

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18638-A of Gregg Busch and Rosebusch, LLC, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for a special exception from the roof structure requirements of subsections 411 and 1902.1(a), and a variance from the off-street parking requirements under subsection 2101.1, to allow the construction of a new residential building in the ARTS/C-3-A District at premises 1456-1460 Church Street, N.W. (Square 209, Lot 65, 66 and 67).¹

HEARING DATES: October 22, 2013
December 10, 2013
December 18, 2013
January 7, 2014

DECISION DATES: February 25, 2014
April 8, 2014

**DECISION ON MOTION
TO REOPEN RECORD/
LIMITED REHEARING:** April 15, 2014

**FIRST LIMITED REHEARING
DATE:** May 20, 2014

DECISION DATE: June 17, 2014

DATE OF DECISION AND ORDER: September 3, 2014

**DATE OF COURT OF APPEAL
OPINION REMANDING CASE:** June 30, 2016

**PROCEDURAL ORDER AND
NOTICE OF LIMITED SCOPE HEARING ON REMAND**

This Procedural Order is issued pursuant 11-Y DCMR § 801.3 for the purpose of giving notice of a limited scope hearing to be held on May 31, 2017 at 9:30 am with respect to the issues remanded by the District of Columbia Court of Appeals in *Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, D.C. 2016), as those issues are described below.

¹ The Applicant amended its application to eliminate the need for relief from the rear yard and lot occupancy requirements.

BZA APPLICATION NO. 18638-A
PAGE NO. 2

Gregg Busch and Rosebusch LLC (“Applicant”), submitted this self-certified application on July 24, 2013 for variance and special exception relief pursuant to the 1958 version of the Zoning Regulations (“the 1958 Zoning Regulations”), to allow the construction of a new residential building on property that was mapped in the C-3-A district and the ARTS Overlay district (“ARTS/C-3-A”).

On September 3, 2014, the Board of Zoning Adjustment (“BZA” or “Board”) issued a written decision granting the application. The Metropole Condominium Association, a party to this proceeding, petitioned the District of Columbia Court of Appeals (“DCCA”) to review that decision. On June 30, 2016, the DCCA issued an Opinion finding that “the BZA failed to make necessary findings of fact and failed to adequately grapple with difficult questions presented by conflicting evidence in the record.” *Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1081 (D.C. 2016). The Opinion remanded the matter to the BZA “for further findings and consideration consistent with this opinion.” *Id.*

On September 6, 2016, the 1958 Zoning Regulations were repealed and replaced with new text (“the 2016 Zoning Regulations”), which among other things authorized the Board to grant a partial or complete reduction of the off-street parking requirements by special exception. *See* 11-C DCMR § 703. The Zoning Commission also adopted implementing amendments to the Zoning Map that converted all overlays into standalone zones. The ARTS/C-3-A District became the ARTS 3 District and the height and special exception provisions of §§ 1902 and 1906 became 11-K DCMR §§ 803 and 811 respectively.

At a closed meeting held February 8, 2017, the Board voted to hold a limited scope public hearing on the issues remanded. The parties in the original case remain as parties in this remand and may present testimony, evidence, and legal argument limited to the issues stated below. Pursuant to 11-Y DCMR § 801.4, new parties may not be added to the case.

The Applicant has the burden of proof as to all the issues.

Description of remand issues.

A. Parking variance relief

As just noted, the parking relief sought by the Applicant is now available by special exception. The Applicant therefore has the option of amending its application to seek such special exception relief and withdraw the variance request. However, the project would have to comply in all respects with the 2016 Zoning Regulations, which continue to require special exception relief from the height requirements of 11-K DCMR § 803 for the proposed building. If such an amendment is not submitted and the Applicant chooses to continue to comply with the 1958 Zoning Regulations, the following remand issues for the parking variance must be addressed:

1. Exceptional Circumstances

The DCCA Opinion stated:

The BZA found that the property was affected by a confluence of exceptional and extraordinary conditions, including: (1) the property was already improved with existing historic buildings, which have been deemed to contribute to the character of the 16th Street Historic District; (2) the Historic Preservation Review Board (“HPRB”) required the applicant to incorporate significant portions of the historic structures into the design of the new building, thereby limiting the location of the elevators and egress stairs as well as the layout of the units; (3) the property is exceptionally narrow and significantly smaller in size in comparison to other multi-family redevelopments within Square 209 and the surrounding community; and (4) the property fronts one of the narrowest streets in the neighborhood.

