

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18679 of Richard and Janet Barnes, pursuant to 11 DCMR § 3103.2, for variances from the lot occupancy requirements under § 403.2, the rear yard requirements under § 404.1, and the nonconforming structure provisions under § 2001.3 to allow an elevated rear deck addition to an existing one-family row dwelling in the R-4 District at premises 3150 17th Street, N.W. (Square 2600, Lot 87).

HEARING DATE: December 17, 2013
DECISION DATE: February 11, 2014

DECISION AND ORDER

This application was submitted on October 8, 2013 by Richard and Janet Barnes (the “Applicant”), the owners of the property that is the subject of the application. The application requests variance relief from the lot occupancy requirements under § 403.2, the rear yard requirements under § 404.1, and the nonconforming structure provisions under § 2001.3 to allow an elevated rear deck addition to an existing one-family row dwelling in the R-4 District at premises 3150 17th Street, N.W. (Square 2600, Lot 87) (the “Subject Property”). Following a public hearing, the Board voted to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated October 10, 2013, the Office of Zoning provided notice of the application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 1; Advisory Neighborhood Commission (“ANC”) 1D, the ANC in which the subject property is located; and Single Member District/ANC 1D01. Pursuant to § 3113.13, the Office of Zoning mailed letters on October 15, 2013 providing notice of the hearing to the Applicant, ANC 1D, and the owners of all property within 200 feet of the subject property. Notice of hearing was published in the *D.C. Register* on October 18, 2013 (60 DCR 14788).

Party Status. The Applicant and ANC 1D were automatically parties to this proceeding. The Board also granted party status in opposition to Frank O. Agbro, an adjacent property owner.

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Applicant's Case. The Applicant provided evidence and testimony describing the proposed rear deck addition and asserted that the application satisfied the requirements for area variance relief.

OP Report. By memorandum dated December 11, 2013, OP indicated that it did not support the application. OP's opposition to the relief requested was based on its finding that no exceptional circumstance exists on the Subject Property that would create a practical difficulty. (Exhibit 27.) In the report and during testimony, OP noted that a patio could be constructed in the rear yard without zoning relief, but such a patio would displace the parking spaces in that area.

DDOT Report. By memorandum dated December 11, 2013, the District Department of Transportation expressed no objection to the requested relief. (Exhibit 26.)

ANC Report. By letter dated November 22, 2013, ANC 1D indicated that it discussed the application at its properly noticed meeting on November 19, 2013. With a quorum present, the ANC voted 4-0 in support of the application. ANC 1D found that denying the relief would cause undue hardship to the Applicant and that the proposed rear deck would not cause substantial detriment to the public good. (Exhibit 25.)

Party in opposition. Frank Agbro, owner of the adjacent property, argued that the proposed addition would have a negative effect on the surrounding properties, chiefly citing concerns about safety and visibility in the public alley to the rear of their properties. Mr. Agbro noted that the proposed deck may provide a hiding place for criminals and make it more difficult for neighbors to be vigilant for criminal activity. Mr. Agbro also claimed that his own rear deck, similar to the one proposed on the Subject Property, does not contribute to the problem of crime in the alley, because he has been able to observe and report criminal activity from his deck. During the public hearing, the Applicant raised the issue that Mr. Agbro's own rear deck was constructed in 2004 without the necessary relief from the Board. Similarly, OP noted that it could find no record that Mr. Agbro had sought or received the requisite zoning relief for his deck. Mr. Agbro admitted that he was unclear about the zoning relief process, but now understands that he should have requested relief from the Board. Finally, Mr. Agbro submitted a petition in opposition to the proposed addition, signed by nine other residents of 1702 and 1706 Kilbourne Place, N.W. The petition, however, incorrectly states that the Applicant's proposed project will be constructed on public space. (Exhibit 28.)

FINDINGS OF FACT

The Subject Property

1. The Subject Property is located at 3150 17th Street, N.W. (Square 2600, Lot 87). The Subject Property is a rectangular lot measuring 18 feet wide and 67.5 feet long.

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2. The Subject Property lot is improved with a three-story row dwelling with a basement, constructed in 1906. On the southern side of lot, the space between the dwelling and the public alley is a paved parking area for the owner and guests. To the west of the parking area, there is a small concrete pad where two air conditioning compressors are enclosed by a chain link fence.
3. The Subject Property is situated at the corner of 17th Street and Kilbourne Place, N.W. and abuts a 15 foot wide public alley to the south. The Subject Property is therefore bound by public space on three sides, which contributes to its exceptional condition.
4. Though the adjacent row dwellings face north toward Kilbourne Place, N.W., the dwelling on the Subject Property faces east toward 17th Street, N.W.
5. The Subject Property is nonconforming in terms of lot occupancy and lot area. Although the maximum lot occupancy permitted in the R-4 District is 60% under 11 DCMR § 403.2, the structure occupies 69% of the lot. Additionally, § 401.3 requires a minimum lot area of 1,800 square feet, but the lot area of the Subject Property is 1,275 square feet. Because the lot predates the adoption of the Zoning Regulations in 1958, it is a legally nonconforming lot. (See, 11 DCMR § 2000.4.) Nonetheless, a building located on such a lot may not be enlarged or replaced by a new building unless it complies with all other provisions of [Title 11].” (11 DCMR § 401.1.)

