

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19193 of C & S Development, LLC, pursuant to 11 DCMR § 3103.2¹, for variances from the lot width and lot area requirements under § 401.3, to allow the construction of three three-story, one-family dwellings² on three new nonconforming lots in the R-4 District at premises 1620-1622 E Street, S.E. (Square 1090, Lots 813, 814).

HEARING DATES: March 1, 2016 and March 15, 2016
DECISION DATE: March 15, 2016

DECISION AND ORDER

Pursuant to a Zoning Administrator memorandum dated October 26, 2015 (Exhibit 6), this application was submitted on November 13, 2015 by C & S Development, LLC (“Applicant”).³ The application requested variance relief to create three new nonconforming lots to permit the construction of three one-family row dwellings in the R-4 District located at 1620-1622 E Street, S.E. Following a public hearing, the Board voted 3-0-2 to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated December 2, 2015, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning (“OP”),

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final paragraph and 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on the date this Application was decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text (“the 2016 Regulations”). The repeal of the 1958 Regulations has no effect on the validity of the Board’s decision or the validity of this order. Pursuant to Subtitle A § 104 of the 2016 Regulations, the construction authorized by this Order is vested as to the area requirements contained in 1958 Regulations as of September 5, 2016.

² The Applicant originally sought to construct three two-family row dwellings, but amended its Application to construct one-family dwellings instead. The caption has been revised accordingly.

³ The Applicant submitted a self-certification form on September 9, 2016 (Exhibit 29) that necessarily added relief from § 401.2, which is a grandfathering provision that permits the erection of a structure on a substandard lot that was unimproved and under common ownership as of November 1, 1957, and which did not adjoin another unimproved lot in the same ownership. As will be noted, the subject site is conforming and improved with a structure. The request is not to construct upon an existing substandard lot but to create three substandard lots on a conforming site. As such, § 401.2 is inapplicable.

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the D.C. Department of Transportation (“DDOT”), and Advisory Neighborhood Commission (“ANC”) 6B, the ANC within which the subject property is located. Pursuant to 11 DCMR § 3113.13, OZ mailed letters providing notice of the hearing to the Applicant, ANC 6B, and all owners of property within 200 feet of the subject property. Notice was also published in the *D.C. Register* on December 11, 2015 (62 DCR 015822). A hearing was scheduled for March 1, 2016; the hearing was later continued to March 15, 2016.

Party Status. Pursuant to 11 DCMR § 3199.1(b) the Applicant and ANC 6B were automatically parties. The Board did not receive any additional requests for party status.

Applicant’s Case. The Applicant provided evidence and testimony from Joel Nelson, Realtor-Owner of KW Capital Properties, as well as J.D. Schmidt, and Jesse Connell, principals of C & S Development and owners of the subject property.

Persons in Support. Neighbors and community groups submitted several letters in support of the application to the record. (Exhibits 28, 43-49.)

OP Report. In a report dated February 23, 2016, the Office of Planning (“OP”) determined that it could not recommend approval of the variance relief requested. The report noted that while its analysis was based on earlier plans proposing three flats and the Applicant had since submitted updated plans proposing three one-family row dwellings, OP’s analysis was not “significantly impacted” by the change in plans as it was “primarily based on original written statement and plans.” The report addressed the three-part area variance test and concluded that the application did not satisfy two of the requirements. The report first concluded that the subject site did not exhibit any unique or exceptional conditions. OP acknowledged that the *pro formas* provided by the Applicant showed that a residential development on two conforming lots would be economically infeasible, while development on three nonconforming lots would succeed. However, OP concluded this did not suffice because “zoning is not intended to make any potential project financially feasible.” Although OP found that there would be no substantial detriment to the public good, it concluded that the requested relief would result in substantial harm to the zone plan because the Zoning Regulations “intend that new lots provide the prescribed lot standards, not replicate existing nonconforming development.” (Exhibit 41.)

DDOT Report. The Department of Transportation submitted a report dated February 18, 2016, stating that the proposed project would have no adverse impacts on the travel conditions of the District’s transportation network. DDOT expressed no objection to the approval of the requested variance. (Exhibit 33.)

ANC Report. By letter dated February 16, 2016, ANC 6B indicated that at a properly noticed public meeting held on February 9, 2016 and with a quorum present, ANC 6B voted unanimously to support the application. (Exhibit 32.)

FINDINGS OF FACT

The Subject Property

1. The property that is the subject of this application was located in the R-4 District, at 1620-1622 E Street, S.E. (Square 1090, Lots 813, 814) (“the Site”) at the time this case was decided.⁴ The Site is improved with a structure comprising two buildings connected by a common division wall. Each building is two stories in height and occupies separate assessment and taxation lots. Both buildings are vacant. The structure was built in the 19th Century, prior to the adoption of the first zoning act in 1920. The Site is conforming as to both lot width and lot area,
2. Each building has a side yard. The R-4 District permits row dwellings as a matter of right. (11 DCMR § 330.5(a).) A row dwelling is defined as “a one-family dwelling having no side yards.” (11 DCMR § 199.1.)
3. The neighborhood surrounding the subject property is predominately developed with one-family row dwellings. Row dwellings abut the subject property’s side lot lines.