141 A.3d at 1083.

The Opinion found that the Board did not adequately explain how these factors were exceptional and expressed concern that the BZA's findings seemed to focus more on the Applicant's intended use of the property rather than the condition of the property itself.

REMAND ISSUE 1.

Without regard to the Applicant’s intended use of the property:

- (a) Why would the first and fourth findings (that the property is a contributing building and is located on a narrow street) merit a departure from the zoning regulations given that there are several properties in the area that are impacted by the same conditions?**
- (b) Why is the requirement to incorporate the historic structures on the property, the placement of elevators and egress stairs, and/or the layout of the particular proposed development critical to determining whether the conditions on the property are extraordinary?**
- (c) Why should the fact that other multi-family development projects in the area which have been built on properties that are not as narrow or small as the property in this case have any bearing on whether the property's conditions are truly extraordinary or exceptional?**

2. Practical Difficulty

Because the Applicant proposed to construct a 37-unit apartment house, the 1958 Zoning Regulations required one space for each two dwelling units, which equates to 19 parking spaces.² The Applicant asserted that only four spaces could be provided. The Opinion noted that the

² The 2016 Zoning Regulations requires one per three dwelling units in excess of four units, which may be reduced by 50% if the conditions of 11-C DCMR § 702 apply.

provision of four parking spaces would still permit an eight-unit apartment building, which the Applicant must demonstrate would be an unnecessarily burdensome restriction. The Opinion found that the BZA made no findings concerning this issue, and must address it on remand. 141 A.3d at 1084. The Opinion also discussed the testimony of a real estate agent that a building with eight units would be more difficult to sell because the unit sizes will increase and thus buyers will expect more amenities, such as a parking space, with a larger unit. The court stated that it was unclear whether that would be enough to demonstrate practical difficulty and if the BZA finds that it is, the BZA “must explain its reasoning with specificity during remand.” *Id.*

REMAND ISSUE 2.

- (a) How would limiting the development of the property to an eight-unit apartment building be unnecessarily burdensome?**
- (b) Why was the real estate agent’s testimony, as summarized above, enough to support the idea that an eight-unit apartment building will cause practical difficulties for the Applicant?**

As with all of the remand issues, the Applicant may offer additional testimony and evidence to support its claim of practical difficulty.

B. Special exception – Roof Structure

1. Impact of building height.

The opinion held that the BZA erroneously characterized the special exception as being one for roof structure height rather than the overall height of the building. The Board therefore needed to reassess the adverse impact of the relief based upon such overall height.

REMAND ISSUE 3.

Would the building’s overall height above the measuring point of 84 feet, three inches adversely impact on the surrounding area?

2. Use of bonus height.

In its decision, the BZA stated the applicant “availed itself of the bonus density and height designed to encourage affordable housing.” During the appeal the Board indicated this was a misstatement because the 70-foot height could be achieved by right. The Opinion indicated that although the Court might agree with this analysis, it nevertheless was remanding the matter back to the BZA “to address this issue in the first instance and accurately explain its findings and rationale for granting the special exception.” 141 A.3d at 1086.

REMAND ISSUE 4.

