GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

☆ ☆ ☆

**Application No. 16682 of W. F. Equipment Corporation**, pursuant to 11 DCMR § 3104.1 for a special exception to allow new residential development consisting of 5 row dwellings under section 353 and pursuant to subsection 3103.2 for variances under sections 401, and 405 from the lot area, lot width, and side yard requirements for one semi-detached dwelling (Lot 36), and a variance under section 402 from the FAR requirements for the five (5) new dwellings in the R-5-A District at premises 5516 – 5526 Hunt Place, N.E. (Square 5204, Lots 31 – 36).

**HEARING DATE:** May 8 2001
**DECISION DATE:** June 5, 2001

## DECISION AND ORDER

The Applicant in this case is W.F. Equipment Corporation, the owner of the lots that are the subject of the application. The application was filed with the Board of Zoning Adjustment on November 11, 2000, pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a special exception under 353.1, relating to new residential developments, and for a variance from sections 401.3, 402.4, and 405.9, relating to required minimum lot area and minimum lot width, maximum floor area ratio (FAR), and required minimum side yard setback, in an R-5-A District at 5516-5526 Hunt Place, N.E. (Square 5204, Lots 31-36). The Applicant seeks to construct five row dwellings and one semi-detached dwelling. The construction plans showed one dwelling per lot, with garages included. After a public hearing, the Board voted 4-0-1, to deny the application. In view of its denial of the variance, the Board has not reached the merits of the Applicant's request for a special exception.

## PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated December 4 and 18, 2000, the Office of Zoning advised the Applicant, the Office of Planning, the Department of Public Works, the ANC 7C (the ANC for the area within which the subject property is located), and the Councilmember for Ward 7, of the application.

The Board scheduled a public hearing on the application for March 13, 2001, and rescheduled the hearing for May 8, 2001. Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed the Applicant, the owners of all property within 200 feet of the subject property, and ANC 7C, letters dated January 18, 2001, and March 15, 2001, providing notice of hearing, and mailed the Department of Public Works, the Board of Education, and the Office of Planning, a letter dated March 6, 2001, providing notice of hearing.

Board of Zoning Adjustment
District of Columbia
CASE NO.16682
EXHIBIT NO.41

The Applicant's affidavit of posting indicates that four zoning posters were placed at the subject property on February 21, 2001. A second affidavit of posting indicates that 4 zoning posters were placed at the subject property on April 19, 2001.

Requests for Party Status. The Board received no written requests for party status.

Applicant's Case. Mr. James Kane, attorney for the Applicant, and Anne McGee, presented the Applicant's case. The Applicant argued that it could not construct the prefabricated housing on the site and at the same time comply with the zoning regulations. The Applicant stated that in order to make the housing affordable and in keeping with market demands for larger houses with garages a variance from the zoning regulations was necessary. The Applicant also pointed to benefits of providing affordable housing in the particular location and to the widespread community support of the project.

Government Reports. The Office of Zoning, by memorandum dated March 6, 2001, noted that the Zoning Administrator referral letter for the application incorrectly stated the zoning of the property as R-2. The Office of Zoning recommended that the hearing be postponed until May 8, 2001, to allow the Zoning Administrator time to submit a revised letter or self-certification.

A memorandum from the Zoning Administrator, dated March 13, 2001, stated that the Applicant needed: 1) a special exception under section 353.1, for approval of new residential developments in an R-5-A District, for lots 31-35; 2) a variance from the requirements of section 401.3, which prescribes the minimum lot area and width, for lot 36; 3) a variance from section 402.4, which sets the the maximum floor area ratio (FAR) at 0.9, for lots 31-35; and a variance from the requirements of section 405.9, which sets the required minimum side yard setback at 8 feet, for lot 36.

The Department of Housing and Community development, by memorandum dated April 4, 2001, supported the project proposed by the Applicant.

The Department of Public Works, by memorandum dated April 17, 2001, stated that it had no objection to the application, based on its assessment that the project will not negatively effect on-street parking supply or cause a large increase in traffic volume on neighboring streets.

