

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18991 of John Stokes, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator (“ZA”), Department of Consumer and Regulatory Affairs (“DCRA”), made December 31, 2014, to issue Building Permit B1503050 (“the permit”), allowing an addition to a one-family dwelling located at 1521 Varnum Street, N.W., and the conversion of the dwelling to a seven-unit apartment building in the R-4 District (Square 2698, Lot 817).

HEARING DATES: May 5, 2015, June 30, 2015, and September 15, 2015
DECISION DATE: September 29, 2015

ORDER DENYING APPEAL

This appeal was submitted to the Board of Zoning Adjustment (“Board”) by John Stokes. Mr. Stokes (the “Appellant”) challenged the decision of the ZA to approve an addition to an existing one-family dwelling in the R-4 zone, thereby allowing the conversion of the dwelling to a seven-unit apartment house. The Appellant claims that the permit was unlawful for several reasons, the primary one being that the ZA erred in his determination to allow a minor deviation from the lot area requirements under § 407.1 of the Zoning Regulations. Following a public hearing during which the Board considered all of the grounds alleged by the Appellant, the Board voted to deny the appeal.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on May 5, 2015. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, to Advisory Neighborhood Commission (“ANC”) 4C, to DCRA, and to the owner of the subject property, Varnum Holdings LLC (the “Owner”).

Parties

Appellant

The Appellant in this case is John Stokes. Mr. Stokes resides at 1519 Varnum Street, N.W., adjacent to the subject property.

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DCRA

The Appellee, DCRA, is the agency of the government of the District of Columbia that is authorized, among other things, to issue building permits. DCRA was represented by its Office of the General Counsel, Maximilian Tondro, Esq. The Zoning Division of DCRA is headed by the Zoning Administrator (“ZA”), Matthew LeGrant, and is charged with administering the Zoning Regulations. Mr. LeGrant testified at the public hearing on behalf of DCRA.

Property Owner

As the owner of the subject property, Varnum Holdings LLC is automatically a party under 11 DCMR § 3199.1, and will hereafter be referred to as the Owner. The Owner was represented by Sullivan & Barros, LLP, Martin B. Sullivan, Esq.

The Affected ANC

ANC 4C, as the affected ANC, was automatically a party to the appeal by virtue of 11 DCMR § 3199.1(a).

ANC Report

The ANC submitted two reports in this matter. In a resolution dated March 11, 2015, issued after a regularly scheduled monthly meeting with a quorum present, the ANC voted to support the appeal. (Exhibit 18.) In a separate motion, the ANC authorized Mr. John Stokes to present the ANC report before the Board, and to have Mr. Stokes represent the ANC before the Board. (Exhibit 18.) In its initial report, the ANC alleged that the permit unlawfully allowed violations of the Zoning Regulations regarding height and density, rear and side yard requirements, overcrowding, parking lot requirements, and roof structure requirements. (Exhibit 18.) In a later submission, dated August 12, 2015, after a regularly scheduled monthly meeting with a quorum present, the ANC voted to submit a “Letter of Support” further detailing its support of the appeal (Exhibits 71 and 72.) Among other things, the ANC stated in its report that the ZA erred in approving the permit because: (1) The proposal was not a “conversion” of one building, but a proposal to construct two separate buildings; and, (2) When exercising its discretion to allow a minor deviation of the lot area requirements, the ZA failed to take into account the preamble language pertaining to the R-4 Regulations, such as the fact that “apartment houses are specifically discouraged” in the R-4 District. Ms. Elisa Irwin, the Commissioner for Single Member District ANC 4C03, testified on behalf of the ANC at the public hearing on the appeal.

Requests to Participate as a Party

Several neighbors filed Requests for Party Status and/or Requests to Intervene in support of the Appeal. (See Exhibits 55, 56, 58, 66, 67, and 73, filed during the period of time between August 30 and September 1, 2015.) The Board treated these requests as requests to participate as a party under § 3106.2. Subsection 3106.2 requires that such requests be filed not less than 14 days prior

to the date set for the hearing. Because the hearing was initially set for May 5, 2015, all of the requests to participate as a party were untimely, and were therefore denied. However, the Board afforded the neighbors an opportunity to testify in support of the appeal.

