

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19018 of Colleen Slattery, pursuant to 11 DCMR § 3103.2, for a variance from the requirements for enlargement of a nonconforming structure under § 2001.3 to allow the enlargement of a second-story deck and construction of a third-story deck in the R-4 District at premises 2026 North Capitol Street, N.W. (Square 3117, Lot 834).¹

HEARING DATES: June 23, July 28, and December 22, 2015

DECISION DATE: April 5, 2016

DECISION AND ORDER

This self-certified application was submitted on April 6, 2015 by North Capitol #2 Land Trust, which then owned the property that is the subject of the application before selling one condominium unit to Colleen Slattery, who was substituted as the applicant for the requested zoning relief (the “Applicant”). The application requested an area variance from requirements for the enlargement of a nonconforming structure under § 2001.3 to allow the enlargement of a second-story rear deck addition and the construction of a third-story rear deck addition to an existing two-family dwelling, in excess of the maximum lot occupancy permitted as a matter of right in the R-4 District at 2026 North Capitol Street, N.W. (Square 3117, Lot 834). Following a public hearing, the Board of Zoning Adjustment (“Board”) voted to grant the application in part and deny it in part.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated April 14, 2015, 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 5; Advisory Neighborhood Commission (“ANC”) 5E, the ANC in which the subject property is located; and Single Member District/ANC 5E08. Pursuant to 11 DCMR § 3112.14, on April 15, 2015 the Office of Zoning mailed letters providing notice of the hearing to the Applicant, ANC 5E, and the

¹ This order refers to provisions and zone districts in effect under the Zoning Regulations of 1958 when the decision was made. The 1958 Regulations were repealed as of September 6, 2016 and replaced by the 2016 Regulations; however, the repeal and adoption of the replacement text has no effect on the validity of the Board’s decision in this case or of this order.

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owners of all property within 200 feet of the subject property. Notice was published in the *District of Columbia Register* on April 24, 2015. (62 DCR 5171).

Party Status. The Applicant and ANC 5E were automatically parties in this proceeding. There were no requests for party status.

Applicant's Case. The Applicant provided testimony and evidence describing how a second-floor rear deck was enlarged and a new third-floor deck was built at the subject property after issuance of a building permit, although the Zoning Administrator ("ZA") later gave notice of an intent to revoke the permit since the property exceeded maximum permitted lot occupancy and the construction of both decks erroneously resulted in decks larger than those approved by the permit. The Applicant requested an area variance from the requirements relating to the enlargement of a nonconforming structure so as to allow (1) the additional area of the decks beyond that shown in the permit plans, to allow the area constructed in error, or alternatively (2) the area of the decks as represented in building permit plans.

OP Report. By memorandum dated June 16, 2015, the Office of Planning declined to recommend approval of the zoning relief requested by the Applicant. (Exhibit 25.)

DDOT. By memorandum dated June 16, 2015, the District Department of Transportation indicated no objection to approval of the application. (Exhibit 26.)

ANC Report. By report dated June 19, 2015, ANC 5E indicated that, at a properly noticed public meeting on June 16, 2015 with a quorum present, the ANC voted 8-0 recommending denial of the application. ANC 5E challenged several contentions made by the Applicant, and asserted instead that the decks at the subject property would infringe upon the privacy of nearby residences, that the Applicant would not encounter practical difficulties or undue hardship as a result of the strict application of zoning requirements, and that approval of the requested variance relief would cause substantial detriment to the public good and impair the intent, purpose, and integrity of the zone plan by allowing the sale of condominium units by a developer who knew that the property required zoning relief.

Person in opposition. The Board heard testimony in opposition to the application from Austin Pearl, the owner and resident of the residence abutting the subject property to the south. Mr. Pearl initially expressed concern about adverse impacts on privacy, especially considering the number of decks at the subject property and the fact that the subject property was larger than the next four properties to the south, thereby providing a view from the decks into the rear yards and decks of those properties. After reaching agreement with the Applicant about the installation of screening materials that would mitigate his concerns about privacy, Mr. Pearl indicated that he was no longer in opposition to the application, provided that the requested zoning relief was approved subject to a condition requiring the Applicant to maintain the screening materials.