The Applicant’s Project

6. The Applicant proposes to construct an unenclosed deck measuring 16 feet wide and 16 feet deep at the second level of the dwelling. The deck would be constructed in the rear yard to the south of the dwelling.
7. The deck would be supported by iron beams and surrounded on three sides by ornamental iron fencing, consistent with existing iron fencing on the Subject Property. The chain link fence enclosing the utilities pad would also be replaced with ornamental iron fencing.
8. The concrete pad beneath the deck would be repaved and retained as a parking area.
9. The proposed deck would increase the lot occupancy of the Subject Property to 93%. Lot occupancy in the R-4 District is limited to 60% as a matter of right under § 403.2 and 70% by special exception under § 223. Therefore, the project requires variance relief from the requirements of § 403.2.
10. The Applicant proposed to provide a rear yard measuring 4.5 feet deep; however, the R-4 District requires a minimum rear yard of 20 feet. (See 11 DCMR § 404.1.) Therefore, the project requires relief from the provisions of § 404.1.

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11. Because the dwelling is nonconforming in terms of lot occupancy and lot area, the project requires variance relief from § 2001.3(a)(b)(1)&(2).
12. As OP suggested, the Applicant could install a patio in the rear yard that does not require zoning relief; however, construction of a patio would displace the parking spaces at the rear of the dwelling and require the Applicant to seek on-street parking.
13. On-street parking in the Mount Pleasant neighborhood is highly utilized, such that, compelling the Applicant to remove existing off-street parking would amount to an unnecessary burden.

CONCLUSIONS OF LAW AND OPINION

The Applicant requests variance relief from the lot occupancy requirements under § 403.2, the rear yard requirements under § 404.1, and the nonconforming structure provisions under § 2001.3 to allow an elevated rear deck addition to an existing one-family row dwelling in the R-4 District at premises 3150 17th Street, N.W. (Square 2600, Lot 87). The Board is authorized under § 8 of the Zoning Act of 1938, D.C. Official Code § 6-631.07 (g)(3) (2012 Repl.) to grant variance relief from the strict application of the Zoning Regulations. As noted by the District of Columbia Court of Appeals:

An applicant must show, first, that the property is unique because of some physical aspect or “other extraordinary or exceptional situation or condition” inherent in the property; second, that strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant; and third, that granting the variance will do no harm to the public good or to the zone plan. *Capitol Hill Restoration Society v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 941 (D.C.1987).

When determining whether the property is subject to an exceptional condition, the Board must find that there are “unique circumstances peculiar to the applicant’s property” and that these circumstances are not merely “the general conditions of the neighborhood.” *Palmer v. Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972). Additionally, the “exceptional situation or condition” of a property can arise out of a confluence of factors, which together affect this property in an exceptional way. *See Gilmartin v. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1169 (D.C. 1990). The “exceptional situation or condition” can also arise out of the structures existing on the property itself.” *See, e.g., Clerics of St. Viator v. Bd. of Zoning Adjustment*, 320 A.2d 291, 293-94 (D.C. 1974). 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. *See Association For Preservation of 1700 Block of N St., N.W., and Vicinity v. Bd. of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978).

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Applying this test to the requested relief, the Board finds that the Applicant has met the burden of proof and that the application should be granted. In this case, the Subject Property is affected by a confluence of factors that, together, create an exceptional condition. The Board found in a prior order for Application No. 17919 that the Subject Property is not exceptional in terms of size, shape or location, but those findings do not foreclose its conclusion here. Certain unique circumstances were overlooked by the Board during its previous analysis, and, as a result of the Applicant raising these factors through its filings and testimony, the Board now concludes that the Subject Property is affected by an exceptional situation. First, the Board previously found that the Subject Property's corner location was not, in itself, exceptional; however, the Board did not consider the exceptional nature of the Subject Property being bound on three sides by public space, as it is located on a corner and abuts a public alley to the south. Further, the Board did not consider the unique orientation of the dwelling's façade. Although the structure is connected to a series of row dwellings that face Kilbourne Avenue, N.W. the Subject Property faces east and fronts on 17th Street, N.W. Such inconsistent orientation is uncommon in the neighborhood. These unique circumstances, when considered together with the lot's relatively small size and corner location, affect the Subject Property and amount to an exceptional condition.

