

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18734 of 1815 RIGGS LLC, pursuant to 11 DCMR § 3103.2, for a variance from the nonconforming structure provisions under § 2001.3, a variance from the open court requirements under § 406.1, and a variance from the floor area ratio (FAR) requirements under § 402.4, to allow an addition to an existing building for residential use in the DC/R-5-B District at premises 1815 Riggs Place, N.W. (Square 133, Lot 818).

HEARING DATES: April 8, 2014 and May 20, 2014
DECISION DATE: July 8, 2014

DECISION AND ORDER

This self-certified application was submitted on January 16, 2014 by 1815 RIGGS LLC (the “Applicant”), the owner of the property that is the subject of the application. The application requests variance relief from the nonconforming structure provisions under § 2001.3, the open court requirements under § 406.1, and from the floor area ratio (“FAR”) requirements under § 402.4, to allow an addition to an existing building for residential use in the DC/R-5-B District at premises 1815 Riggs Place, N.W. (Square 133, Lot 818) (the “Subject Property”). Following two public hearings, the Board voted to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated January 23, 2014, 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 2; Advisory Neighborhood Commission (“ANC”) 2B, the ANC in which the Subject Property is located; and Single Member District/ANC 2B01. Pursuant to § 3113.13, the Office of Zoning mailed letters on February 3, 2014 providing notice of the hearing to the Applicant, ANC 2B, and the owners of all property within 200 feet of the subject property. Notice of hearing was published in the *D.C. Register* on February 7, 2014 at 61 DCR 983.

Party Status. The Applicant and ANC 2B were automatically parties to this proceeding.

Modification to Application. The Applicant originally requested variance relief from the applicability requirements for Inclusionary Zoning (“IZ”) under § 2602.1. The Applicant

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proposed that, with such variance relief, the Applicant could utilize the bonus density permitted by IZ, although the proposed project does not meet the 50% expansion threshold that would ordinarily trigger IZ requirements under the regulations. At the first public hearing, the Board questioned whether its power to “to authorize ... a variance from such strict application [of the zoning regulations]” includes the authority to apply additional requirements to which a property would not normally be subject under the regulations. (D.C. Official Code § 6-641.07.) The Applicant subsequently amended its application to include a request for variance relief from the FAR requirements in place of its request to apply the IZ requirements under § 2602.1.

Applicant’s Case. The Applicant provided evidence and testimony describing the proposed third-story addition and asserted that the application satisfied the requirements for variance relief. The Applicant argued that constructing a smaller, one-unit addition would allow the Applicant to comply with the FAR requirements, but would cause economic hardship, resulting in a loss of profit. Therefore, the Applicant requested that the Board grant variance relief to allow the construction of a larger, economically feasible addition. The Applicant also noted that relief from § 2001.3 and § 406.1 would be necessary regardless of the size of the addition.

After the close of the record, the Applicant submitted a supplemental filing accompanied by a request to waive § 3121.5, which provides that the record of a case is closed after the hearing exception for materials expressly requested by the Board. (Exhibit 42.) At its public meeting on July 8, 2014, the Board found that the Applicant had not demonstrated good cause for the additional submission and therefore denied the request, pursuant to § 3121.9.

OP Report. By memorandum dated March 25, 2014, the Office of Planning indicated that it could not support the request for area variance relief to impose Inclusionary Zoning (“IZ”) requirements on the project. (Exhibit 30.) In response to the Applicant’s amended application, OP submitted a supplemental report dated May 13, 2014. In this report, OP reiterated that it was still unable to support the requested relief, finding that the Applicant has not demonstrated the existence of an exceptional condition of the property and that even if the condition cited by the Applicant were exceptional, none created a practical difficulty in complying with maximum permitted FAR. OP also noted that, if the Board finds that the Applicant has met the variance test for FAR variance relief, it would have no objection to the relief regarding open court and expansion of a nonconforming structure. (Exhibit 38.)

DDOT Report. By memorandum dated March 20, 2014, the District Department of Transportation indicated that it had no objection to the requested variance. (Exhibit 29.)

ANC Report. By letter dated May 20, 2014, ANC 2B indicated that it discussed the application at its properly noticed meeting on May 19, 2014. With a quorum present, the ANC voted 7-0 in support of the Applicant. (Exhibit 39.)

