D. Application for Variance Relief

Africare, Inc.(the "Applicant" or Africare"), the fee owner of 440 R Street, N.W., located at Lot 805, Square 509 (the "subject property"), hereby makes application to the District of Columbia Board of Zoning Adjustment (the "Board") for: (i) a variance from the rear yard requirement of § 404.1 of the District of Columbia Zoning Regulations, 11 DCMR *Zoning* (February 2003)(the "Zoning Regulations") to permit a rear yard of less than twenty feet (20') in an R-4 District; and (ii) a variance from the lot occupancy limitation of forty percent (40%) applicable to the R-4 district pursuant to § 403.2.

1. Statement of Existing and Proposed Use

The subject property is a 18,318 square foot lot, presently improved by the renovated Morse School on the eastern half of the lot. The Morse School was renovated by Africare in 1983-1984, pursuant to the order of this Board in Application No. 13904 (a copy of which is attached hereto as Exhibit 6) granting a use variance to use the subject property as "headquarters office of a charitable organization".

Africare is a District of Columbia nonprofit corporation, organized in 1970, which is dedicated to

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providing humanitarian and development assistance to the African continent. Today, Africare operates 150+ active programs in 26 African nations, ranging from HIV/AIDS prevention, food production, river blindness control, wells and irrigation systems, small-scale entrepreneurship and refugee relief. Africare receives financial support from private organizations, businesses, individuals, foundations, the United States Government and international organizations. Over the years, Africare has delivered more than $400 million in assistance to the African continent.

Africare is one of the nation's leading private voluntary organizations sponsoring programs that inform and involve the local African-American community in understanding and supporting African development. In addition to its efforts in Africa, Africare has also been a local catalyst for dialogue between and among the African diplomatic community, regularly hosting meetings of this group at its offices. Africare has opened its facility to the community in various ways: hosting local community meetings, including ANC-2C, in its Board Room and making Africare's collection of African art and cultural objects available to viewing and tours by local high school students.

Africare now employs approximately 56 full-time employees at it facility. At the time of the 1983 approval

of the use of the Morse School for its headquarters, Africare anticipated a total of 40 employees. The expansion of its staff over the past two decades is one measure of the growth and success of Africare's involvement in Africa.

As a former public school building, the facility is relatively inefficient as offices since there are large interior areas devoted to stairwells and a central hall. As a result of the staff expansion and the architectural limitations of the Morse School for reconfiguration, working conditions are presently overcrowded. The instant application is aimed at resolving this problem and enabling Africare to remain at its present location in the Shaw community.

The Applicant intends to construct an annex to the existing building, which will be connected to the existing building by a covered portico in such a manner that the two structures will constitute a single building. Africare will devote the annex to the same uses presently conducted in the existing building, namely, the headquarters offices for a nonprofit corporation, including offices, meeting space, document storage and underground parking for the entire complex. While Africare has no present intention to enlarge the current Africare staff, the additional office space in

the annex will lessen existing overcrowding and provide room for future staff expansion of an additional 20 employees, when and if that eventuality becomes necessary.

The Africare annex will consist of a three-story building set opposite the Morse School. The two Africare buildings will be situated on either side of a landscaped, paved courtyard with a central fountain, which will afford pedestrian and handicapped access to R Street. The proposed annex will have a footprint of approximately 4,157 square feet and a gross floor area of 12,633 square feet.

The annex will be a masonry structure, the color and texture of which will be designed to be compatible with the Morse School. The portions of the annex facing the courtyard will be predominately glass curtain-wall, while the fenestration facing R Street will be more modest and have dimensions, proportions and cornice lines similar to those adorning the Morse School. By limiting the amount of glass on R Street facade and by articulating the facade into two elements, the design respects the residential vernacular of the community and reduces the commercial character of the building. There will be two sub-surface levels for parking and for document and art storage. The two Africare buildings will be linked on the surface by a columned portico connecting the main lobby of each building with the other.

Below ground at the garage level, there will be a connection to the basement level of the Morse School.

Africare will provide a total of 22 parking spaces: 18 within the underground garage and 4 at the rear of the annex off the public alley.[1] There will also be space within the parking garage dedicated for bicycle use.

