could be built on the subject lot without zoning relief.
14. The Applicant attempted to enlarge the size of the subject property by purchasing the adjacent vacant lot, but was unable to do so, and the property cannot be enlarged on the opposite side, as it abuts federal parkland.
15. Even if the Applicant had acquired the adjacent vacant lot, the total land area would have been approximately 4,500 square feet, and the lot width 45 feet, still 500 square feet less than the required 5,000-square-foot area and five feet short of the required 50-foot width.

Practical difficulty

16. Because this is an R-1-B Zone District, the proposed dwelling must be a detached dwelling, i.e., it must have two side yards, or it would require a use variance as a semi-detached dwelling. (See, 11 DCMR §§ 201.1 and 199.1, definition of “Dwelling, one-family detached.”)
17. To comply with the Zoning Regulations’ requirement of eight-foot side yards, the proposed dwelling would end up being an absurd four feet in width.
18. The actual footprint of the dwelling will occupy less than the final lot occupancy of 54%. Some of the lot occupancy overage is due to the necessity to have two side yards, coupled with the small size of the lot, resulting in the inclusion of the side yards in the lot occupancy calculation.

³Because both side yards are less than five feet wide, they are both included in the “building area,” and thus included in the lot occupancy calculation for the dwelling.

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19. A third story cannot be added to reduce the lot occupancy while making up for lost floor area, because a third story would be incongruous in this neighborhood of one- and two-story dwellings.

No detriment to public good or zone plan

20. Although the proposed construction will result in the loss of some trees, the property sits between treed federal parkland and a treed vacant lot.

21. The proposed dwelling will have a peaked roof and front porch, similar to many of the dwellings in the neighborhood.

22. The dwelling's front porch setback matches that of the neighboring dwellings and its exterior finishes also match those of nearby dwellings.

23. The dwelling will maintain open space at its front, between the front porch and the street, and will provide the required 25-foot rear yard.

24. The proposed one-family detached dwelling is a matter-of-right use in this R-1-B District.

CONCLUSIONS OF LAW

The Variance Standard

The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of the Zoning Regulations would "result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g)(3) (2008 Supp.), (11 DCMR § 3103.2.) Relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." D.C. Official Code § 6-641.07(g)(3) (2008 Repl.), (11 DCMR § 3103.2.)

A showing of "practical difficulties" must be made for an area variance, while the more difficult showing of "undue hardship," must be made for a use variance. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The Applicant in this case is requesting area variances; therefore, he had to demonstrate an exceptional situation or condition of the property and that such exceptional condition results in a practical difficulty in complying with the Zoning Regulations. Lastly, the Applicant had to show that the granting of the variances will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

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The Variance Test is Met

The subject lot was created before the Zoning Regulations mandated the current minimum lot area and width of 5,000 square feet and 50 feet, respectively. At an area of 2,000 square feet and a width of 20 feet, it cannot be built upon without zoning relief. It is the smallest and narrowest lot in the Square and its small, nonconforming size is an exceptional condition, satisfying the first prong of the variance test.

The practical difficulties encountered in developing the subject lot within the Zoning Regulations arise directly out of the lot's small size. It would not only be practically difficult, but impossible, to build a useable detached dwelling on this lot with two eight-foot side yards. But, reducing the side yards to a width which allows for a narrow, but useable, 14-foot wide dwelling, automatically makes those side yards count in the lot occupancy calculation, thereby increasing the lot occupancy. The Applicant twice attempted to purchase the adjacent vacant lot, to enlarge the size of the subject lot, but was unsuccessful in those attempts.

The proposed one-family detached dwelling is a matter-of-right use in this R-1-B Zone District and has been designed to comport harmoniously with nearby dwellings. The original plans showed a flat-roofed building with a blank, windowless left side. (See, Exhibit 6.) These plans were changed to depict a design more in keeping with the neighborhood, with a peaked-roof and five windows on the left exterior wall. (Exhibit 39.)

In terms of the third prong, although the lot is narrow, it will maintain an open area at its front and a rear yard, and it is situated next to open federal parkland, which helps to prevent a feeling of crowding. Nor will there be any loss of street parking as the dwelling will provide a parking pad accessible from the alley at the rear of the property.

Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2008 Supp.). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. Only legally relevant concerns of the ANC need be addressed by the Board. *Concerned Citizens of Brentwood v. D.C. Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C. 1993). (Citation omitted.)

OP twice recommended approval of the application, although it originally was hesitant to recommend approval of the lot occupancy variance. After part of the hearing was held, the plans changed, and more information gathered, OP recommended approval of the lot occupancy variance as well. The Board agrees with OP's recommendations.

ANC 5A was opposed to the application and presented many arguments against it. (See,

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Exhibits 23, 45, 48, and 50.) The ANC argues that the subject property is not unique because the adjacent lot is also a nonconforming, infill lot, and there are other such lots in the District. The subject lot is, however, five feet narrower and 500 feet smaller than the adjacent lot and is the smallest and narrowest lot in its Square. Further, the subject lot does not have to be the “only” lot beset with its particular exceptional circumstances to meet the first prong of the variance test. *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972). (Exceptional circumstances must not be “general conditions in the neighborhood.”) As well stated by the Court of Appeals of New York, “[u]niqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship.” (Citations omitted.) *In the Matter of Douglaston Civic Ass’n, Inc. v. Bd. of Standards and Appeals of the City of New York*, 416 N.E.2d 1040, 1041 (Ct. App. N.Y. 1980). The District of Columbia is an old city, and there are many nonconforming lots which were platted before enactment of the Zoning Regulations. That is precisely why variance relief exists – to allow reasonable construction on, or use of, a lot which is affected by an exceptional situation or condition, whether a nonconformity, or other unusual circumstance. *Cf. Gorieb v. Fox*, 274 U.S. 603, 607 (1927).