Persons in support. The adjacent property owner at 1817 Riggs Place, N.W. submitted a letter in support of the proposed addition. (Exhibit 27.)

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Persons in opposition. The Board received two letters in opposition from neighbors residing at 1728 18th Street N.W. (Exhibit 23) and 1829 Riggs Place, N.W. (Exhibit 35). Both letters cited concerns regarding increased traffic and inadequate parking in the neighborhood.

FINDINGS OF FACT

1. The property is located on the north side of Riggs Place, N.W. between 18th Street, N.W. and 19th Street N.W. at 1815 Riggs Place, N.W. at Square 133, Lot 818 (the “Subject Property”).
2. The Subject Property is a rectangular lot that includes approximately 3,787 square feet of land area. The Subject Property abuts a public alley to the east and north.
3. The Subject Property measures 42 feet wide along Riggs Place, N.W. The lot is wider than the adjacent properties on the north side of Riggs Place, N.W., but other lots on the south side of Riggs Place, N.W. and elsewhere in Square 133 are of a similar width or wider than the Subject Property.
4. The Subject Property is improved with a two-story plus cellar multi-family dwelling constructed in approximately 1941.
5. The southern portion of the building occupies the entire width of the lot, and the northern portion of the building provides open courts on the east and west, as well as a rear yard to the north. The building measures approximately 29 feet in height and has a FAR of 1.65. The building includes 6,252 square feet of gross floor area devoted to residential use.
6. The Subject Property contains 21 residential units that are fully leased to tenants.
7. The Subject Property is mapped within the R-5-B District and the Dupont Circle Overlay District. The R-5-B District is intended to permit urban residential development of a moderate height and density. (11 DCMR §§ 350.1 & 350.2.)
8. The Subject Property is located within the Dupont Circle Historic District; however, the building is not considered to be a contributing building to the historic district.
9. The surrounding neighborhood includes a range of residential building forms, including one-family row dwellings on the north side of Riggs Place, N.W., as well as two-story and three-story apartment buildings on the south side of Riggs Place, N.W.
10. The Subject Property is nonconforming with regard to lot occupancy, with a lot occupancy of 85% where a maximum of 60% is permitted. (11 DCMR § 403.2.)
11. The Subject Property is also nonconforming in terms of rear yard and open court. The rear yard measures 3.75 feet, where a minimum depth of 15 feet is required by § 404.1.

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The open court to the east measures two feet and the open court to the west measures seven feet. Subsection 406.1 requires that each court measure four inches per foot of height, with a minimum width of six feet.

12. The Applicant proposes to construct a partial third-story addition to the existing building. The proposed addition would create three dwelling units, including two rear decks enclosed by railings.
13. The Applicant revised the design of the proposed addition based on comments from the Historic Preservation Review Board (“HPRB”), including removal of the front railing and modification of the setbacks. After the Applicant revised the plan accordingly, HPRB found that the proposed concept was compatible with the character of the historic district.
14. The proposed addition would be set back from the front of the building by six feet and would be built within the existing footprint. Accordingly, the proposed addition would not increase lot occupancy and does not require variance relief from § 403.2.
15. The proposed addition would increase the height of the building to 31 feet, extending the nonconforming open courts to the east and west. Therefore, the proposed addition would require variance relief from the open court requirements of § 406.1 and the regulations regarding enlargement of a nonconforming structure in § 2001.3.
16. The proposed addition would increase the building’s FAR from 1.65 to 2.16, where a maximum FAR of 1.8 is permitted under § 402.4. Therefore, variance relief from this provision is required.
17. The Applicant could construct a smaller, one-unit addition measuring 565 square feet that would comply with the FAR limitations of § 402.4.
18. The Applicant plans to continue renting the building to residential tenants while the proposed addition is constructed. The Applicant also notes that, if relief were not granted, the Subject Property could continue to operate as a 21-unit apartment house.
19. When asked by the Board whether any renovation or addition is necessary at this time, the Applicant indicated that the desire for additional units is motivated by the general policy goal of increasing the housing supply in the District of Columbia.