FINDINGS OF FACT

1. The subject property is located on the west side of North Capitol Street near its intersection with V Street, N.W. (Square 3117, Lot 834).
2. The subject property is a rectangular parcel 20 feet wide and 100.5 feet deep, with a lot area of 2,001 square feet. The rear lot line abuts a public alley 15 feet wide.
3. The subject property is improved with a row building, now three floors with a cellar, that was constructed before the effective date of the Zoning Regulations of 1958. The building is configured as a two-family flat. The Applicant occupies Unit 2, located on the second and third floors of the building.
4. The subject property is nonconforming with respect to lot occupancy. The existing lot occupancy is approximately 78 percent, reflecting the principal structure with the deck addition and an accessory garage. The principal structure, excluding the deck addition, occupies approximately 57.5 percent of the lot; the deck addition results in lot occupancy of approximately 65.5 percent. A maximum of 60 percent is permitted as a matter of right. (11 DCMR § 403.2.)
5. At the time of its acquisition by North Capitol #2 Land Trust, the building had two floors and rear decks on both the first and second floors. The first-floor deck was approximately eight feet deep and 20 feet wide (across the width of the building), and provided stairway access to the rear yard. The second-floor deck, at eight feet by eight feet, extended less than halfway across the rear of the building, and also provided a staircase to the rear yard.
6. Building Permit No. 1408394 was issued August 8, 2014 for “Addition for the Attic and renovation of rear deck stairways” at the subject property. As part of the project, North Capitol #2 Land Trust rebuilt the first-floor deck, expanded the second-floor deck, and built a new third-floor deck at the rear of a new third-floor addition. Sliding glass doors were installed on each floor to provide access to the rear decks. The enlarged property also has a roof deck.
7. In February 2015, after work on the decks was completed, the ZA notified North Capitol #2 Land Trust of an intention to revoke the building permit and to require removal of the new third-floor deck and a reduction in size of the second-floor deck, because those decks were considered additions to a structure that was nonconforming with respect to lot occupancy. According to the ZA, although the permit had been issued, the applicable permit plans showed the two decks had not been stamped by the Zoning Division.
8. Due to what North Capitol #2 Land Trust described as a “contractor error,” both the enlarged second-floor deck and the new third-floor deck were built larger than the decks

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shown on plans submitted with the building permit application. The plans showed decks extending approximately three-quarters of the width of the building.

9. As now constructed, the three decks are all approximately the same size, extending eight feet into the rear yard and almost 20 feet across the full width of the rear of the building. The renovated first-floor deck continues to provide stairway access to the rear yard. The second-floor deck also provides access to the rear yard by means of a spiral staircase installed at the northern edge of the building.
10. Construction on the decks by the North Capitol #2 Land Trust did not increase lot occupancy at the subject property, because the construction of the new third-floor deck and the expansion of the second-floor deck both occurred within the building footprint of the existing first-floor deck.
11. The Applicant reached an agreement with the owner and resident of the abutting property to the south (2024 North Capitol Street, N.W.), which was recorded in a covenant regarding screening for the decks and lighting. The covenant acknowledged that the existence of the decks might negatively impact the privacy of the adjoining property, and reflected the Applicant's intent to mitigate any negative impacts. The Applicant agreed to install and maintain permanent screening on the south end of both balconies (on the second and third floors of the building); the screening would be made of "wood or like materials," at a height of six feet above the floor of each deck, for the entire width of the deck, and with openings no greater than one-half inch between the boards. The Applicant also agreed that all exterior lighting, including on the two decks and on the roof deck, would be "moderately-illuminated down-lighting" that would face away from the adjoining property.
12. The building at the subject property abuts similar row dwellings. The adjoining property to the north extends further into its rear yard than does the Applicant's property, at a distance of approximately eight feet (*i.e.* equal to the outer edge of the Applicant's decks). The side wall of the property to the north does not contain any windows facing the decks, although that property also has a rear deck addition with stairs to the rear yard. The neighboring properties immediately to the south are smaller than the Applicant's building, such that the building at the subject property is both taller and extends further into the rear yard than the nearby properties to the south. Other properties in the vicinity of the subject property are also improved with similar row buildings, many of which have rear deck additions.
13. The subject property is located in the R-4 District, which is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two or more families. (11 DCMR § 330.1.) The "primary purpose" of the R-4 zone is "the stabilization of remaining one-family dwellings." (11 DCMR § 330.2.)

