Government of the District of Columbia

OFFICE OF ZONING

441 4TH STREET, N.W.
SUITE 210
WASHINGTON, D.C. 20001
(202) 727-6311

MEMORANDUM

TO: Board of Zoning Adjustment

THRU: Jerrily R. Kress, FAIA
Director

FROM: Richard S. Nero, Jr. RSN
Special Assistant

DATE: January 4, 2002

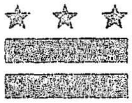
RE: BZA Application No. 16837 – 5129 Macomb Street, N.W.

The subject property in the above-cited application was the subject of BZA denial Order No. 16694, dated July 12, 2001 (attached). During the Board's deliberations on this matter it was determined that variance relief was required under subsection 2001.3, in addition to the requested special exception relief under section 223. The new application is being filed as a special exception under section 223, as recently amended to include subsection 2001.3.

BZA
Case No. 16837
Exhibit No. 11

Board of Zoning Adjustment
District of Columbia
CASE NO.16837
EXHIBIT NO.11

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 16694 of Benjamin and Julia Rowland, pursuant to 11 DCMR § 3104.1 for a special exception under section 223 to allow an addition to a one-family dwelling not meeting the rear yard requirements (section 404) in an R-1-B District at premises 5129 Macomb Street, N.W. (Square 1446, Lot 7).

HEARING DATE: May 1, 2001

DECISION DATE: June 5, 2001

DECISION AND ORDER

Benjamin and Julia Rowland, the owners of Lot 7 in Square 1446, filed an application with the Board of Zoning Adjustment on January 23, 2001, pursuant to 11 DCMR § 3104.1 for a special exception under 11 DCMR § 223 to construct an addition that would not comply with the minimum rear yard requirements of 11 DCMR § 401.4 to a one-family dwelling in an R-1-B Zone District. The application was self-certified by the applicants' architect. At the public hearing on the application, the Board determined that the applicants also required variance relief pursuant to 11 DCMR § 3103.2 from the provisions of 11 DCMR § 2001.3 to permit an addition to a nonconforming structure. After a public hearing, the Board denied the application on the grounds it did not meet the criteria for a variance. In view of its denial of the variance, the Board did not reach the merits of the applicants' request for a special exception.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Application and Notice of Hearing. By memoranda dated February 7, 2001, the Office of Zoning advised the Zoning Administrator; D.C. Office of Planning; Advisory Neighborhood Commission (ANC) 3-D, the ANC for the area within which the property that is the subject of the application is located; the ANC Commissioner for the affected single-member district; and the Ward 3 Councilmember of the application.

The Board scheduled a public hearing on the application for May 1, 2001. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on March 8, 2001, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 3-D notice of the hearing. Notice of hearing was also published in the *D.C. Register* on March 9, 2001, at 48 DCR 2161. The applicant's affidavit of posting indicates that on April 5, 2001, a zoning poster was placed on the front of the dwelling, in plain view of the public.

Applicant's Case. Architect Andre F. Houston represented the applicants at the hearing. He stated that the applicants wished to build a family room addition off of their kitchen, and reviewed the proposed plans with the Board.

Public Agency Reports. There are no public agency reports in this case.

ANC Report. In its report dated March 9, 2001, ANC 3-D indicates that on March 7, 2001, at a regularly scheduled and duly-noticed public hearing with a quorum present, ANC 3-D unanimously approved the application, subject to four conditions. To protect the interests and safety of the adjacent neighbor to the rear, the ANC recommended that (1) the distance between the chimney on the addition and the rear retaining wall be no more than eleven feet; (2) the chimney be no more than the minimum height permitted under the Building Code; (3) the fireplace in the addition use only gas; and (4) during construction, the necessary shoring be in place to protect the rear retaining wall.

Persons in Support of the Application. The applicants submitted a petition signed by four neighbors in support of the application, two of whom added qualifying notes relating to the proposed chimney and fireplace.

Persons in Opposition to the Application. There were no persons in opposition to the application.

Closing of the Record. The record closed at the conclusion of the public hearing on May 1, 2001, with the exception of alternative designs for the construction of the addition and a written letter, pursuant to 11 DCMR § 3106.1, authorizing Mr. Houston to represent the applicants. The applicants submitted several alternative designs that would comply with the Zoning Regulations, but failed to submit the requested authorization letter.

Decision Meeting. At its decision meeting on June 5, 2001, the Board, by a vote of 3 – 0 – 2, with two members not voting, denied the application.

FINDINGS OF FACT

The Subject Property and Proposed Addition

1. The subject property is Lot 7 in Square 1446, with a street address of 5129 Macomb Street, N.W. It is located in an R-1-B District.

