

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19191 of Colleen Eubanks, as amended, pursuant to § 3103.2¹ for a variance from the lot occupancy requirements under § 403, and the nonconforming structure requirements under § 2001.3, to allow a third story addition and deck addition to an existing dwelling, located in the R-4 zone at 133 U Street, N.W. (Square 3533, Lot 186).

HEARING DATE: March 1, 2016
DECISION DATE: March 1, 2016

DECISION AND ORDER

On November 13, 2015, the Applicant filed an application with the Board of Zoning Adjustment (the “Board”) requesting variance relief from the lot occupancy requirements, the rear yard requirements, and the open court requirements of the Zoning Regulations, in order to construct a third story addition and deck addition to an existing two-story row dwelling. The relief requested was based upon a referral from the Zoning Administrator (“ZA”), dated September 20, 2015. However, on February 16, 2016, the ZA issued a revised memorandum indicating that relief was required only from the lot occupancy requirements and the nonconforming structure requirements of the Zoning Regulations. The application was amended accordingly. Following a public hearing on March 1, 2016, the Board voted to approve the application, as amended.

PRELIMINARY MATTERS

Notice of Public Hearing Pursuant to 11 DCMR § 3113.13, notice of the hearing was sent by the Office of Zoning to the Applicant, all owners of property within 200 feet of the subject site, Advisory Neighborhood Commission (“ANC”) 5E, and the District of Columbia Office of Planning (“OP”). The Applicant posted placards at the property regarding the application and public hearing in accordance with 11 DCMR §§ 3113.14 through 3113.20. (Exhibit 24.)

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraphs, are to provisions that were in effect on the date this Application was decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text. Also, all zone districts described in this order were renamed as of that date. The repeal and replacement of the 1958 Regulations and the renaming of the zone districts has no effect on the validity of the Board’s decision or the validity of this order.

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ANC 5E Report

The property is located within the area served by ANC 5E, which is automatically a party to this application. By a memorandum dated February 26, 2016, ANC 5E indicated that, at a regular public meeting held February 16, 2016, with a quorum present, the ANC voted 7-1-0 to oppose the requested relief.²

The ANC noted various concerns: (1) The first concern noted by the ANC was the “precedent” that the proposed development would set. The ANC states that the Eckington community (within which the property is located) was established before the enactment of the 1958 Zoning Regulations and that, as a result, many of the homes in the community are nonconforming; (2) The ANC states that the proposal results in a home that is not in proportion with the scale of the other homes on the same side of the block, and that the existing mansard roof will be protracted by five feet to accommodate a third story; (3) According to the ANC, the fact that no windows are proposed on the west side of the addition suggests that the neighbor to the west may also be planning a third story addition.

The ANC did not present any testimony at the public hearing.

Requests for Party Status There were no requests for party status, either in opposition or in support of the application.

Persons in Opposition The Board received a letter in opposition to the application from Michelle Turner, a nearby property owner. (Ex.34.) However, no persons appeared at the hearing to testify in opposition to the application.

Persons in Support The Board received a letter in support of the application from Mike Aiello. (Ex. 35.) The Board also received a letter in support from the Applicant’s adjacent neighbor, Jared Heming. (Ex.26.) Mr. Heming, who is an architect, stated that the block on which the property is located consists entirely of row houses. However, the two end row houses on the block (including the Applicant’s) are narrower and smaller than the several row houses in between. He stated additionally that the proposed third story addition is “sympathetic to the look and character of the surrounding neighborhood” in that, among other things, the addition maintains the slope and lines of the false mansard roofs that are featured on the block, the new windows mimic the scale and detail of the existing windows, and the parapet step down echoes the original row house. Mr. Heming also testified in support of the application, reiterating the several points made in his letter. The Board received a letter from the Eckington Civic Association stating that it supported the variance application by a vote of 12-7. (Ex.22.)

² The ANC report reflects a review of the original application, not the revised application.