Persons in Support of the Appeal

The Board also received written submissions from neighboring property owners in support of the appeal. (See, for example, Exhibits 19, 27, and 34-39.)

Motions and Continuances

The May 5, 2015 hearing date. As stated, the public hearing was first scheduled for May 5, 2015, and the Board heard testimony from the Appellant and Henrik Weng (a neighbor in support of the appeal) on that date. However, the Board also noted the lack of specificity in the Appellant's pleading (the Statement on Appeal), and in Appellant's testimony. Following extended colloquy between the Board and the Appellant, the Appellant requested a continuance. The Board continued the hearing to June 30, 2015 to allow Appellant to file a revised appeal that contained more particularized claims. The Board also allowed responses to Appellant's filing from DCRA and the Owner, and a reply by the Appellant to said responses. The Board set a timetable for all filings.

The June 30, 2015 hearing date. The Appellant filed a revised Statement of Appeal (Exhibit 42) in accordance with the Board's directive. DCRA and the Owner filed late responses to the revised Statement, and requested that the Board accept the late responses, claiming there had been a good faith misunderstanding of the due date that was set by the Board on May 5. The Appellant requested a second continuance, partly so he could "reply" to the late responses from the Owner and DCRA, and partly so he could retain an architect to review plans and elevations that had been provided by DCRA. The Board granted the requests by DCRA and the Owner to accept their late filings. The Board also granted the Appellant's second request for a continuance, and scheduled a continued hearing for September 15, 2016.

The September 15, 2015 hearing date. Prior to the September 15 hearing date, the Board received a third request for a continuance from the Appellant (Exhibit 57), and responses in opposition to this request from DCRA and the Owner (Exhibits 62 and 64.) The Appellant withdrew the continuance request. As discussed previously, the Board also received and ruled on the Requests for Party Status from various neighbors. During the September 15 hearing, the Board focused on the merits of the appeal. The Board heard further testimony from the Appellant, and also heard testimony from DCRA, the Owner, a representative of ANC 4C, and four neighbors who testified in support of the appeal.

Scope of the Hearing

The Board requested clarification from the Appellant regarding the alleged violations of the Zoning Regulations. Based upon the testimony of the Appellant and his revised Statement on

Appeal, the Board clarified that this appeal was based upon alleged violations of the following Zoning Regulations:

- §2500 Impermissible second building,
- §407 ZA flexibility rule,
- §101 Purpose of the Zoning Regulations,
- §330 Purpose of the R-4 zone district,
- §199 Definitions of the terms “basement” and “cellar,”
- §403 Lot occupancy requirements,
- §402 FAR (floor area ratio) requirements,
- §404 Rear yard requirements,
- §405 Side yard requirements, and
- §411 Rooftop structure requirement.

The ANC representative testified that the ANC’s claims of alleged violations were the same as those raised by the Appellant. (Hearing Transcript (“Tr.”), September 15, 2015, p.149-152.)

Closing of the Record

The Board closed the record at the end of the public hearing on September 15, 2015 and set the case for decision on September 29, 2015.

FINDINGS OF FACT

The Property

1. The subject property is located at 152 Varnum Street, N.W. (Square 2698, Lot 817) in the R-4 zone district.
2. The property is currently improved with a one-family dwelling that was constructed prior to May 12, 1958.
3. The property has a land area of 6,279 square feet.

The Proposed Project

Proposed Conversion to Apartment House

4. Prior to June 26, 2015, it was permissible to convert a pre-1958 structure into an apartment house, provided the lot occupancy requirements were met under § 403, and provided there

was at least 900 square feet of land area for each apartment unit (11 DCMR § 330.5(e).)¹

5. The Owner proposed converting the structure to a seven unit apartment house, a proposal that required 6,300 square feet of land area under § 330.5(e).
6. The property was approximately 21 square feet short of the minimum required amount of land area, or 0.33% short of the minimum required amount.