2. The lot is 8,048 square feet in size. It is 80 feet wide in front and 82.76 feet wide in the rear.

3. The lot is trapezoidal in shape, with a depth of 90 feet on one side and 111.21 feet on the other.

4. The existing structure is a two-story, one-family dwelling, apparently built during the 1930s.

5. The existing lot occupancy is 20.5 percent. The lot occupancy with the proposed addition would be 24 percent.

6. There are small, existing side yards of 5.4 feet on the shorter side and 6.7 feet on the longer side.

7. Since 11 DCMR § 405.9 requires each side yard to be at least eight feet in width, the existing dwelling is a "nonconforming structure" as defined in 11 DCMR § 199.1.

8. The rear yard ranges from 25 feet deep on the shorter side to 50 feet deep on the longer side, for an average depth of 40 feet. The proposed addition would be constructed in the shallow half of the rear yard.

9. The lot slopes steeply downward toward the existing dwelling.

10. The addition would be a one-story structure, consisting of a family room extension to the existing kitchen.

11. The addition would extend 23 feet beyond the existing dwelling. It would come to within twelve feet of the rear property line at its closest point, making the depth of the rear yard, calculated as the mean horizontal distance between the rear line of the proposed structure and the rear property line 19 feet.

12. Because the addition would not comply with the minimum 25-foot rear yard requirement in 11 DCMR § 404.1, the addition would not conform to structure requirements and would further create a new nonconformity of structure and addition combined.

Unique or Exceptional Conditions of the Property

13. Under 11 DCMR § 401.1, the minimum lot area in an R-1-B District is 5,000 square feet and the minimum lot width is 50 feet. The subject property, which substantially exceeds the minimum lot area and minimum width requirements does not qualify as an exceptionally narrow or shallow property.

14. The trapezoidal shape of the lot is not unique or exceptional. The Baist Atlas shows that many of the adjacent and nearby properties have a more pronounced trapezoidal shape.

15. The slope of the lot does not create practical difficulties for the applicants in complying with the Zoning Regulations.

16. The applicants assert that their dwelling is sited farther back on their lot than the adjacent dwellings due to the presence of a large tree in the front yard. However, there is no evidence in the record other than their architect's statement that would support a finding that the applicants' dwelling is situated any farther back on the property than the adjacent dwellings. The photographs of the tree do not show that the applicants' dwelling is situated farther back than the adjacent dwelling.

17. There is no other extraordinary or exceptional situation or condition of the property that would result in practical difficulties if the Zoning Regulations were strictly applied.

Practical Difficulties

18. The applicants have available several alternative designs that would comply with the Zoning Regulations.

19. The alternative designs, which would not be unreasonably disruptive of the first floor layout, would provide the applicants with the extra space they are seeking with their proposed addition.

20. The Board finds that there are no practical difficulties in building an addition that complies with the Zoning Regulations.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Code § 6-641.07(g)(2) and (3) (2001)), to grant special exceptions and variances. Benjamin and Julia Rowland are seeking a special exception under 11 DCMR § 3104.1 to construct an addition to a one-family dwelling pursuant to 11 DCMR § 223. During the public hearing on the application, the Board determined that the applicants also require an area variance from 11 DCMR § 2001.3(b)-(c), since the existing dwelling is a nonconforming structure. The notice requirements of 11 DCMR § 3113 for a public hearing on the application have been met.

The Zoning Regulations define the term "nonconforming structure" as:

> a structure, lawfully existing at the time this title or any amendment to this title became effective, which does not conform to all provisions of this title or the amendment, other than use, parking, loading, and roof structures requirements. Regulatory standards that create nonconformity of structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, *yard,* court, and residential recreation space requirements.

11 DCMR § 199.1 (emphasis added). Under 11 DCMR § 405.9, each side yard in an R-1-B District must be at least eight feet wide. The existing dwelling, with side yards measuring 5.4 and 6.7 feet wide, is therefore a nonconforming structure.

Under 11 DCMR § 2001.3, an addition may be made to a nonconforming structure devoted to a conforming use provided:

> (a) The structure shall conform to percentage of lot occupancy requirements;
>
> (b) The addition or enlargement itself shall conform to use and structure requirements; and
>
> (c) The addition or enlargement itself shall not increase or extend any existing, nonconforming aspect of the structure, and shall not create any new nonconformity of structure and addition combined.

The proposed addition does not comply with the 25-foot minimum rear yard requirements of § 404.1. The proposed addition, therefore, does not comply with § 2001.3(b) and (c) because the addition would not conform to structure requirements and would create a new nonconformity of structure and addition combined. The Board concludes that in addition to special exception relief from the rear yard requirements of § 401.4 pursuant to §§ 223 and 3104.1, the applicants also require variance relief from the provisions of 11 DCMR § 2001.3(b) and (c) pursuant to § 3103.2.