CONCLUSIONS OF LAW AND OPINION

The Applicant requests variance relief from the nonconforming structure provisions under § 2001.3, the open court requirements under § 406.1, and from the floor area ratio (“FAR”) requirements under § 402.4, to allow an addition to an existing building for residential use in the DC/R-5-B District at premises 1815 Riggs Place, N.W. (Square 133, Lot 818) (the “Subject Property”). The Board is authorized under § 8 of the Zoning Act of 1938, D.C. Official Code §

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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. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972).

For the second aspect of the variance test, the Court of Appeals has held that the more stringent “undue hardship” standard applies to use variances, while an applicant seeking an area variance must show only “practical difficulties.” *Id.* at 540-41. The Court did not explicitly define “practical difficulties,” but notes that an applicant must show that strict compliance with the Zoning Regulations would be “unnecessarily burdensome.” *Id.* at 542. The Court has made clear that the Board may consider economic factors such as increased cost and marketability in determining what constitutes a practical difficulty. See *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990); *Wolf v. District of Columbia Bd. of Zoning Adjustment*, 397 A.2d 936, 943 (D.C. 1979). The Court has also held that “[a] variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if put to another use, will yield a greater return.” *Palmer*, 287 A.2d at 542.

Exceptional Condition

The Board finds that no exceptional conditions exist on the Subject Property. The Applicant argues that several factors contribute to the exceptional nature of the Subject Property, including the width of lot, the shape of building, the property’s location within a historic district, and the nonconforming elements of the existing building. The Board credits OP’s testimony and finds that the width of the Subject Property is not exceptional when compared to other lots in Square 133. Also crediting the testimony of OP, the Board finds that the shape of the building is not exceptional when compared to other structures in the vicinity.

Further, the Applicant raises the location of the Subject Property within a historic district; however, in *Application No. 18201 of Ingomar Associates Inc.*, the Board found that a property’s location in a historic district is not sufficient grounds to find an exceptional condition. When confronted with a similar argument, the Court of Appeals held: “The inclusion of intervenor’s property in the Capitol Hill Historic District is not a condition which uniquely affects the lot at issue. If this fact were sufficient to justify a finding of uniqueness, then each and every parcel of

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land within the Capitol Hill Historic District would be entitled to a variance on this basis.” *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 942 (D.C. 1987). Therefore, the Board finds that the location of the Subject Property within the Dupont Circle Historic District does not create an exceptional situation.

Finally, the Applicant argues that an exceptional situation is created by the unalterable conditions within the existing building, such as the center staircase and the plumbing stacks, as well as the nonconforming aspects of the existing building. The Board finds this argument unpersuasive. In support of this contention, the Applicant cites cases where the Board has granted variance relief to permit the renovation of nonconforming buildings. The Board notes that, in several cases cited by the Applicant, the exceptional condition of the property was not exclusively based on the presence of an existing nonconforming structure. Rather, the Board considered the nonconforming structure to be one factor that contributed to the property’s uniqueness and found other exceptional factors such as fire damage in the case of *Application No. 18421 of 3579 Warder Street LLC*, as well as grade changes and irregular lot shape in the case of *Application No. 18646 of 3053 Q Street LLC*. Because no such confluence of factors exists here, the Board finds that the Subject Property is not subject to an exceptional condition.

Practical Difficulty

Even if the Board were to find that the previously discussed factors create an exceptional condition on the Subject Property, the Applicant fails to demonstrate how these factors create a practical difficulty. The Applicant’s argument is based on the economic infeasibility of a smaller, one-unit addition that would conform to the FAR limitation of the R-5-B District. The Court of Appeals has held that economic feasibility is a proper factor for consideration when the Board must determine whether a practical difficulty exists. *See Tyler v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362, 1366 (D.C. 1992); *Gilmartin*, 579 A.2d at 1171. Accordingly, the Board has considered the factors of increased cost and inconvenience to the Applicant, but finds that these factors do not amount to a practical difficulty in this case.