ZA Flexibility

7. Subsection 407.1 of the Zoning Regulations allows minor flexibility to the ZA to permit a deviation from the lot area requirements, subject to specified criteria, where the deviation does not exceed two percent of the minimum area requirements.
8. On August 11, 2014, the ZA issued a Determination Letter which granted minor flexibility pursuant to § 407.1 for the lot area deviation to allow the proposal for a matter-of-right addition and conversion to a seven-unit apartment house. (Exhibit 24.)
9. The Determination Letter noted that the deviation from § 401.3 is the only deviation required, and that the requested deviation of 0.33% (a third of one-percent) satisfied the “quantitative” requirement of § 407.1(a).
10. The Determination Letter concluded that the deviation would also satisfy the “qualitative” requirements of § 407.1(b) because it would not “impair the purpose of the otherwise applicable regulations”.
11. The Determination Letter noted that the degree of deviation requested is only one-third of one percent, which will have no apparent impact on adjacent properties. The Determination Letter noted the purpose of the R-4 District is to stabilize remaining one-family dwellings, but also noted the uniquely large size of this property compared to surrounding properties and the fact the conversion to an apartment house was already permitted as a matter-of-right. The Determination Letter noted that granting the deviation would allow seven units at market size for an apartment house in the District, rather than six slightly larger units. Despite the additional unit, the ZA noted that the lot occupancy, height, density, and other aspects of the property would not be increased as a result of the requested deviation. (Exhibit 24.)

Building Permit Application and Plans

12. On August 18, 2014, shortly after the Determination Letter was issued, the Owner

¹ As was discussed during the proceedings, § 330.5 has since been amended and such conversions became more restrictive, and § 407.1 was also amended to disallow the ZA from applying its minor deviations when determining the minimum lot area needed for such conversions (Z.C. Order No. 14-11.) However, the amended regulation went into effect on June 26, 2015, after the permit in this case was issued. Therefore, the amended regulation is not relevant to this appeal.

submitted proposed plans for the project, and applied for a building permit for the proposed conversion.

13. The application was for an addition to an existing building, where three of the four structural walls would be retained and an addition would be built to the rear of the existing building. (Exhibit 45.)
14. The approved plans depict one proposed building which shares the same stairwell, walls, and roof. (Exhibit 43A, at 10-13 (Sheets A202-205).)
15. The approved plans specify a total height of 39 feet and 11 inches, as measured from the existing grade at the midpoint of the main façade of the proposed building closest to the street line, up to the highest part of the roof. (Exhibit 22, Sheet A204, "Building Elevations", #1 Front Elevation.)
16. The approved plans specify three stories and a cellar. The height of the cellar is three feet and seven inches above the adjacent finished grade. The adjacent finished grade was measured from the existing grade at the midpoint of the main façade of the building (Exhibit 22, Sheet A204, "Building Elevations", #1 Front Elevations.)
17. The approved plans depict the proposed lot occupancy, including façade balconies, at 50%. (Exhibit 22, Sheet A000, "Cover Sheet" and Sheet A001, "Existing and New Work Site Plans".)
18. The approved plans show one side yard of 16 feet.
19. The approved plans provide for a rear yard of approximately 21½ feet. (Exhibit 22, Sheet A001, "Existing and New Work Site Plans".)
20. The approved plans show that the proposed air conditioning units on the rooftop rise three feet above the rooftop deck. (Exhibit 43A, Sheet A205.) Other rooftop mechanical equipment - aside from the air conditioning units - is located inside of an enclosure.

