BASES FOR GRANTING SPECIAL EXCEPTION

Vinay Pande (hereinafter "Mr. Pande"), the owner of the property and improvements located at 5210 Klingle Street, NW, Washington, D.C. 20016-2657 (hereinafter, the "Property" and the "Home" respectively), sets forth the following bases in support of his application for the granting of a special exception to the R-1 side-yard zoning requirements set forth in § 405.9 of the Code of D.C. Zoning Regulations:

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Facts

In Summer 1991, Mr. Pande purchased the above-referenced Property and Home. As of the purchase date, the Property consisted of, among other things, a sloped 25-foot driveway and 13-steps leading from the driveway to the entranceway.[1] Prior to the construction of the awning in dispute, each of the foregoing structures/walkways were not covered, and consequently, subject to the elements.

From the date of purchase, Mr. Pande anticipated occupying the premises with his 68-year old mother, Sheila Pande (hereinafter "Ms. Pande").[2] As evidenced by the attached statement signed by Dr. Richard L. Danehower, Ms. Pande suffers from severe Rheumatoid Arthritis.[3] As a result of her condition, Ms. Pande experiences great difficulty and discomfort in negotiating stairs and other sloped surfaces. Per Dr. Danehower's instruction, Mr. Pande sought to alleviate the pain and discomfort associated with his mother's traversing of the Property, by

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[1] *See* those photographs attached hereto as Exhibit A.
[2] Due to circumstances beyond his control, Mr. Pande has, as yet, been unable to occupy the Home. Consequently, Mr. Pande has leased the Property to various tenants from Spring 1993 to Winter 2001. The current lessee will be returning to Spain shortly, at which time Mr. Pande and his mother expect to occupy the Home (pending a favorable resolution in this matter).
[3] *See* Dr. Danehower's statement, attached hereto as Exhibit B.

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constructing a chairlift which would "carry" Ms. Pande's wheelchair from the driveway to the main entranceway.

Because such chairlifts consist of exposed metallic and electrical components, Mr. Pande hoped to eliminate the potential for rust and electrical shock by building a protective awning above the structure.[4] In Winter 1997, Mr. Pande approached A & A International, LTD, a professional contractor (hereinafter "A & A"), regarding the construction of the aforesaid awning. During his initial consultation with A &A, Mr. Pande inquired about the necessity of additional permits for the awning's construction. A & A representatives informed Mr. Pande that no further permits were required. In Fall 1998, A & A constructed the awning for approximately $7,282, including tax.[5] Per Mr. Pande's request, A & A built the awning deliberately low and in leaf-green so as to blend in with the natural surroundings.[6] For some eighteen (18) months, the awning remained in place without incident or complaint.

Approximately one year and eight months after the awning's construction, John H. Kennedy, the adjacent landowner, filed a complaint with the District of Columbia Department of Consumer and Regulatory Affairs. Mr. Kennedy occupied the adjacent premises since 1997.

In July 2000, Mr. Pande received two (2) Notices of Infraction dated June 28, 2000, one for constructing without a permit, and the other for a violation of the side-yard requirement.[7]

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[4] *See* photographs, *supra* note 1.
[5] *See* A & A receipt, attached hereto as Exhibit C.
[6] *See* photographs, *supra* note 1.
[7] *See* Notices of Infraction, attached hereto as Exhibit D.

Authority

1. *Variance.* Pursuant to Section 3103.2 of the D.C. Code of Municipal Regulations, the Board of Zoning Adjustment has the authority to grant variances from the strict application of the District of Columbia zoning requirements.[8] Specifically, the Board may grant such variances:

> . . . where, by reason of . . . extraordinary or exceptional situation[s] or condition[s] of a specific piece of property, the strict application of any regulation adopted under D.C. Code Ann. §§5-413 to 5-432 (1981) would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property . . . .[9]

In such instances, the Board may grant a variance from the strict application of the zoning requirements. However, the Board may grant such relief only upon certain conditions:

"[p]rovided that such 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."[10]

2. *Special Exception.* Pursuant to Section 223 of the D.C. Code of Municipal Regulations, the Board of Zoning Adjustment may grant "special exceptions for reasonable additions to single family dwellings where the strict tests associated with an area variance are unattainable. . . ."[11] However, Section 223 is subject to the following conditions:

- The addition shall not have a substantially adverse affect on the use or enjoyment of any abutting or adjacent dwelling or property; in particular:
  (a) The light and air available to neighboring properties shall not be unduly affected;
  (b) The privacy of use and enjoyment of neighboring properties shall not be unduly compromised;

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[8] *See* Code of D.C. Municipal Regulations §3103.2.
[9] *Id.* at §3103.2.
[10] *Id.* at §3103.2.
[11] Notice of Final Rulemaking, 45 D.C. Reg. 1446 (Mar. 13, 2998).