The Board evaluates these economic factors in light of other Court of Appeals precedent – notably the Court’s holding that “[a] variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if put to another use, will yield a greater return.” *Palmer*, 287 A.2d at 542. With regard to economic infeasibility, the Board considers whether the condition of the property creates financial difficulties that would prevent the property from generating a reasonable income. *See Wolf*, 397 A.2d at 943 (The Board properly granted an area variance to permit conversion to a three-unit rental apartment where “marketability” of property would otherwise be “unfeasible” and investment would yield loss rather than profit); *Russell v. District of Columbia Bd. of Zoning Adjustment*, 402 A.2d 1231 (D.C. 1979) (The Court held that an area variance was properly granted “where the owner could never sell the unimproved lot for a permitted residential use absent a variance”). In the case at hand, the existing building is a fully leased, 21-unit apartment house. The Applicant has not shown that the current use of the Subject Property fails to produce a reasonable income nor that the Applicant will encounter any practical difficulty should an addition not be constructed.

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Instead, the Applicant seeks to construct a third-floor addition with the asserted goal of increasing the housing stock in the District and wishes for that addition to generate additional profit. The Applicant indicates that a three-unit addition exceeding the FAR limit of 1.8 would be financially feasible, while a one-unit addition conforming to the FAR regulations would be prohibitively costly. Thus, the Applicant's argument hinges on the notion that a property owner is entitled to maximize each metric within the Subject Property's "zoning envelope." In *Application No. 16896 of Randle Heights Manor*, the Board found that "[t]he Zoning Regulations do not guarantee that every lot may be put to every allowable use." Applying this reasoning, the Board finds that the financial hardship associated with maximizing the Subject Property's FAR does not amount to a practical difficulty in this case. Though being unable to expand to the maximum allowable FAR may constitute some loss to the property's utility, the Court of Appeals has held that "a substantial increase in the cost of an intended improvement coupled with some loss in the overall utility of the property was not a practical difficulty that merited an area variance." *Gilmartin*, 579 A.2d at 1170 (discussing *Barbour v. Bd. of Zoning Adjustment*, 358 A.2d 326 (D.C. 1976)). In this case, the Board finds that the Applicant's inability to make use of the currently unrealized .15 FAR permitted under the regulations does not amount to a more significant burden that would justify variance relief. Therefore, the Applicant has not demonstrated that any conditions affecting the Subject Property give rise to a practical difficulty.

Substantial Detriment to the Public Good or Zone Plan

Though the Applicant has not met the first and second prongs of the variance test, the Board notes that the proposed addition would not cause substantial detriment to the public good nor would it substantially impair the zone plan. As indicated by HPRB's support of the project, the proposed design fits within the context of the neighborhood. Additionally, the Board credits the support of ANC 2B and finds that granting variance relief would not negatively affect the public good. Nonetheless, because the Applicant has not shown an exceptional condition on the Subject Property or that any such alleged condition creates a practical difficulty, the Board must deny the request for variance relief.

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.)). For the reasons discussed, the Board concurs with OP's recommendation to deny the FAR relief requested. As to the open court and expansion of nonconforming structure variances, OP did not separately analyze whether these met the variance tests, but indicated that if the Board were to grant the FAR variance, then OP did not object to the two variances being granted as well. Since the FAR relief was denied, and the OP Report made no recommendation as to the open court and nonconforming structure variances if that were to occur, there is no recommendation to give great weight to.

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.)).) After deliberating on the matter at a regularly scheduled, properly noticed meeting,

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ANC 2B voted in support of the application. The written report does not provide a basis for the ANC's decision, but the Board considered the ANC's support in finding that granting the application would do no harm to the public good. As previously discussed, however, the Board cannot follow the ANC's recommendation to grant the requested variance relief because the first and second prongs of the variance test have not been met.

Based on the findings of fact and conclusions of law, the Board finds that the Applicant has not satisfied the burden of proof with regard to the request for variance relief from the nonconforming structure provisions under § 2001.3, the open court requirements under § 406.1, and the FAR requirements under § 402.4, to allow an addition to an existing building for residential use in the DC/R-5-B District at premises 1815 Riggs Place, N.W. (Square 133, Lot 818). Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: **4-0-1** (Peter G. May, Jeffrey L. Hinkle, Lloyd J. Jordan, and Marnique Y. Heath to Deny; S. Kathryn Allen not present, not voting.)

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: January 28, 2015

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.