The Building Permit

21. On December 23, 2014, DCRA issued Building Permit No. B1411058 (Exhibit 81), which authorized the conversion of a one-family dwelling into two flats.
22. On December 31, 2014, DCRA issued a revised permit, Building Permit No. B1503050, which corrected the work description of the earlier permit to reflect the conversion of a one-family dwelling into a multi-family dwelling.
23. At the time of the public hearing, construction had not begun. However, DCRA had issued two stop work orders: one for a stairway penthouse setback deficiency, and the other for a failure to include all applicable plans with a neighbor notification form.

24. According to DCRA and the Owner, both of these deficiencies were corrected, and the stop work orders were lifted.

25. On June 25, 2015, DCRA issued Building Permit No. B1506170 to reflect these corrections.

The Appeal

26. This appeal was filed on February 27, 2015.

27. One side of the building to be converted shares and will continue to share an existing party wall with Appellant's residence. (Exhibit 30, Written Testimony of Appellant.)

CONCLUSIONS OF LAW

The Board is authorized by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(1) (2008 Repl.), to hear and decide appeals where it is alleged that there is error in any decision made by an administrative officer in the administration of the Zoning Regulations. The decision in this case is DCRA's issuance of the building permit. The alleged zoning errors were the ZA's determinations that: the proposal was for a conversion of one building and not the construction of two separate buildings; the height/story requirements were met; there was no violation of the FAR requirements; the minimum rear yard requirements were met; the side yard requirements were met; the rooftop structure requirements were met; and the requested minor deviation for lot area requirements could be granted. As will be explained below, the Board concludes that, the ZA did not err in any of the above determinations. The following will examine each claim of error.

The Claim of Two Separate Buildings

The Appellant's position is that the proposal includes an impermissible second building at the property in violation of § 2500 of the Zoning Regulations.² Appellant alleges that "over 90% of the original house ... will be removed" and "there will be two buildings, the first of which will consist of four apartments The second building will have three apartments on three floors...". (Exhibit 42, Appellant's Revised Statement on Appeal.) Appellant is incorrect. As indicated in the approved plans, there is only one proposed building at the property, and this building shares the same stairwell, walls, and roof. (Finding of Fact 14.)

The Zoning Regulations define a building as not "separated [i.e., connected] from the ground up or from the lowest floor up." (11 DCMR §199.1, "Building".) The Board has held that

² The citation to § 2500 assumes that the second of the two alleged buildings is an accessory building that exceeds the matter of right limits of that section. The section of the Zoning Regulation that limits the number of principal building on a lot in a residence zone is § 2516, which permits more than one principal building by special exception.

The definition of “building” under §199.1 permit separate portions of a structure to be considered as a single building for zoning purposes provided that a communication exists between those separate portions at or above the main floor.

(BZA Application No. 18263-B of Stephanie and John Lester (2011).)

As the approved plans demonstrate, this definition has been met and a single building was approved.

The Claim Regarding the Minor Deviation for Lot Area Requirements

Subsection 407.1 of the Zoning Regulations authorizes the ZA to allow a minor deviation from up to two area requirements, including a deviation up to two percent from the lot area requirements of § 401.

In *Appeal No. 18108 of Advisory Neighborhood Commission 3C* (2011), the Board stated that the application of § 407.1 requires a two-part standard: not merely a quantitative or numerical exercise to calculate a permitted deviation, but also a qualitative analysis regarding whether a deviation would impair the purpose of the otherwise applicable regulations. In this case, the ZA engaged in both a quantitative and qualitative analysis.

Quantitative Analysis

As explained previously, the Owner sought one minor deviation from the lot area requirements so that it could convert a structure to seven apartment units instead of six apartment units.³ Because the Zoning Regulations require a minimum lot area of 900 square feet for each apartment unit, a total of 6,300 square feet of land area was required for the project. The subject property consists of 6,279 square feet of land area, and is therefore 21 feet short of the minimum required amount, or 0.33%. The ZA’s Determination Letter states that only one request for a deviation was made, and that this request was for only a 0.33% deviation from the lot area requirements. (Finding of Fact 9.)