The Applicant’s Project

4. The Applicant proposes to create three new, nonconforming record lots and construct on each lot a three-story one-family row dwelling with one parking space at the back of the house that will be accessible from the rear alley.
5. The proposed three-story dwellings would each have a footprint of 864 square feet and consist of four bedrooms, three full bathrooms, one half bathroom, a kitchen with separate dining space, a living room, a crawl space, and a loft.

Zoning Relief Required

6. Each of the new lots will be approximately 16 feet wide while the R-4 District requires a minimum width of 18 feet for row dwellings and flats. (See 11 DCMR § 401.3.) In addition, the proposed lot area of each new lot is 1,440 square feet while the minimum required in the R-4 District is 1,800 square feet for those same types of structures. *Id.*
7. Apart from the lot area and lot width, the proposed buildings would comply with all other provisions of Title 11.

Exceptional Condition

8. The Site has a lot area of approximately 4,320 square feet and a width of 48 feet.

⁴ As of September 6, 2016, all R-4 properties not included in overlays were rezoned to the new RF-1 zone.

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9. The average lot area within the vicinity of the site is 1,220 square feet and the average width is 16 feet.
10. Of the 23 neighboring properties located south of Square 1090, three exceed the minimum lot width of 18 feet, four are 14.75 square feet wide, and 16 are approximately 16 feet in width.
11. Directly across the Site, on the North Side of Square 1091, two properties exceed the minimum lot width of 18 feet, six are 14.77 feet wide, nine are 15 feet wide, and five are 17 feet wide.

Practical Difficulty

12. The Applicant submitted as part of its application comparative *pro forma* financial documents illustrating the development outcomes of the matter-of-right projects it could pursue. (Exhibit 39.) The Applicant also submitted plans showing a theoretical matter-of-right development involving two record lots. (Exhibit 54.)
13. Based upon these submissions, the Board finds that there is no scenario under which development on two conforming lots would be both economically feasible and marketable.
14. In order to obtain a return on its investment, the Applicant would have to construct the maximum building envelope on each lot. The maximum building envelope for the Site would consist of two two-unit flats. Each building would 24 feet wide and 35 feet tall. Each unit would be 2,500 square feet. Because these would be for-sale developments, having two units in a single building would require the establishment of a condominium.
15. Buyers in this neighborhood tend to seek out moderately sized single-family houses rather than condominiums of this size.
16. In addition, the likely sale price of each unit would greatly exceed the sale prices of condominium units in the area.
17. The average price per square foot within .33 miles (4-5 city blocks) of this project site is \$438 for single family houses or \$478 for condominium units.
18. To approximate the average sale prices per interior square foot, a 2,500 square foot condominium would be priced between \$1,100,000 and \$1,200,000, which would be dramatically different than anything else in the immediate area – or across all of the Capitol Hill market.
19. The theoretical matter-of-right development would also be stylistically inconsistent with the neighborhood. At 24 feet wide each house would be twice as wide as most in the neighborhood.

No Impairment to Zone Plan

20. The subject property is located in the R-4 zone district, which is “designed to include those areas now developed primarily with row dwellings.” (11 DCMR § 330.1.)

21. Although providing less than the minimum width required, the houses will be comparable to the width of adjacent and nearby buildings and will be in all other respects compatible with the scale and character of the neighborhood.
22. The project will meet all other zoning area requirements such as height, lot occupancy, rear yard and parking.

No Harm to the Public.

23. The relief granted will not impair the light and air available to nearby homes, nor negatively impact privacy greater than matter of right development.
24. The Department of Transportation in a report dated February 18, 2016 concluded that the proposed project would have no adverse impacts on the District's transportation network

CONCLUSIONS OF LAW

The Merits of the Application

The Applicant requests a variance from the lot width and lot area and the lot width requirements under § 401.3, to create three new nonconforming lots to allow the construction of three three-story, one-family dwellings on in the R-4 District at premises 1620-1622 E Street, S.E. (Square 1090, Lots 813, 814).

The Variance Standard

The Board is authorized to grant variances from the strict application of the Zoning Regulations where “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition” of the property, the strict application of the Zoning Regulations would “result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property....” (D.C. Official Code § 6-641.07(g)(3) (2012 Repl.), 11 DCMR § 3103.2.) The “exceptional situation or condition” of a property need not arise from the land and/or structures thereon, but can also arise from “subsequent events extraneous to the land.” *De Azcarate v. Bd. of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978). Relief can be granted only “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.” (D.C. Official Code § 6-641.07(g)(3). 11 DCMR § 3103.2.)