CONCLUSIONS OF LAW AND OPINION

The Applicant seeks an area variance from the requirements relating to the enlargement of a nonconforming structure under § 2001.3 to allow the enlargement of a second-story rear deck addition and the construction of a third-story rear deck addition at a three-story row building configured as a two-family flat, in excess of the maximum lot occupancy permitted as a matter of right in the R-4 District at 2026 North Capitol Street, N.W. (Square 3117, Lot 834). The Board is authorized under § 8 of the Zoning Act to grant variance relief where, “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property,” the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. (See 11 DCMR § 3103.2.)

Based on the findings of fact, the Board concludes that the application satisfies the requirements for variance relief in accordance with § 3103.2 in part, and fails to warrant variance relief in part. This request for variance relief arose from a renovation project undertaken at the subject property by a developer who believed that a building permit had authorized the construction of a second-floor deck larger than the previously existing deck as well as the construction of a new third-floor deck, as shown on plans submitted with the permit application. The degree of variance relief requested in this case was increased by what the developer described as a “contractor error” that resulted in decks larger than those shown on the plans.

With respect to the decks as shown in the plans, the Board concurs with the Applicant that the subject property faces an exceptional situation. Although the property is nonconforming with respect to lot occupancy, the developer applied for and apparently received approval from DCRA for new construction, including the second- and third-floor deck additions shown in the plans submitted with the developer’s application for a building permit. The developer relied on that approval in undertaking the renovation and enlargement of the residence at the subject property – including construction of the two new decks – before DCRA notified the developer of its intent to revoke the building permit. *See De Azcarate v. District of Columbia Bd. of Zoning Adjustment*, 388 A.2d 1233 (D.C. 1978) (Board is empowered to provide variance relief, in appropriate cases, to extraordinary or exceptional conditions brought about after the original adoption of the zoning regulations; court upheld BZA’s grant of area variance due to extraordinary situation that arose from actions by zoning officials later found to be in error.)

Under the circumstances, strict compliance with the Zoning Regulations would cause a practical difficulty for the Applicant as the owner of the upper dwelling unit, where the decks are located. The Applicant learned shortly before purchasing the unit that the decks did not comply with zoning requirements, but opted to proceed with the purchase under the circumstances, including that she

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had already sold her prior residence and moved into her unit at the subject property. (See Transcript of July 28, 2015 at 46-47.) The decks provide outdoor living and recreation space for the dwelling unit, which is located on the second and third floors of the building. Removal of the third-floor deck and a reduction in size of the second-floor deck, reverting to the small area that previously existed, would eliminate that usable outdoor space.

Approval of this aspect of the requested relief would not result in substantial detriment to the public good or substantially impair the intent, purpose, and integrity of the zone plan. The subject property is located in a relatively dense area where many nearby properties have rear decks. The decks at issue in this proceeding are relatively small – protruding approximately eight feet from the rear of the building – and are unenclosed, thereby not likely to create any adverse impacts on light or air available to any neighboring property. The two decks will not affect privacy for the adjoining property to the north, which extends further into its rear yard than does the building at the subject property, such that the adjoining building borders the two decks with a solid wall.

