

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 18970 of Application of Nam Dinh Pham, pursuant to 11 DCMR § 3104.1 for a special exception under § 223, not meeting the rear yard setback requirements under § 404.1, to allow the construction of an addition to an existing single-family dwelling in the WH/R-1-A District at premises 2903 44th Street N.W. (Square 1620, Lot 85).

HEARING DATES: April 7, 2015, May 12, 2015, and June 23, 2015

DECISION DATE: June 23, 2015

DECISION AND ORDER

This application was submitted on January 29, 2015 by Nam Dinh Pham, owner of the property that is the subject of the application. The application requests special exception approval under § 223 of the Zoning Regulations to allow construction of an addition to the existing home on the subject property, including closing in a deck and raising the existing roof on a portion of the structure that was already located within the rear yard setback area. This portion of the structure was approved by way of BZA variance relief in 1974.¹ Following a public hearing, the Board voted to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Public Hearing. By memoranda dated February 6, 2015, the Office of Zoning sent notice of the application to the Office of Planning (“OP”); the District Department of Transportation; the Councilmember for Ward 3; Advisory Neighborhood Commission (“ANC”) 3D, the ANC for the area within which the subject property is located; and the Single-Member District ANC 3D-01. Pursuant to 11 DCMR § 3112.14, on February 10, 2015, the Office of Zoning mailed notice of the hearings to the Applicants, ANC 3D, and the owners of all property within 200 feet of the subject properties. Notice was published in the *D.C. Register* on February 20, 2015 (62 DCR 2321).

Referral by the Zoning Administrator. The application was referred to the Board by the Zoning Administrator (“ZA”) of the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA”) by a memorandum dated December 31, 2014. (Exhibit 8.)

Party Status. The Applicant and ANC 3D were automatically parties in this proceeding. There were no requests for party status.

Applicant’s Case. The Applicant provided evidence and testimony to show that the application satisfied all requirements for approval of the requested zoning relief.

¹ The reason that the 1974 case was a variance request, rather than special exception, is because § 223 was not yet adopted in 1974.

BZA APPLICATION NO. 18970
PAGE NO. 2

OP Report. By memoranda dated March 31, 2015, and through testimony at the public hearing, OP recommended approval of the application.

DDOT Report. By memoranda dated March 27, 2015, DDOT indicated it had no objection to the approval of the application, noting that the proposal will have no adverse impacts on travel conditions of the District's transportation network.

ANC Report. By letter dated June 16, 2015, ANC 3D indicated that, at a regular public meeting on June 3, 2015, with a quorum present, the ANC voted 9-0 to oppose the application. The reasons provided for such opposition were assertions that granting relief would (i) violate certain provisions of the Comprehensive Plan, including a provision regarding the conservation of family neighborhoods; (ii) cause significant light and air to be lost as a result of closing off the existing deck and raising the existing roof two feet; and (iii) substantially negatively impact the privacy of the neighboring property, even though an open deck was being enclosed and there would be no windows on the side facing the purportedly affected neighbor. The ANC also expressed concern as to the accuracy of the zoning relief being requested and the authority under which the one-story addition over the garage was permitted.

Persons in Opposition. The Board received two letters in opposition from Christopher Cahill, owner resident of the property located adjacent to the subject property, at 4343 Garfield Street, N.W. (Exhibits 31 and 42.) Mr. Cahill also testified at the public hearing.

Persons in Support. The Board received two letters in support from other neighbors that live near the subject property. (Exhibits 40 and 41.)

FINDINGS OF FACT

1. The property is located 2903 44th Street, N.W (Square 1620, Lot 85), at the northeast corner of Garfield and 44th Streets, N.W.
2. The property is improved with a one-family detached dwelling, originally constructed in or around 1927.
3. The property is located in the R-1-A Zone District and is also located within the Wesley Heights (WH) Overlay District.
4. According to the ZA's Memorandum, the property has a current lot occupancy of 19.7%, and the proposed lot occupancy would be 22%. The current rear yard setback is zero feet.
5. The adjacent property to the west is 4343 Garfield Street. That property is improved with a one-family detached dwelling.

BZA APPLICATION NO. 18970

PAGE NO. 3

6. The Applicant proposed to construct a 19' x 8' addition and renovation of an existing room located above an attached garage, including closing an open deck above the garage and raising the existing roof on the existing room approximately two feet in accordance with the plans provided to the Board.
7. The proposed addition is to be constructed on a portion of the existing structure which already encroaches into the required rear yard setback. The subject structure, in that area, abuts the western property line.
8. When constructed, neither the addition nor the existing garage structure will contain any west-facing windows. One current west-facing window will be eliminated. The existing open deck which overlooks the garage driveway will be closed off, and new windows will only face south, directly to Garfield Street, N.W.
9. The proposed work will not be visible from 44th Street, N.W.
10. The proposed addition is being made to a portion of the existing building which is already set back approximately 44 feet from the property line adjacent to Garfield Street.
11. The house on the property located at 4343 Garfield Street, N.W., is located farther south than the house on the subject property, being set back approximately 10 feet from the Garfield Street property line.