Government Reports

Office of Planning (“OP”) Report

OP reviewed the application and submitted a report stating that it was “not opposed” to the requested relief. (Ex. 27.) The report noted that the proposed third story addition would not extend beyond the footprint of the existing dwelling, and the proposed deck (above the garage) would not extend beyond the limits of the existing garage. OP’s representative, Elisa Vitale, clarified OP’s position during testimony at the public hearing on March 1, 2016, stating that OP recommended “approval” of the application.

Department of Transportation (“DDOT”) Report

DDOT reviewed the application and submitted a report stating that it had no objection to the approval of the requested relief. (Ex.28.)

FINDINGS OF FACT

The Subject Property

1. The subject property is a substandard lot in the R-4 zone that is 16 feet wide and 1,220 square feet in area. The Zoning Regulations require a lot width of 18 feet and an area of 1,800 square feet. (11 DCMR § 401).
2. The property is improved with a two story brick residential row dwelling that was constructed around 1912 and is used as a flat (i.e. a two-family dwelling), and a garage.
3. Because of the narrow and small size of the lot, the existing dwelling and garage occupy 92% of the lot. Under the 1958 Zoning Regulations, the existing lot occupancy is nonconforming. (11 DCMR § 403.)

The Surrounding Area

4. The nearby properties on the street consist of residential row dwellings.
5. As an end lot property, the subject property is exceptionally narrower and exceptionally smaller than the several properties in between the end lots. As a result, the existing row dwelling is exceptionally narrower and smaller than the other row dwellings on the block, with the exception of the other end lot row dwelling.

The Proposed Project

6. The Applicant proposes to construct a third story addition that would align with the footprint of the existing row dwelling.

7. The Applicant also proposes to construct a deck on top of the existing garage.

The Zoning Relief

8. The proposed project will maintain the nonconforming lot occupancy of 92%. Because the maximum allowable lot occupancy in the R-4 zone is only 60% (11 DCMR § 403), relief is required under this provision.
9. Because the structure is nonconforming with respect to lot occupancy and the nonconforming lot occupancy will be continued by the addition, relief is required under § 2001.3 of the Zoning Regulations.

Constraints of the Property

10. Because the lot and row dwelling are both exceptionally small and narrow, the Applicant is limited in her ability to update or expand her dwelling in a conforming manner.
11. The only way the Applicant could construct an addition and comply with the Zoning Regulations, would be to demolish a portion of the existing structure or demolish the garage.

The Impact of the Proposed Project

12. Neither the footprint of the property nor the use of the property as a flat will be changed by the proposed additions.
13. The proposed third story addition will maintain the row dwelling scale and architectural character.
14. The third story addition will maintain the slope and lines of the false mansard roofs that are a key feature of the row dwellings on the block.
15. The proposed windows mimic the scale and detail of the existing windows.
16. The proposed parapet step down echoes the original parapet design.

CONCLUSIONS OF LAW

The Requested Variances

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 Court of Appeals, the Applicant must meet a three-prong test for the Board to grant relief:

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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).

An applicant for a use variance must show that strict compliance with the applicable regulation will result in an undue hardship, while an applicant for an area variance must meet the less stringent standard that compliance will result in exceptional practical difficulties. (11 DCMR § 3103.7.)

As noted, the Applicant is seeking area variances from the lot occupancy requirements under §403, and the nonconforming structure requirements under § 2001.3. Therefore, the “practical difficult[y]” standard will be applied.

As discussed below, the Board finds that the Applicant has met its burden of proof for the requested area variances in this case.

The exceptional condition

The Board concludes that the Applicant meets this prong of the variance test. As stated in the Findings of Fact, the subject property is exceptionally smaller and narrower than other properties on the block. As a consequence, the existing row dwelling is smaller and narrower than all of the other row dwellings, except for the one row dwelling at the other end of the block. According to Mr. Heming, the architect and neighbor who testified on behalf of the Applicant, the row dwellings in the middle of the block are situated on lots that are comparatively larger and wider than the subject property. In fact, according to Mr. Heming, those property owners would not violate the lot occupancy restrictions were they to propose the same additions as the Applicant has proposed.