Qualitative Analysis

The ZA also conducted a qualitative analysis and determined that the deviation would not impair the purpose of the otherwise applicable regulations. It is this portion of the analysis which the Appellant contests and it will be examined more closely.

As described in Findings of Fact 10 and 11, the ZA considered several qualitative factors in his analysis, for example: the extremely small amount of the deviation required, the uniquely large size of the lot, the fact that conversions to apartment houses were allowed as a matter-of-right, the relative consistency in character between a six-unit building and a seven-unit building, the fact

³ As proposed, six of the units will comply with the 900 square feet minimum and the seventh unit will be 879 square feet.

that the seven-unit configuration provides fairly large living units (1,350 square feet) for an apartment in the District, and the fact that this decision does not allow for any increase in the overall density or bulk of the proposed project.

Appellant argues that a qualitative analysis should have included:

1. An analysis of § 101 of Title 11, particularly § 101.1 (b), which provides that in “their interpretation and application, the provisions of this title shall be held to be the minimum requirements ... to ... [p]revent undue concentration of population and the overcrowding of land” and § 102.1 (b), which states that the “regulations in this title ... are designed with consideration of the... [c]haracter of the respective districts ... ; and
3. Further analysis of the purpose of the R-4 zone district (stating the R-4 zone is not an apartment house district, and the purpose of the R-4 is to stabilize the remaining one-family dwellings.)

As explained above, the ZA did consider the purpose of the R-4 zone, but also noted that conversions to apartment houses were allowed as a matter-of-right. With respect to § 101, the Board concluded in *Appeal 18108*, that § 101 is not pertinent because it contains statements about the nature of the Zoning Regulations in general. The Board believes that the ZA correctly identified the pertinent regulations and properly analyzed the impact of the deviation on their intended purposes.

In sum, the Board is not persuaded by the Appellant that an error occurred in the decision of the ZA, pursuant to § 407.1, to approve a minor deviation in the minimum lot area required so as to allow a seventh apartment unit.

The Claim of Excessive Height/Number of Stories

The Appellant also alleges that the proposed building violates the requirements of § 400 in that it exceeds the maximum allowable height (40 feet) and the maximum number of stories (three). This claim is incorrect.

Regarding the building height, the approved plans indicate that the total height of the building is 39 feet and 11 inches. (Finding of Fact 15.) This height is within the maximum height of 40 feet which is allowed in the R-4 zone district. (11 DCMR § 400.1.)⁴ Moreover, the ZA utilized the measuring process specified by §§ 400.15-400.17, by measuring the height from the existing grade at the midpoint of the main façade of the proposed building up to the highest part of the roof. (Finding of Fact 15.)

⁴ The amendments referred to earlier in this Order also reduced matter of right height for this type of development to 35 feet, subject to up to five additional feet by special exception.

Regarding the number of stories, § 400.1 limits buildings in an R-4 zone district to three stories in height. The definition of “story” excludes cellars and stairways or other rooftop structures. (11 DCMR § 199.1.) The term “cellar” is defined as space with a ceiling less than four feet above the adjacent finished grade. The approved plans specify three stories and a cellar, and that the floor of the first floor is three feet and seven inches above the adjacent finished grade. (Finding of Fact 16.)

The Appellant disputes the measurements regarding the height and the number of stories, claiming that the building height and lower level cellar should be measured from the window well on the west wall. However, the ZA testified that it was longstanding practice to treat window wells as exceptions to grade, and that the correct practice was to measure from the adjacent grade. (Tr., September 15, 2015, p. 173.) The Board finds this interpretation to be reasonable. Moreover, under § 400.1, maximum height is measured in terms of feet and in terms of stories. In residential zones, the building height and number of stories are both measured from the center of the front of the building, not the side of the building, where the window wells are. (See, 11 DCMR §§ 400.15 and 400.16.)