(c) The addition, together with the original building, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage; and

(d) In demonstrating compliance with paragraphs (a), (b) and (c) of this subsection, the applicant shall use graphical representations such as plans, photographs or elevation and section drawings sufficient to represent the relationship of the proposed addition to adjacent buildings and views from public ways.[12]

- The lot occupancy of the dwelling or flat, together with the addition, shall not exceed fifty percent (50%) in the R-1 and R-2 districts or seventy percent (70%) in the R-3, R-4 and R-5 districts.[13]
- The Board may require special treatment in the way of design, screening, exterior or interior lighting, building materials or other features for the protection of adjacent and nearby properties.[14]

3. Americans With Disabilities Act (ADA). Pursuant to the ADA, a public entity is required to reasonably modify its policies, practices or procedures to avoid discrimination on the basis of disability.[15]

Analysis

Variance.

As noted above, the Board of Zoning Adjustment has the authority to grant variances from the strict application of the District of Columbia's zoning requirements. Granting such variances requires "a showing that the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulty upon the owner arising out of some extraordinary or exceptional condition of the property such as exceptional narrowness, shallowness, shape, or topographical conditions."[16] The Board must also find that the application will not be of

[12] Code of D.C. Municipal Regulations §223.2.
[13] *Id.* at §223.3.
[14] *Id.* at §223.4
[15] *See generally*, 42 U.S.C. §12101.
[16] Application No. 16362, 46 D.C. Reg. 6887, 6892 (citing D.C. Code §5-424(g)(3)).

substantial detriment to the public good and will not impair the intent and purpose of the Zoning Regulations.[17]

The Property at issue meets the test for relief from the Zoning Regulations. As evidenced by the photographs filed herewith as Exhibit A, the condition of the Property, in light of Ms. Pande's condition, requires that certain steps be taken in order to ensure the safety of the Property's occupants. The existence of unavoidable safety hazards must fall within "extraordinary or exceptional conditions of the property" as that phrase is set forth in the regulations.[18] As noted above, the driveway is approximately 50 feet long. Due to the slope of the property, stairs lead down from the driveway to the main entranceway. The length of the driveway, coupled with the stairs leading from the driveway to the main entranceway, present a significant obstacle to Ms. Pande's full enjoyment of the premises. In order to remove that obstacle, Mr. Pande will install a chairlift running from the street to the Home's entrance. In order to protect the chairlift from the elements, Mr. Pande installed a protective awning. In order for the awning to remain in place, Mr. Pande requires a variance from the strict application of the Zoning Regulations- specifically, the minimum side-yard requirement of §405.9. The need for the variance is incident to the particular condition of the Property, specifically to the proximity of the driveway to the lot line.

However, Mr. Pande recognizes that certain other elements, in addition to those listed above, may aid the Board in reaching its ultimate determination. Specifically, that: a) the subject property is unique, b) there is a practical difficulty associated with the eight-foot side-yard

[17] *See id.*
[18] *Id.*

setback, and c) no adverse impact on the community would result from the awning's construction.[19]

First, the subject property, in light of Ms. Pande's condition, is unique. Due to the terrain and topography discussed above, the Property presents unique challenges to handicapped individuals, specifically Ms. Pande. Consequently, the terrain and topography, coupled with the significant challenges presented to handicapped individuals thereby, renders the property sufficiently "unique."

Second, there is a practical difficulty associated with the eight-foot side-yard setback. As noted above, and pursuant to Dr. Danehower's professional medical advice, Mr. Pande wishes to install a chairlift so that his mother may enter and exit the Home without risking her safety. Because various electrical and metallic components of the chairlift will be exposed to the elements, Mr. Pande had a protective awning professionally installed on the Property. In order to adequately protect the chairlift, the awning must cover the driveway and the stairs leading to the main entranceway. In order to cover the driveway and the stairs leading to the main entranceway, the awning must encroach upon the 8-foot side-yard requirement. Consequently, there are practical difficulties associated with the 8-foot side-yard setback.