The Office of Planning report, recommending the application, was received on May 2, 2001.

ANC Reports. The ANC 7C report, dated April 25, 2001, stated that the Commission voted to approve the project by a vote of 4 to 0 on April 12, 2001. The report references a Special Public Meeting, at which all 5 Commissioners were present and discussed the application. Also present at that meeting were the Applicant and two representatives from the Office of Planning.

Parties and Persons in Opposition to the Application. There were no parties or persons in opposition to the application.

Hearing. A hearing was held on the application on May 8, 2001. Board members present at the hearing included: Susan Morgan Hinton, Anne Renshaw, Carol J. Mitten, and Sheila Cross Reid.

Testimony was received from the Applicant's attorney, James Kane, and Anne McGee, representative for W.F. Equipment. Testimony was also received from John Fondersmith from the Office of Planning. At the close of the hearing, the record was left open to accept plans for grading, construction, and landscaping, which were received on May 31, 2001.

Decision Meeting. At its decision meeting of June 5, 2001, the Board, by a vote of 4-0-1, denied the application.

## FINDINGS OF FACT

1. The Applicant proposes to construct six prefabricated houses, one on each of its six adjacent lots. Each house would have 1,890 sq. ft. of living area, including a basement with garage space.

2. The proposed development is in an R-5-A District.

3. The FAR for each of the six lots is 0.9. The proposed structures on lots 31 through 35 would exceed the FAR limits.

4. Lots 31 though 35 are identical in size.

5. The Applicant seeks a variance in order to construct more affordable houses and to be able to provide houses with garages.

6. The Applicant's construction plan for the houses states that it is a "concept plan", "for conceptual purposes only", and is "not an engineered site plan". The landscaping plan states that it "is for review purposes only". The Board therefore concludes that the Applicant's plans are preliminary and not representative of a final project.

7. The Applicant's grading plan shows that the drainage will be inadequate, causing damage to the driveways of the proposed houses.

## CONCLUSIONS OF LAW

The Applicant seeks a special exception in an R-5-A District for lots 31-35 pursuant to 11 DCMR § 353.1, which provides that all new residential developments, except those comprising all one-family detached and semi-detached dwellings, must be reviewed as a special exception. The Applicant also seeks variance approval with respect to lot size and width requirements for lot 36, pursuant to 11 DCMR § 401.3. That section, however, actually requires special exception review for all lots in an R-5-A District. In addition, the Applicant seeks a variance from 11 DCMR § 402.4, which sets the FAR at 0.9 for lots 31-35, and from 11 DCMR § 405.9, which prescribes an 8 foot side yard setback for lot 36.

The Board is authorized to grant variances where "by reason of exceptional narrowness, shallowness, or shape of a specific property. . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or conditions" of the property, the strict

application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property. . ." D.C. Code § 5-424(g)(3), 11 DCMR § 3103.2. Where an applicant seeks an area variance, as here, the above standard of "practical difficulties" applies, with the "undue hardship" standard applying only to use variances. *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535 (D.C. App. 1972). Additionally, variance 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". *Id.*

The Applicant has not met its burden with respect to the first part of the test for a variance: exceptional or extraordinary conditions or features of the property. Lots 31-35 are identical in size, while the row houses the Applicant proposes to construct will be the same size on all of the Applicant's lots. Moreover, lots 31-35 appear to be the same size as the neighboring lots that now have row houses on them. *See, Capitol Hill Restoration Society Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 942 (D.C. 1987) (where there were other similarly sized lots in the area, the condition could not support a finding of uniqueness for purposes of variance approval). The applicant for a variance must show "that the difficulties or hardships [are] due to unique circumstances peculiar to the applicant's [lot] and not to the general conditions in the neighborhood.". *Barbour v. District of Columbia Bd. of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976) (quoting *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972).