The practical difficulty

The Applicant is so constrained by the buildable size of the lot that she cannot expand her residence without demolishing some portion of the existing dwelling or demolishing the garage. The Board believes this situation presents a significant practical difficulty and the Applicant therefore meets the second prong of the variance test.

There will be no detriment to the public good or the zone plan

Finally, the Board is persuaded that the proposed additions meet the third prong of the variance test. The Board finds that the Applicant succeeded in her efforts to ensure that the third story addition was compatible with the other row dwellings on the block, particularly the nearby two-

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story row dwellings. As stated in the Findings of Fact, the proposal is consistent with the row dwelling scale and architectural character and in keeping with the design of the existing dwelling. The Board agrees with OP's finding that the proposal will not impair the public good or the zone plan, and notes as OP noted, that the footprint of the structure will not be enlarged and the use as a flat will not change.

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)(3)(B) requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC.

In this case the ANC 5E expressed several issues and concerns. However, as will be explained below, the Board finds that the ANC's first and third concerns are not legally relevant. While the ANC's second concern is legally relevant, the Board does not find the articulated advice to be persuasive.

The ANC raised three specific concerns. First, the ANC states that the Eckington community (within which the property is located) was established before the enactment of the 1958 Zoning Regulations and that, as a result, many of the homes in the community are nonconforming with respect to zoning. The ANC claims this project would, therefore, "set a precedent". Second, the ANC states that the proposal results in a home that is not in proportion with the scale of the other homes on the same side of the block, and that the existing mansard roof will be protracted by five feet to accommodate a third story. Third, according to the ANC, the fact that no windows are proposed on the west side of the addition suggests that the neighbor to the west may also be planning a third story addition.

The Board may only consider ANC concerns that are legally relevant. *Concerned Citizens of Brentwood v. Bd. of Zoning Adjustment*, 634 A.2d 1234 (1993), quoting *Bakers Local Union No.118 v. Bd. of Zoning Adjustment*, 437 A.2d 176 (1981). In other words, the expressed concern must be relevant to the legal question that is before the Board.

The first concern: The ANC suggests that because so many of the homes in the area are nonconforming, the grant of this variance will establish a precedent. However, this variance was granted because the subject property is exceptionally narrow and smaller when compared to nearby properties. Because this and all variances must be based upon the exceptional characteristic of a specific piece of property, no precedent is ever established.

The third concern: Here, the ANC expresses concern over a statement in the application that no windows are proposed for the west side of the house to allow the adjacent neighbor to construct a vertical addition, commonly referred to as a "pop-up". Whether or not the neighbor to the west is also planning a third story addition is, of course, speculative. However, even if the Board were to accept the ANC's suggestion as fact, the neighbor's future plans are not a basis for denying the application that is currently before the Board. If the project were to require zoning relief, the grant

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of the present application could not serve as grounds for granting any future request. As the Board has stated on numerous occasions, each application is evaluated on its own merits.

The second concern regarding compatibility of scale and style: This concern relates to the third prong of the variance test discussed above; i.e., whether the proposal will result in a substantial detriment to the public good and, as such, is legally relevant. Here, the ANC claims that the proposed third story addition will be incompatible with other homes on the same side of the block. However, the Board disagrees with this contention and does not find the ANC's advice to be persuasive in this instance. As OP notes, the addition will not increase the footprint of the structure, it will only increase the height. Also, the property is currently developed as a residential row dwelling that is used as a flat, and will continue to be so. Moreover, as noted by the Board during its deliberations, the proposed project results in a dwelling that is below the 35- foot height limit, and the proposed third story is a "sensitive" and "architecturally appealing" addition.

OP

The Board is also required under D.C. Official Code § 6-623.04(2001) to give "great weight" to OP recommendations. For reasons stated in this Decision and Order, the Board finds OP's advice to be persuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application, as amended, is **GRANTED** to allow variance relief from the lot occupancy requirements under § 403, and the nonconforming structure requirements under § 2001.3, **AND PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 7.**

VOTE: 3-0-2 (Marnique Y. Heath, Frederick L. Hill, and Michael G. Turnbull to APPROVE; Jeffrey L. Hinkle, not participating; 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.

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: May 4, 2017

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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 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.