- (a) **Did the Applicant avail itself of the bonus height designed to encourage affordable housing?**
- (b) **If not, would that be a basis for denying the special exception request?**

C. Miscellaneous issues

1. Calculation of maximum density.

As noted, this Application was a self-certified one. The Applicant did not request relief from the applicable floor area ratio (“FAR”) limitation. However, the order indicated that the maximum permitted FAR for a property zoned ARTS/C-3-A that provides at least 3.0 FAR of residential use and utilizes the maximum bonus density available under the Inclusionary Zoning (“IZ” requirements regulations is 5.3 FAR. This figure resulted from adding the 4.8 maximum FAR available through the “modification” made by former § 1909.1(c)(2) for development subject to IZ with the 0.5 FAR bonus authorized by § 1902.3 when there is at least 3.0 FAR of residential uses. The petitioners argued that a property cannot use the additional 0.5 FAR unless the building also includes one of the preferred uses set forth in former § 1904.2. The Board has held that it will not dismiss an application due to an erroneous self-certification unless “there is no plausible basis to conclude that the relief requested is sufficient.” *Application No. 18263-B of Stephanie and John Lester*, p. 10 (2012) (Order on Remand explaining why it was plausible that a connecting trellis could create a single building), *summarily affirmed on other grounds, Parsons v. D.C. Bd. of Zoning Adjustment*, 13-AA-922 (July 22, 2016).

REMAND ISSUE 5

Is there a plausible basis to conclude that the additional 0.5 FAR permitted by § 1904.3 is allowed for a building containing none of the preferred uses identified in § 1904.2?

If the Application is amended to seek relief under the Zoning Regulations of 2016, the issue would be:

Is there a plausible basis to conclude that the additional 0.5 FAR permitted by 11-K DCMR § 802.3 is allowed for a building containing none of the preferred uses identified in K § 802.2?

2. Great Weight to Advisory Neighborhood Commission

The Board’s decision indicated that it gave great weight to Advisory Neighborhood Commission (“ANC”) 2F’s recommendation that the Board approve the requested relief. The Opinion stated that the ANC Act “does not require the BZA to give ‘great weight’ to the ANC’s recommendation but requires the BZA to give great weight to any issues and concerns raised by the ANC in reaching its decision.” 141 A.3d at 1086. The court thus held that although “it may be helpful to an

applicant seeking a variance or a special exception to have the support of the local ANC, that body's recommendation in favor of a project does not provide any substantial support to justify the BZA's decision.” 141 A.3d at 1087. The Opinion’s meaning is plain and the parties need not respond to it.

Pre-hearing submissions.

If any party believes that the issues stated above do not accurately or fully reflect the issues remanded, that party must, no later than 5:00 p.m. on Wednesday, May 17, 2017, file with the Office of Zoning and serve upon the other parties **a written statement** identifying the asserted deficiency(ies) and offering revised language for the existing or any proposed additional issue identified. If no such submission is timely made by a party, that party is deemed to have agreed that the scope of this hearing as described in this Order fully encompasses the issues on remand.

By that same date and time any party may file **a written brief** responding to the remand issues stated above and the Office of Planning may also file **a report**. The Applicant may also by that same date and time amend its application to request relief under the Zoning Regulations of 2016 and submit a **revised self-certification**.

No response to another party’s filing will be accepted.

The record in this remand proceeding includes the entire record of Board of Zoning Adjustment Application No. 18638. The Parties are to avoid repetitious testimony and evidence.

This public hearing will be conducted in accordance with the contested case provisions of the Zoning Regulations, 11 DCMR Subtitle Y, Chapter 4, except that pursuant to 11-Y DCMR § 801.6 testimony shall be limited to witnesses called by the parties. The Office of Planning also may make an oral presentation.

The unexcused failure of the Applicant to appear at the hearing will result in the dismissal of the Application.

This is not a final order of the Board and is therefore not the proper subject of a motion for reconsideration.

Accordingly, it is ORDERED that the Board APPROVES the issuance of this Order.

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this Order.

(Frederick L. Hill, Carlton E. Hart, Lesylleé M. White, and Peter G. May to approve issuance; one Board seat vacant).

BZA APPLICATION NO. 18638-A
PAGE NO. 7

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

FINAL DATE OF ORDER: April 7, 2017