To the south, however, the neighboring properties are smaller and do not extend as far back as the Applicant's property, such that the decks could potentially afford views into the backs of those residences and into their rear yards. The Board finds that the planned privacy screening measures, which the Applicant committed to install and maintain on both decks, will ensure that use of the decks at the subject property will not impinge on the privacy available to the adjoining properties to the south. The owner and resident of the neighboring property to the south, Mr. Pearl, initially opposed the application due to concerns about potential adverse impacts on privacy. Mr. Pearl withdrew his opposition after reaching agreement with the Applicant about the installation of screening materials, and requested a condition of approval of the application requiring the Applicant to maintain the screening materials. The Board concludes that such a condition is not necessary in light of the recordation of the covenant between the Applicant and Mr. Pearl, which requires the installation of specific screening measures and binds both the current parties and their successors.

Approval of a variance to allow the rear deck additions, as shown in the plans, is consistent with the residential use of the property by creating usable outdoor space at the Applicant's residence. Variance relief would be needed for any rear addition to the property, given its existing nonconforming lot occupancy. The enlarged decks would not increase the existing lot occupancy and therefore also will not increase the nonconforming aspect of the subject property. Although existing lot occupancy is 78 percent, where a maximum of 60 percent is permitted as a matter of right, the property retains a conforming rear yard and otherwise complies with zoning requirements.

While the developer's plans submitted with the building permit application depicted second- and third-floor decks extending approximately three-quarters of the width of the building, the decks were actually constructed across the full width of the building. The Board was not persuaded by the Applicant that variance relief should be granted in essence to ratify an alleged error by a contractor. As the Applicant acknowledged, the developer did not rely in good faith on DCRA's

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approval of the extended length, because construction over the entire width of the building was not shown on the submitted plans. The Board does not find any exceptional situation with respect to the extended length of the decks.

Nor does the Board find any practical difficulties arising from the strict application of the Zoning Regulations with respect to the extended length. The decks were not constructed as proposed. The developer has acknowledged the error and has indicated an intent to the Applicant to correct the violation by paying for the removal of a portion of the decks. The extended length is not required to provide usable outdoor space on the decks for the Applicant.

Similarly, variance relief to condone the extended length of the two decks cannot be granted without causing substantial detriment to the public good or without substantially impairing the intent, purpose, and integrity of the zone plan. The Board does not find any basis in this record to validate construction that was not undertaken in accordance with the permit plans. The Board was not persuaded by the Applicant's contention that an area variance to allow the extended length would constitute *de minimus* relief in light of the apparent approval of smaller decks on both the second and third floors. Although DCRA belatedly recognized that a mistake had occurred in the issuance of the building permit, the developer also had an obligation to ensure that construction was carried out strictly according to the plans.

The Board is required to give "great weight" to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2001).) In this case, OP could not recommend approval, citing the lack of any exceptional condition giving rise to practical difficulty. For the reasons discussed above, the Board partially agrees with OP's recommendation but concludes that approval of a portion of the requested variance relief is warranted under the circumstances.

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) (2001)). In this case ANC 5E expressed concern that the decks would infringe upon the light, air, or privacy of surrounding homes, and that strict application of the zoning regulations would not cause practical difficulty to the owner of the property. For the reasons discussed above, the Board disagrees with the ANC in finding that a portion of the requested relief should be approved.

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has partially satisfied the burden of proof with respect to the request for an area variance from requirements for the enlargement of a nonconforming structure under § 2001.3 to allow the enlargement of a second-story rear deck addition and the construction of a third-story rear deck addition at an existing two-family dwelling, in excess of the maximum lot occupancy permitted as a matter of right in the R-4 District at 2026 North Capitol Street, N.W. (Square 3117, Lot 834). Specifically, the Board grants the requested relief to allow the area of the decks as represented in the building permit plans (Exhibit 33 of the record) but denies a variance to allow any additional area of the decks, beyond that shown in the permit plans. Accordingly, it is **ORDERED** that the

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application is **GRANTED IN PART** and **DENIED IN PART AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 33 – PERMIT PLAN SET (FILE COPY).**

VOTE: 3-2-0 (Marcie I. Cohen, Frederick L. Hill, and Jeffrey L. Hinkle to GRANT IN PART, DENY IN PART; Marnique Y. Heath and Anita Butani D’Souza opposed).

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: June 13, 2017

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, 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 SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, 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

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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 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.