The Applicant has also failed to meet its burden of proof with respect to peculiar or exceptional practical difficulties. The Applicant stated at the public hearing that its basis for asserting practical difficulties is that it encounters economic obstacles and cannot meet the consumer's demand for garages if it is limited to building houses in conformity with the zoning regulations. The Board first notes that many existing houses in the area do not have garages and that many new houses are being constructed without garages throughout the District. As for any perceived economic burden, that alone does not necessarily constitute sufficient grounds to justify the grant of a variance. *Id.* at 327 (increased expense of 50% to 90% to expand small kitchen if variance not obtained does not justify grant of variance); *Myrick v. District of Columbia Bd. of Zoning Adjustment*, 577 A.2d 757 (D.C. 1990) (the fact that renovating existing space without obtaining variance would be more costly does not justify grant of variance). The District of Columbia Court of Appeals also considers whether there exists other development options that will not require a variance. *Association for Preservation of 1700 Block of N St., N.W., & Vicinity v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978) (court upheld grant of area variance from off-street parking requirements because there was no feasible alternative that would have complied with the zoning regulations). Thus, the Court has held that proof of economic burden may be relevant to the decision of whether to grant an area variance where the applicant is not merely seeking the most profitable use for its land but faces difficulty financing any improvement of the property without the variance. *Tyler v. D.C. Board of Zoning Adjustment*, 606 A.2d 1362 at 1366, 1367 (D.C. 1992). It is not clear from the record that there are no other economically feasible alternatives for developing the applicant's land that do not require a variance.

Lastly, the Applicant's grading plans indicate that water will not drain properly and will collect in the driveways, causing them to deteriorate rapidly. Such an unsightly condition will adversely affect not only the occupants themselves but also the surrounding neighborhood as a whole. Therefore, the Board concludes that if the project were to proceed as represented it would have a substantial detriment to the public good. Nevertheless, even if the grading was better engineered, the Board would still have to deny the application. The grading plans, as well as the landscaping and construction plans, are preliminary, as indicated by statements such as: "for conceptual purposes only", and are therefore not necessarily representative of the final construction. Unless the Board is reviewing the final version of the plans, it cannot be certain that the Applicant's project would not constitute a substantial detriment to the public good.

Because the Applicant has not met its burden of proof for a variance, the Board need not reach the issue of whether or not the Applicant meets the special exception requirements.

Pursuant to 11 DCMR § 3126.11, an Applicant "whose application has been **denied** shall not institute a new appeal or application on the same facts within one (1) year from the date of the order upon the previous appeal or application".

**VOTE: 4-0-1** (Anne Mohnkern Renshaw, Susan Morgan Hinton, Carol J. Mitten, Sheila Cross Reid, to **DENY.** Geoffrey H.Griffis not voting not having heard the case).

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

Each concurring member has approved the issuance of this Decision and Order.

**ATTESTED BY:** Jerrily R. Kress

**JERRILY R. KRESS, FAIA**
**Director**

**FINAL DATE OF ORDER:** AUG 2 2 2001

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

**BZA APPLICATION NO. 16682**

As Director of the Office of Zoning, I hereby certify and attest that on AUG 2 2 2001, a copy of the foregoing Decision and Order in BZA Application No. 16682 was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing and who are listed below:

Mrs. Ann McGee
W.F. Equipment Corporation
2009 Trappe Church Road
Darlington, Maryland, 21034

Mary L Gaffney, Chairperson
Advisory Neighborhood Commission 7C
328 62nd Street, N.E., # 201
Washington, D.C. 20019

Terrance Johnson, Commissioner
Single Member District 7C-03
5220 Hayes Street, NE
Washington, D.C. 20019

Councilmember, Kevin Chavous
Ward Seven
441 4th Street, NW, Room 709
Washington, DC 20001

Ellen McCarthy, Deputy Director
Office of Planning (4th Floor)
801 North Capitol Street, NE
Washington, D.C. 20002

Michael D. Johnson, Zoning Administrator
Department of Consumer & Regulatory Affairs
941 North Capitol Street, NE, Suite 2000
Washington, D.C. 20002