The Claim of Excessive FAR

The Appellant has alleged that the permit approval violates § 402, which governs floor area ratio (“FAR”) requirements in residential districts. However, there is no FAR requirement in the R-4 zone district, where the subject property is located. (See, 11 DCMR § 402.4.) The FAR requirement is first prescribed in the R-5 zone district, where it is 0.9. (*Id.*) The Appellant acknowledges that no FAR requirement is prescribed in the R-4 zone. However, he asserts that the proposed building has a FAR of 1.5, an amount that exceeds the allowable FAR in the R-5 zone. As such, Appellant argues that the R-4 Zoning Regulations should not be interpreted to permit an amount of density that would be disallowed in the R-5 zone. Even assuming that the Appellant’s calculations are correct⁵, any anomaly between the densities permitted within more and less restrictive zone districts can only be rectified by the Zoning Commission through a text amendment, not by the ZA or this Board. (See, D.C. Official Code § 6-651.07(e) (“The Board ... shall not have the power to amend any regulation or map.”))

The Claim of an Insufficient Rear Yard

The Appellant alleges that the proposed building does not meet the requirements of § 404.1 which requires a minimum rear yard of 20 feet. However, the Board finds no evidence of this claim. The approved plans show a rear yard of approximately 21½ feet. (Finding of Fact 19.)

The Claim of Insufficient Side Yards

⁵ The Appellant would count the lower level “basement” as building area toward the FAR. (Tr., September 15, 2015, p. 155.) As discussed above, the Board has concluded that the lower level is a “cellar”, which does not count as building area toward FAR. Thus, the Appellant’s FAR calculation of 1.5 may be inaccurate.

The Appellant claims that what he refers to as the second apartment building is proposed up to the lot line abutting his property. He also claims that under § 405 of the Regulations, a side yard is required on each free standing side of this purported second building. (Exhibit 42, p. 4.) However, as explained earlier, the Appellant erroneously treats the proposed rear addition as a second building. For zoning purposes, there is only one building. Subsection 405.6 of the Regulations states that if a side yard is provided, it must be a minimum of eight feet. In this case, there is one side yard provided that is 16 feet in width. (Finding of Fact 18.) Thus, the side yard requirement has been met.

Moreover, the Appellant's reliance on § 405.3 is misplaced. Subsection 405.3 only applies to buildings that do "not share a common division wall" with another building. As the Appellant states, the building to be converted shares a party wall with the Appellant's residence. (Finding of Fact 26.)

The Rooftop Structure Claim

The Appellant contends that the presence of rooftop air conditioners on two separate locations violates § 411.3 of the Regulations, requiring that all mechanical equipment be housed in a single enclosure.⁶ However, the approved plans show air conditioning units on the rooftop that rise three feet above the rooftop deck. (Finding of Fact 20.) Under § 411.17, rooftop structures less than four feet above a roof are exempt from other requirements of § 411 governing roof structures. Thus, this claim also lacks merit.

ANC

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC D.C. (Official Code §1-309.10(d) (1012 Repl.)) As noted, ANC 4C voted to support Mr. Stokes' appeal and participated fully in the proceedings before the Board. As also noted, the ANC raised the same issues and concerns that were raised by the Appellant in his appeal. Therefore, for the reasons explained above, the Board finds the ANC's advice not to be persuasive.

CONCLUSION

For reasons discussed above, it is hereby **ORDERED** that the appeal is **DENIED**.

VOTE: 3-1-1 (Lloyd J. Jordan, Jeffrey L. Hinkle, and Frederick L. Hill voting to DENY the appeal, affirming the Zoning Administrator; Anthony J. Hood opposed to the motion; Marnique Y. Heath, not participating.)

⁶ As a result of an amendment to § 411 occurring after the issuance of the building permit, this exemption was moved to § 411.2 and reworded. Other claims regarding the rooftop structures were not pressed by Appellant because permit revisions occurred to correct discrepancies with respect to equal height and rooftop setbacks.

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

A 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 19, 2016

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.