2. Site and Surrounding Area Description

The subject property is located on the south side of R Street, N.W. in a R-4 Zoning District. Directly across R

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[1] Africare currently provides 10 parking spaces for the existing use of the Morse School, as required by this Board's 1983 order. Since the subject property is located in an R-4 Zone District and the use exists pursuant to a use variance, there is no applicable instruction in Chapter 21 of the Zoning Regulations as to the parking requirement for a nonprofit office in such a zone district. The most restrictive zone district in which a nonprofit office could exist as a matter-of-right is the Special Purpose (SP) Zone District, which is a useful analogy since according to § 500.2 the SP zone exists "to act as a buffer between adjoining commercial and residential areas..." In this respect, the circumstances of the SP zone are similar to those of the subject property in terms of location and function. In the SP Zone District an office use must provide 1 parking space for each 1,800 square feet of gross floor area in excess of 2,000 square feet. If this standard is applied to the entire Africare complex, including the Morse School and the proposed annex, Africare is required to provide 14 parking spaces. If the SP standard is applied only to the proposed annex, Africare is required to provide 7 parking spaces, in addition to the 10 parking spaces dedicated to the Morse School, for a total of 17 parking spaces. In either case, the provision of 22 parking spaces as proposed in the instant application exceeds the mandatory parking requirement.

Street, N.W. from the subject property to both the north and west is the zone boundary for the C-2-A Zoning District, containing both low-scale commercial and residential buildings. Square 508 to the north facing the subject property is split-zoned, divided between the C-2-A and the R-4 Zoning Districts. The subject property is opposite the commercially-zoned land in Square 508. On either side of, and to the rear of, the subject property, the remaining land within Square 509 is improved with two-story row houses.

3. Zoning History of the Site

As previously mentioned the subject property was granted a use variance in 1983. In discussions with the Office of Planning about this application, there was a view expressed that the use of the subject property was a "nonconforming use of land" within the meaning of § 2002 of the Zoning Regulations and, as such, the Applicant's proposed use of the subject property would require a further variance from the requirements of Chapter 20 of the Zoning Regulations, which would otherwise prohibit the enlargement of a nonconforming use.

Although we were unable to find controlling legal authority in the District of Columbia, it is a generally accepted principle of the law of zoning in other

jurisdictions that "when a variance is granted, the use permitted becomes a conforming use."[2] In this instance, Africare, Inc.'s use of the Morse School for nonprofit offices purposes since 1983 is not now nonconforming, and the enlargement of the building is therefore not prohibited by the Zoning Regulations.[3] The authorities also distinguish between a use or structure made non-conforming by subsequent legislative enactment and a use of structure established by

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[2] Rathkopf's The Law of Zoning and Planning (Ziegler, ed.) (2002), § 58:23, p. 58-153.

[3] *Id.*, fn. 11, p. 58:155. *See* Industrial Lessors Inc. v. City of Garfield, 119 N.J. Super. 181, 290 A2d 737 (App. Div. 1972) in which it was held that since the nonconforming building had been authorized by a variance, it had the status of a conforming use and any impairment thereof by the provisions of the municipal ordinance, such as prohibiting nonconforming buildings (expressly defined as being inclusive of variance structures) from being reconstructed after destruction unless they thereafter conformed with the ordinance in all respects, was invalid and conflicting with the statute authorizing variances ... Similarly, a building constructed pursuant to an area variance (side yard) is not a nonconforming building in the sense that a further variance is required to rebuild, alter, enlarge or extend it. Esquire Floors, Inc. v. Gunevald, 29 Misc. 2d 1019, 218 N.Y.S. 2d 720 (Sup. 1961).

variance.[4] By definition in § 199 of the Zoning Regulations, "nonconforming use" is treated in exactly this manner. Thus, the Africare building exists today as a conforming use by virtue of this Board's action in 1983.[5]

In addition, the Applicant applied for and received variance relief in 1999 from this Board in order to be able to construct the annex to the Morse School which is quite similar to the structure being proposed in the instant application. See Summary Order, dated December 20, 1999, in Application No. 16506, which is attached hereto as Exhibit 7 (the "1999 Order").[6] Unfortunately, financing to proceed with construction was not then available to Africare, and the 1999 Order lapsed.

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[4] *Id.* at § 73:29, p. 73:123-126. "In the context of this chapter - as well as by definition in most ordinances - the term [nonconforming use] is used to designate uses and structures lawfully established which were made nonconforming by the enactment by the legislative body of different - usually more restrictive - regulations. A use or structure established by a variance of existing regulations is not created in this manner... When the variance is granted, then 'in essence, the use or structure allowed becomes a conforming use.'"