The Board finds that the unique condition of the property creates practical difficulties to the Applicant in this case. When considering Application No. 17919, the Board found that the size of the lot does not constrain the Applicant's ability to design an interior dining room space. This finding dealt specifically with the Applicant's prior proposal to construct an enclosed sunroom addition. As the Applicant's design has changed substantially, so has their argument regarding the practical difficulty he faces as a result of the property's exceptional condition. Accordingly, the Board is not bound by its prior finding that there existed no practical difficulty. In the present case, the Applicant's plans to construct an open-air deck are constrained by the public space that borders the lot and the unique eastward orientation of the dwelling's façade.

Due to these conditions and the resulting lack of side yards, the nonconforming rear yard remains the only feasible space in which to construct a deck addition. In its report, OP suggests that the installation of a first floor patio in this rear yard space would be possible without zoning relief. This alternative plan, however, would displace the Applicant's parking spaces in a neighborhood where on-street parking is limited. Though it is possible to create outdoor patio space without variance relief, forcing the Applicant to permanently seek on-street parking would amount to an unnecessary burden. Therefore the Board concludes that the Applicant has shown that the unique conditions of the Subject Property create a practical difficulty.

Finally, the Board finds that granting the relief requested would cause no harm to the public good or the zoning plan. The deck addition is unenclosed, and therefore, it does not impose on the adjacent property to create the same "towering" effect. Further, the size of the proposed deck addition is similar to that of the deck maintained on the adjacent dwelling by the party in opposition. As noted by ANC 1D, the proposed deck is also consistent with similar deck additions in the Mount Pleasant area and is not out of character for the neighborhood. Additionally, the deck addition is a low, unenclosed structure, which ensures visibility in the alley. Mr. Agbro, the party in opposition, argued that the deck addition would provide a hiding

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place for criminals; however, Mr. Agbro also represented that his own deck has allowed him to be vigilant for criminal activity in the alley and has accordingly benefitted the neighborhood. The Applicant suggested, and the Board agrees, that an open-air deck would similarly allow the Applicant to have an increased presence in the alley, further discouraging criminal activity in the area. Therefore, the party in opposition's argument is without merit. Thus, the Board concludes that granting the requested variance would not cause a substantial detriment to the public good or to the zoning plan.

The Board is required to give "great weight" to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2012 Repl.)). In this case, OP recommended denial of the application based on their finding that no exceptional circumstance exists on the Subject Property that would create a practical difficulty. OP also suggested that the proposed increase in lot occupancy would impair the zoning plan, but noted that the proposed addition would not cause any detriment to the public good, as other similar decks exist on the subject square. The Board did not find this recommendation persuasive for two reasons. First, OP considered only the size of the lot and the dwelling's existing nonconformities when making its determination that the Subject Property is not unique. As previously discussed, the Board's finding that the property is exceptional was based upon a confluence of factors, including the relationship of the property to public space and the eastward orientation of the dwelling's façade. These factors were not included within OP's analysis. Second, OP found that the Applicant faced no practical difficulty, as a ground-level patio could be installed without zoning relief. As the Board previously noted, such a patio would eliminate the Applicant's existing parking pad and would require the Applicant to seek on-street parking. Because the neighborhood's on-street parking is highly utilized, this alternative suggested by OP would cause a practical difficulty to the Applicant and is therefore not a persuasive argument.

The Board is also required to give "great weight" to the issues and concerns raised by the affected ANC in its written report. (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) (2012 Repl.)).) In this case, ANC 1D voted 4-0 in support of this application. For the reasons discussed, the Board concurs with the ANC's recommendation to approve the requested relief.

Based on the findings of fact and conclusions of law, the Board finds that the Applicant has satisfied the burden of proof with regard to the request for variance relief from the lot occupancy requirements under § 403.2, the rear yard requirements under § 404.1, and the nonconforming structure provisions under § 2001.3 to allow an elevated rear deck addition to an existing one-family row dwelling in the R-4 District at premises 3150 17th Street, N.W. (Square 2600, Lot 87). Accordingly, it is **ORDERED** that the application, subject to plans at Exhibits 3 and 8, is hereby **GRANTED**.

VOTE: **4-0-1** (Lloyd J. Jordan, S. Kathryn Allen (by absentee vote), Jeffrey L. Hinkle, and Michael G. Turnbull to Approve; one Board seat vacant.)

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

The majority of the Board members approved the issuance of this order.

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: August 25, 2014

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 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

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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.