A showing of “practical difficulties” must be made for an area variance, while the more difficult showing of “undue hardship” must be made for a use variance. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). Since area variances are sought by the Applicant, the Applicant must comply with the three prong test: (1) that an exceptional situation results in a “practical difficulty” in complying with the Zoning Regulations; (2) the granting of the relief will

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not be substantial detrimental to the public good; and (3) the granting of the variances will not substantially harm the zone plan.

Based on the above findings of fact, the Board concludes that the Applicant has satisfied the burden of proof and that the application should be granted.

Exceptional Situation Resulting in a Practical Difficulty

The Board finds that the Site's unusually large size is an exceptional condition. The Site's lot area of approximately of 4,320 square feet is three and a half times the average lot area of 1,220 square feet of properties in the vicinity and its 48-foot width is more than three times the average lot width of 16 feet.

These exceptional conditions lead to a practical difficulty, because strict compliance with the requirement for lots of 18 feet or more would limit the subdivision of the site to two lots. As explained in the findings of fact, to obtain a return on its investment the Applicant would be required to construct two condominium units on each lot. Each condominium would be 2,500 square feet in size and priced between \$1,100,000 and \$1,200,000. The Board credits the testimony and submissions offered by the Applicant that such units would be too large and expensive to be marketable. Further, with a width of 24 feet, each building would be entirely out of scale with the character of the neighborhood. The District of Columbia Court of Appeals has recognized that a practical difficulty results from an inability to achieve "stylistic consistency with other neighboring structures." *Washington Canoe Club v. D.C. Zoning Comm'n*, 889 A.2d 995, 1002 (D.C. 2005).

No Substantial Detriment to the Zone Plan

The grant of this variance will not substantially impair the intent, purpose, and integrity of the Zone Plan. The proposed three one-family row dwellings are appropriate and in the character of the block and the area. Furthermore, the project will meet all other zoning area requirements such as height, lot occupancy, rear yard, and parking.

No Substantial Detriment to the Public Good.

Nor will the grant of the relief cause substantial detriment to the public good. Although the dwellings will be 16 feet wide, the buildings will match the average lot width of 16 feet in the vicinity. Furthermore, the project will result in a development compatible with the scale and character of the neighborhood. Nor will the development adversely affect the light, air, and privacy of adjacent properties greater than matter of right development. As noted, the Department of Transportation submitted a report dated February 18, 2016, stating that the proposed project would have no adverse impacts on the District's transportation network.

Great weight to the Office of Planning

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.)) The Office of Planning found that the subject property is not affected by an exceptional or unique condition and that, therefore, no practical difficulty exists. However, OP did not contest that the Site is unusually large or that its matter of right development would be infeasible. Rather, OP asserts that “zoning is not intended to make any potential project financially feasible.” The District of Columbia Court of Appeals has rejected a similar contention:

Petitioners assert that ‘this Court has held repeatedly that the BZA does not have authority to grant variances to make a particular project economically feasible.’
Stated thus categorically, the contention is erroneous.

Tyler v. D.C. Bd. of Zoning Adjustment, 606 A.2d 1362, 1366 (D.C. 1992).

Since the OP analysis of this element of the variance test was based upon a misapplication of the relevant legal principles, the Board finds OP’s advice in this regard to be unpersuasive.

OP also found that the relief would impair the integrity of the zone plan because the Zoning Regulations “intend that new lots provide the prescribed lot standards, not replicate existing nonconforming development.” (Exhibit 41.) The “nonconforming development” to which the OP refers are the row dwellings in the vicinity that, as noted in the findings of fact, range in nonconforming lot width from 14.75 to 17 feet. Strict compliance with the Zoning Regulations would, as described previously, result in two 24-foot wide buildings. Such bulky structures would be stylistically inconsistent with the neighborhood and therefore impair the public good. In this exceptional circumstance, a replication of the surrounding nonconforming conditions is needed and, contrary to OP’s view, precisely what Zoning Regulations intend.

Great weight to the ANC

The Board is also required to give great weight to any issues and concerns raised in the written report submitted by ANC 6B in this proceeding. (D.C. Official Code § 1-309.10(d).) As noted, ANC 6B voted unanimously to support the application and did not raise any issues or concerns. The Board therefore gives great weight to ANC 6B’s written recommendation by granting the application.

Based on the findings of fact, and having given great weight to the recommendations of the Office of Planning and to the written report of ANC 6B for the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof for variances and the lot width requirements under § 401.3, to permit the construction of three three-story, one-family dwellings on three new nonconforming lots in the R-4 District at premises 1620-1622 E Street, S.E. (Square 1090, Lots 813 and 814).

It is therefore **ORDERED** that the application is hereby **GRANTED, AND PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 37 – REVISED ARCHITECTURAL PLANS AND ELEVATIONS.**

VOTE: 3-0-2 (Marnique Y. Heath, Fredrick 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 Board members approved the issuance of this Order.

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: October 14, 2016

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.

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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.