[5] Anderson's American Law of Zoning (K.H. Young, editor, 4th ed. 1996), vol. 1, § 6.01, fn. 8, p. 483: "Thus, a use established or maintained pursuant to a variance granted by an administrative body is not a nonconforming use." Atlantic Richfield Co. v. Senn, 105 App. Div. 2d 1074, 482 NYS2d 380 (1984, 4th Dept.)

[6] The issuance of the 1999 Order merely reaffirms this status of the Africare building as a conforming use.

This application essentially reapplies for the same relief which was granted previously by the Board. The only differences between this application and the one filed in 1999 are that the Applicant: (i) has increased the amount of parking spaces provided from 15 to 22, by redesigning the lower level garage and utilizing available space at the rear of the annex on the public alley for additional parking spaces; (ii) adds the portico to connect the two buildings above-grade, thus constituting them as a single building for zoning purposes; (iii) alters the facade of the annex facing R Street to more closely resemble in scale and fenestration the row houses immediately to the west, which are more typical of the surrounding neighborhood; and (iv) adds a decorative, wrought iron gate to screen the entrance to the below-ground parking level giving the parking access a more residential appearance. These last two suggestions for revision to the site plan came as a result of comments received from the Office of Planning staff in a preliminary review of the site and architectural plans.

The exterior materials of the annex are designed to harmonize with the Morse School building and the courtyard in between will enhance their relationship with each other and with the street.

4. Basis for Variance Relief

The nature of the variances requested --- the extent of the rear yard and the lot occupancy coverage --- are both area variances.[7] In pertinent part, § 3107.2 of the Zoning Regulations states that the Board has the power:

> Where, by reason of . . . [an] exceptional situation or condition on a specific piece of property, the strict application of any regulation adopted under D.C. Code sections 5-413 to 5-432 would result in peculiar and exceptional practical difficulties to . . . the owner of the property, to authorize . . . a variance from the strict application so as to relieve the . . . hardship; Provided, that the 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. (emphasis added)

The test for an area variance then is threefold: (1) whether some condition of the subject property is exceptional or unique; (2) creating a practical difficulty under the Zoning Regulations; and (3) relief from which would not occasion substantial detriment to the public good or impair the intent, purpose, and integrity of the zone plan. Roumel v. D.C. Board of Zoning Adjustment, 417 A.2d 405, 408 (1980); Capitol Hill Restoration Society, Inc. v. D.C. Board of Zoning Adjustment, 398 A.2d 13, 15 (1979). It is clear that,

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[7] Ass'n for Preservation of 1700 Block of N Street v. D.C. Board of Zoning Adjustment, 384 A.2d 674, 676 (D.C. 1978).

like the circumstances of unusual shape or topography, "existing structures on the land are part of the property and may be exceptional conditions for variance purposes". Draude v. D.C. Board of Zoning Adjustment, 527 A.2d 1242, 1255 (D.C. App. 1987) citing Clerics of Saint Viator, Inc. v. D.C. Board of Zoning Adjustment, 320 A.2d 291, 293-94 (D.C. App. 1974).

The manner in which the Applicant's circumstances and the circumstances of the subject property satisfy these three distinct elements for area variance relief are discussed below.

d. Application of the Facts to the Variance Standards

i. Exceptional Situation or Condition

The unique condition inherent in the land which necessitates the variance portion of this application lies with the unique construction and configuration of the Morse School building.

> "Moreover, we have held that the need to expand an existing building may constitute the kind of exceptional condition of the property that justifies a variance." Draude v. D.C. Board of Zoning Adjustment, 527 A.2d 1242, 1255 (1987).

It is not practicable to enlarge the existing building by building a traditional addition because of the 14-foot slab-to-slab heights of each floor would yield an addition that is excess of the 40-foot height limit of the R-4 Zone District, thereby necessitating a further variance. Aesthetically,

adding to one side of the Morse School would destroy the symmetry of the traditional school building and result in an even more massive structure that is out-of-scale with the neighborhood.