The ANC also claims that the practical difficulty prong of the variance test is not met. But the ANC focuses its practical difficulty analysis on the relief requested by the Applicant, not on the Zoning Regulations. The ANC emphasizes that there is no practical difficulty in constructing a dwelling with three-foot side yards. (See, e.g., Exhibit 48, at 3.) The question is, however, whether there is a practical difficulty in constructing a dwelling with eight-foot side yards, which is what the Zoning Regulations require. It is the inability to comply with the Zoning Regulations without relief which results in the practical difficulty, not the inability to construct anything at all.

The ANC also makes the point several times that the Applicant knew when he purchased the subject lot, that it was nonconforming and would require variance relief. Such knowledge, without any affirmative action on the part of the Applicant making the subject property nonconforming, may be considered by the Board, but does not defeat an area variance, as it might a use variance. See, e.g., *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1169 (D.C. 1990), *Carliner v. D.C. Bd. of Zoning Adjustment*, 412 A.2d 52, 54 (D.C. 1980). Further, any applicant has the right to request variance relief, and takes the risk that it might not be granted.

The ANC makes several arguments which fall under the aegis of the third prong of the variance test. The ANC claims that the lot “as is” is more in keeping with the neighborhood than it would be if the proposed dwelling were built on it. The ANC opines that the proposed dwelling would be a substantial detriment to the public good because it would result in the loss of trees on the lot, which would change the character of the neighborhood, and because it would negatively impact the neighbor’s light, air, and privacy.

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The subject lot is currently treed, but it is flanked on both sides by open, treed land. To one side is the vacant lot owned by the neighbor, and to the other side is the federal parkland. The Board is not convinced that a small home nestled between these two treed parcels will change the character of the neighborhood. Similarly, the Board does not agree with the ANC that the proposed dwelling will have any significant effect on the light, air, or privacy of the one neighboring dwelling, which is approximately 28 feet away from the proposed dwelling.

The ANC also makes that point that there is a natural spring in the area which runs out on to “Eastern Avenue and Monroe where it puddles and freezes in the winter,” (Exhibit 48, at 4) and that the loss of the trees on the subject property means fewer tree roots to soak up this spring water. The spring, however, is not limited to the subject property and even with the trees currently on the property, it still “puddles and freezes” on the streets. The existence of the spring and any problems it causes need to be addressed whether or not the proposed dwelling is constructed.

The ANC further claims that the construction of the proposed dwelling, because of its small size and presumably lower sales price, will have a negative effect on the property values of nearby homes. As a threshold matter, it is not clear to the Board that a reduction in property values resulting from the grant of a variance would amount to a “substantial detriment to the public good.” However, even if such were the case, the ANC presented no *probative* evidence demonstrating a negative effect on property values. In fact, the ANC submissions, attached to Exhibits 48 and 50, show a wide disparity in sales prices for homes in the area, from \$149,900 to \$494,500, with many varying price points in between. Property values are subject to many variables and, on the facts presented here, the Board is not persuaded that the construction of the proposed dwelling will have such an effect on property values, if any effect at all, so as to amount to a substantial detriment to the public good.

The ANC characterizes the relief requested as “excessive” (Exhibit 48 at 3), suggesting that the magnitude of the relief is too great to be granted. The Board simply disagrees with the ANC on this point. The relief requested is what is necessary to make the lot viable to construct a matter-of-right use in this R-1-B Zone.

Lastly, the ANC puts forth a table showing that the Applicant has been granted relief by this Board several times in the past, calling the Board’s actions “a disappointment and shame.” (Exhibit 45 at 2.) Each variance application that comes before the Board is decided on its own facts, independent of decisions made in other cases, as each application must independently meet the three prongs of the variance test. And, contrary to the negative implication of the ANC’s remark, the fact that the Applicant has been granted relief in the past, often on facts similar to those here, shows that the Board is not acting in an arbitrary and capricious manner.

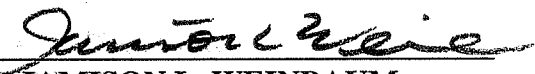
For all the reasons set forth above, the Board concludes that the Applicant has met the burden of proof for area variances, pursuant to 11 DCMR § 3103.1, from the lot area and lot width requirements of § 401, the lot occupancy maximum of § 403, and the side yard requirements of

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§ 405. Accordingly, it is hereby **ORDERED** that the application, pursuant to Exhibit 39, Revised Plans, is **GRANTED**.

VOTE: **4-0-1** (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle,
Konrad W. Schlater to Approve; No other Board member (vacant)
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: 
JAMISON L. WEINBAUM
Director, Office of Zoning

JUN 01 2011

FINAL DATE OF ORDER: _____

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 PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

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. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on JUN 01 2011, 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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ATTESTED BY:


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