The applicants argue that under 11 DCMR § 223, which authorizes the Board to grant special exceptions to permit the construction of an addition to a one-family dwelling where the addition does not comply with "all the requirements of sections 401 (minimum lot dimensions), 403 (percentage of lot occupancy), 404 (rear yards), 405 (side yards) or 406 (courts)" obviates the need for a variance from § 2001.3. The Board does not agree.

Section 223 is only available to provide relief from the specified sections of the Zoning Regulations, not from any other sections that are omitted from mention in § 223. While the rule of statutory and regulatory construction that the "expression of one thing means the exclusion of another" is to be applied cautiously, there is no indication in the wording of § 223 or in the Zoning Commission order approving the Notice of Final Rulemaking for § 223 that the Commission intended to include § 2001.3 among the list of zoning regulations from which relief could be sought by special exception. See 45 DCR 1491, 1495 (1998); see also *Afge v. Koczak*, 439 A.2d 478, 480 (D.C. 1981), discussing the statutory construction. Moreover, the purpose of § 2001.3 is to establish certain parameters by which an enlargement or addition to a nonconforming structure may be made, which may entail different or additional considerations than an enlargement or addition to a conforming structure. Finally, the Zoning Commission has set down for hearing on July 12, 2001, a proposal to amend § 223 to specifically reference § 2001.3 as a section from which relief can be granted by special exception. 48 DCR 4914 (2001). The Board concludes therefore that § 223, as adopted, does not relieve the applicant of the

necessity of seeking a variance from § 2001.3 to construct an addition to a nonconforming structure.[1]

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990).

Further, the Board is required under D.C. Code § 1-309.10(d) (2001)) to give "great weight" to the affected ANC's recommendations. Under D.C. Code § 1-309.10(d)(3), the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns. In this case, the ANC evaluated the application as a special exception and recommended approval, subject to four conditions designed to protect the adjacent property to the rear. The ANC therefore did not consider whether the applicants had met the much stricter test for a variance from the provisions of the Zoning Regulations relating to additions to nonconforming structures.

Applying the variance test, the Board concludes, based upon Findings Nos. 13 – 17, that the applicants have failed to prove that their property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property. Based upon Findings Nos. 18 – 20, the Board concludes that the applicants have failed to prove that they would confront practical difficulties in building an addition that would comply with the Zoning Regulations. The applicants have available several alternative designs that would provide them with the additional living space they seek and that would comply with the Zoning Regulations. The applicants have not shown that these alternative designs are unnecessarily burdensome or rise to the level of "peculiar and exceptional practical difficulties" required under the variance test. *See Barbour v. District of Columbia Bd. of Zoning Adjustment*, 358 A.2d 326 (D.C. 1976).

Since the applicants have not met the threshold requirements of showing that as a result of the unique conditions of their property, the strict application of the Zoning Regulations would result in practical difficulties, it is not necessary to reach the third prong of the variance test, whether the requested variance would result in substantial detriment to the public or substantial impairment of the zone plan. Moreover, since the applicants have not met the test for the required variance, the Board has not reached the question of whether they meet the conditions of 11 DCMR §§ 223 and 3104.1 for special exception relief.

For the reasons stated above, the Board concludes the applicants have not met their burden of proof. It is hereby **ORDERED** that the application is **DENIED.**

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[1] If the Zoning Commission adopts the proposed amendment to § 223, the applicants may, of course, submit a new application for special exception relief.

VOTE: 3 - 0 - 2 (Susan Morgan Hinton, Anne M. Renshaw, and Sheila Cross Reid, to deny; Geoffrey Griffis, not voting, not having heard the case; the Zoning Commission representative not present, not voting).

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, Office of Zoning

FINAL DATE OF ORDER: JUL 12 2001

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME EFFECTIVE 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. 16694

As Director of the Office of Zoning, I hereby certify and attest that on JUL 12 2001, a copy of the foregoing Decision and Order in BZA Application No. 16694 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing and who is listed below:

Benjamin and Julia Rowland
5129 Macomb St., N.W.
Washington, D.C. 20016

Andre F. Houston
1053 31st St., N.W.
Washington, D.C. 20007

Eleanor Roberts Lewis, Chair
Advisory Neighborhood Commission 3D
P.O. Box 40846
Palisades Station
Washington, D.C. 20016

Honorable Kathleen Patterson
Councilmember Ward 3
441 4th Street, N.W., Room 709
Washington, D.C. 20001

Ellen McCarthy, Deputy Director
Development Review Division
D.C. Office of Planning
801 North Capitol Street, N.E., Suite 4000
Washington, D.C. 20002

Michael D. Johnson, Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of