The current landscaped courtyard is therefore the logical and only practical place for expansion. Achieving a separation of the buildings, and arranging the buildings on the perimeter of the courtyard, permit the Morse School to continue its visual role as an important community landmark. The reduced bulk of the annex does not detract from the principal building on the site.

The location of the Morse School on the subject property creates the effective line of the rear yard, fourteen feet (14') distant from the public alley at the rear of the subject property. The proposed annex respects this distance and maintains a consistent orientation of the structures on the subject site. To create the 20-foot rear yard required in the R-4 Zone District would require the annex to be set back an additional six feet with the likely consequence that the alignment of the below-grade connection of the two buildings would be thrown-off and the overall annex building footprint reduced. In order to satisfy the concerns of the Office of Planning about the street-scape impact of the annex design, Africare has already reduced the annex footprint by

pulling the front of the building away from the R Street property line. Further reductions in the building footprint adversely impact the number of parking spaces which could be accommodated in the garage level and the overall efficiency of the building.

The Morse School occupies only 31.56% on the total lot area and is substantially under-built as a structure, since the R-4 Zoning District permits 40% lot occupancy for structures other than churches, row dwellings, flats and school buildings. For permitted residential structures and institutional community services (*e.g.*, churches, public schools), the R-4 Zoning District allows a maximum of 60% lot occupancy.[8] With its proposed site plan, Africare is adding the annex footprint, plus the area under the connecting canopy, to the total lot occupancy on the subject property. The resultant lot occupancy is 56.8%, which is in excess of what is allowed for non-public school buildings in the R-4 Zoning District; hence the instant request for variance.

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[8] As a public school building, the Morse School could have been built to double the gross floor area it presently contains and pursuant to § 400.11 of the Zoning Regulations, up to a maximum height of ninety feet (90'). Such a structure would have towered over the surrounding residential buildings in the R-4 Zoning District.

ii. Practical Difficulty

As a public service organization, the Applicant, is not, like other applicants before the Board, required to make a showing that no other economic use can be made of the proposed site. When a public service organization applies for an area variance based upon the need for adequate facilities to fulfill its organizational purpose, it must show that: (1) the design it wants to build is an institutional necessity, and not merely the most desirable of various options, and (2) how the design requires the specific variances sought. Draude, 527 A.2d, at 1256. Africare will offer expert testimony at the public hearing on the architectural issues necessitating the variances and will discuss the institutional imperatives which require this expansion.

iii. Compatibility with the Zoning Scheme

The final prerequisite for variance relief is to demonstrate that the requested relief can be granted without adverse impact on the intent, purpose and integrity of the zone plan. The existing Africare facility exists in a residential community, but is really located in a way that minimizes the impact of its non-residential use on neighboring property. Directly across R Street facing the Morse School and the site of the proposed annex is the C-2-A

Zoning District, which is presently improved by low-scale commercial buildings. The public alley at the rear of the subject property clearly separates the office use from the row houses fronting on Warner Street. The land to the east of the Morse School across the north-south public alley, consists of three small, irregularly-shaped lots presently owned by Africare. The improvements on this land are vacant and Africare is not aware of any plans for future development.

The only clearly adverse impact on an adjacent residential property arises from the fact that the Africare annex is a taller building than the three (3) two-story row houses immediately west of the subject property on R Street. However, the impact is, in practical effect, no different than the construction of a matter-of-right residential structure of the same height in the same location. The one difference is the impact of the 6-foot variance in the rear yard which allows the Africare annex to extend further toward the public alley and creates a larger shadow on the backyards of the these three properties.

Africare envisions no immediate change in its workforce and will be providing off-street parking in excess of the requirements of the Zoning Regulations. Many of its employees live in the neighborhood and other commute to

Africare's offices by public transportation, either by Metrobus or at the nearby Metrorail station, three blocks to the west at Rhode Island Avenue & R Street, N.W.

E. Conclusion

The Board made an important decision in 1983 in granting the use variance to Africare: that this nonprofit use could be a valuable and compatible addition to the local community. The instant request is the single opportunity which Africare has to grow into this site and continue to fulfill the potential which this Board acknowledged two decades ago.

Based upon the foregoing discussion, the Applicant requests that the Board grant two area variances: (i) under § 404.1 of the Zoning Regulations to permit a fourteen foot (14') rear yard; and (ii) under § 403.2 to permit lot occupancy of 56.8% in the R-4 Zoning District.

Respectfully submitted,

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