CONCLUSIONS OF LAW AND OPINION

The Applicant requests special exception relief under § 223 of the Zoning Regulations to construct an addition to the existing structure along the western property line, above an existing garage. The existing structure in this area already is encroaching 100% into the existing required rear yard, and the addition will expand this existing legally nonconforming situation. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2008) to grant special exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, the special exception 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 in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions. (See 11 DCMR § 3104.1.)

The Board's discretion in reviewing an application for a special exception under § 223 is limited to a determination of whether an applicant has complied with the requirements of §§ 223 and 3104.1 of the Zoning Regulations. If an applicant meets its burden, the Board ordinarily must grant the application. See, e.g. *Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973); *Washington Ethical Society v. District of Columbia Bd. of Zoning Adjustment*, 421 A.2d 14, 18-19 (D.C. 1980); *First Baptist Church of Washington v. District of*

BZA APPLICATION NO. 18970
PAGE NO. 4

Columbia Bd. of Zoning Adjustment, 432 A.2d 695, 698 (D.C. 1981); *Gladden v. District of Columbia Bd. of Zoning Adjustment*, 659 A.2d 249, 255 (D.C. 1995).

Because the proposed addition is located within the required rear yard setback, the proposed work, as noted in the ZA's memorandum, requires special exception relief from § 404.1 of the Zoning Regulations.

Pursuant to § 223, an addition to a one-family dwelling may be permitted as a special exception, despite not meeting certain zoning requirements, subject to the enumerated conditions. These conditions include that the addition must not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property. Specifically, the light and air available to neighboring properties must not be unduly affected (§ 223(a)), the privacy of use and enjoyment of neighboring properties must not be unduly compromised (§ 223.2(b)), and the addition, together with the original building, must not substantially visually intrude upon the character, scale, and pattern of houses along the subject street frontage (§ 223.2(c)).

Based on the findings of fact, the Board concludes that the request for special exception relief, as represented by the submitted plans, satisfies the requirements of § 223. The Board finds that the proposed addition will not unduly affect the light and air available to adjacent properties. As shown in the maps and diagrams and photos submitted by the Applicant, the proposed addition will not have a material impact on the light and air to any abutting or adjacent property, and will not compromise the privacy or enjoyment of any abutting or adjacent property. The proposed addition, including the existing garage structure, will have no west-facing windows, an existing west-facing window will be removed, and an existing open deck will be enclosed, with the only windows facing out to Garfield Street and not to the abutting property to the west. The Board gave careful consideration to the testimony of neighbor to the west, at 4343 Garfield Street, but for the reasons stated above finds his concern over light, privacy, air, and view to be unsupported by the evidence.

The Board finds also that the proposed addition, along with the original structure, will not visually intrude on the character, scale, or pattern of houses along the street frontage. The subject structure is set back a considerable distance from the adjacent street frontage and the adjacent house at 4343 Garfield Street is located much closer to the street frontage. The addition is also modest in scale. Accordingly, the Board concludes that the proposed addition satisfies the requirements of § 223.

For these same reasons, the Board finds that the proposed addition will not adversely affect the use of neighboring properties as required by § 3104.1. Further, the Board finds that the addition will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.

The Board is required by § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990, (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2012 Repl.)) to give

BZA APPLICATION NO. 18970
PAGE NO. 5

“great weight” to the recommendation of the Office of Planning. In this case, the Board concurs with OP’s recommendation that the application should be approved.

The Board is also required to give “great weight” to the issues and concerns raised by the affected ANC. (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 3D voted to recommend denial of the Application. For the reasons stated above, the Board respectfully disagrees with the ANC that granting the relief would impair the privacy of the neighbor to the west or negatively affect the light and air of abutting or adjacent properties. For this same reason and because the addition will not visually intrude on the character, scale, or pattern of houses along the street frontage, the Board finds that granting the relief would not be inconsistent with any of the Comprehensive Plan provisions referenced. The remaining issues cited by the ANC concerning the adequacy of the relief requested and the authority under which one-story addition over the garage was constructed are not legally relevant to the Board’s consideration of this special exception.

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the requests for a special exception under § 223 to provide relief from the rear yard setback requirement of § 404.1, to allow the proposed addition to the existing garage structure portion of the existing house on the subject property. Accordingly, it is **ORDERED** that the application is **GRANTED, SUBJECT TO THE REVISED ARCHITECTURAL PLANS AND ELEVATIONS (EXHIBIT 34), AND THE FOLLOWING CONDITION:**

1. The Applicant shall remove the “Azek Trim and Rails” decorative screen walls/parapet, shown on Sheets 5 and 6 (Right Elevation and Rear Elevation, respectively) of Exhibit 34.

VOTE: **3-1-1** (Lloyd J. Jordan, Marnique Y. Heath, and Michael G. Turnbull to Approve; Jeffrey Hinkle to oppose; one Board seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: August 17, 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.

BZA APPLICATION NO. 18970
PAGE NO. 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.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITION IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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.