Finally, the awning presents no adverse impact upon the community. As noted above, the awning was built deliberately low so that it extends above the Property's fence by only a minimal amount. Moreover, Mr. Pande had the awning built in leaf-green so as to blend in with the natural surroundings. While it is true that Mr. Kennedy recently complained to the District of Columbia Department of Consumer and Regulatory Affairs about the awning, his complaints are somewhat perplexing in light of the fact that he has, until the subject complaint was filed on June 28, 2000, remained silent since the awning's construction in 1998.

[19] 46 D.C. Reg. 6887, 6889.

In light of the foregoing, Mr. Pande requests that the Board grant a variance from the strict application of the 8-foot side yard requirement.

Special Exception.

As noted above, the Board of Zoning Adjustment has the authority to grant special exceptions from the strict application of the District of Columbia's zoning requirements. Special exceptions may be available in certain instances "where the strict tests associated with an area variance are unattainable."[20]

Section 223 of the D.C. Code of Municipal Regulations provides certain standards for the granting of special exceptions. As noted above, a special exception may be granted where the structure does not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property. In determining whether such an effect exists, a number of other factors are considered as well.[21]

First, it must be determined whether the light and air available to neighboring properties is unduly affected.[22] With regard to the awning, there is no significant effect on the light and air available to Mr. Pande's neighboring properties. The awning was built deliberately low so that it rises a minimal amount above the existing fence. The leaf green awning is also hidden, to some extent, from the view of neighboring properties by trees and shrubbery. Consequently, the light and air available to neighboring properties is not unduly affected.

Second, the structure must not unduly compromise the privacy of use and enjoyment of neighboring properties.[23] Mr. Pande's awning does not extend beyond his property line, nor does it affect views from the adjacent properties, or offer views of the adjacent properties, not

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[20] Order No. 840, 45 D.C. Reg. 1491 (Mar. 13, 1998).
[21] *See generally, supra* notes 13-15.
[22] *See supra* note 13.

otherwise available. Consequently, the awning does not unduly compromise the privacy of use and enjoyment of neighboring properties.

Third, the structure, together with the original building, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage.[24] While the fence generally conceals the Home, a structure which does not substantially visually intrude upon the character, scale and pattern of houses along the street frontage, from the street and neighboring properties, the awning is visible above the fence. However, the awning does not visually intrude upon the character, scale and pattern of houses along the street frontage either. In fact, the shape of the awning matches the "A-frame" architecture of the neighboring properties and the colors match the natural foliage. Consequently, the awning, together with the Home, as viewed from the street, alley, or other public way, do not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage.

In conclusion, the awning does not have a substantially adverse effect upon any abutting or adjacent dwelling or property and a special exception is warranted

In light of the foregoing, Mr. Pande requests that the Board grant a special exception to the strict application of the 8-feet side yard requirement.

Americans With Disabilities Act (ADA). As noted above, pursuant to the ADA, a public entity is required to reasonably modify its policies, practices or procedures to avoid discrimination on the basis of disability.[25] To illustrate this requirement, the Technical Assistance Manual for the ADA (covering state and local government programs and services) states:

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[23] *See supra* note 14.
[24] *See supra* note 15.
[25] *See generally*, 42 U.S.C. §12101.

> A public entity must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public entity can demonstrate, however, that the modifications would fundamentally alter the nature of its service, program, or activity, it is not required to make the modification.
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> ILLUSTRATION 1: A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three (3) feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy."[26]

Much like the above illustration, Mr. Pande seeks a variance or special exception to the zoning requirements as a reasonable modification of District policy. Mr. Pande wishes to install a chairlift so that his mother can enter and exit the Home without unreasonable difficulty and risk of injury. Mr. Pande cannot do so without a variance or special exception granted by the Board.

In light of the foregoing, Mr. Pande requests that the Board grant either a variance or special exception based on the policy underlying the ADA as articulated by the above illustration.

Conclusion

Based on the facts and legal authority set forth above, Mr. Pande requests that the Board grant a variance to the strict application of §405.9. In the alternative, Mr. Pande requests that the Board grant a special exception to the strict application of §405.9.

[26] Section II-3.6100 of the Technical Assistance Manual.