ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

PHIL FEOLA
202-663-8789
phil.feola@shawpittman.com

May 26, 2004

2004 MAY 26 PM 2:15
CLERK'S OFFICE D.C.

By Hand Delivery

Mr. Geoffrey H. Griffis
Chair
Board of Zoning Adjustment
441 4th Street
Suite 210
Washington, DC 20001

Re: BZA Application No. 17154 - Application of Bruno B. Freschi, Motion to Strike, or, in the Alternative, Allow the Applicant to Respond to the Submission of the Foggy Bottom Historic District Conservancy

Dear Chairperson Griffis and Members of the Board:

At the conclusion of the hearing in the above-mentioned application, held on May 4, 2004, the Board of Zoning Adjustment ("BZA") left the record open for the submission of one item – the applicant's evidence demonstrating the subdivision date for Lots 94 and 95 in Square 16. The Board also indicated that it would permit other parties to file responses to the applicant's submission by June 1, 2004.

On May 18, 2004, the applicant submitted a subdivision plat showing the subdivision date as January 6, 1969. Also on May 18th, the Foggy Bottom Historic District Conservancy ("FBHDC") filed a letter addressing numerous issues relating to the substantive matters at issue in the application. Because this letter was filed on the same day as the applicant's submission, it clearly was not a response to the subdivision plat Indeed, very little of FBHDC's submission discusses the subdivision date or its relationship to § 401.6 of the Zoning Regulations. Furthermore, FBHDC agreed with the applicant that § 406.1 does not preclude the applicant from constructing a single-family dwelling on the subject property.

Section 3121.5 provides that the "record shall be closed following the public hearing, except that the record may be kept open for a stated period for the receipt of specific exhibits, information, or legal briefs, as may be directed by the presiding officer." 11 DCMR § 3121.5. "Any material received by the Board after the close of the record that bears on the substance of the appeal or application shall be returned by the Director and not received into the files of the Board." 11 DCMR § 3121.9.

BZA
Case No. 17154
Exhibit No. 43

Board of Zoning Adjustment
District of Columbia
CASE NO. 17154
EXHIBIT NO. 43

FBHDC impermissibly submitted substantive materials after the close of the record. The Board did not request any additional materials from the FBHDC, and the FBHDC's submission clearly was not a response. Accordingly, the applicant requests that the submission be returned to FBHDC and be stricken from the record.

If the Board accepts the FBHDC's submission into the record, however, the applicant requests to opportunity to respond. The applicant's response is attached.

Sincerely,

Phil Feola

Ashleigh D. Horne

Enclosure

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of Bruno B. Freschi

BZA Application No. 17154
Public Hearing: May 4, 2004
ANC 2A

APPLICANT'S REPLY TO MAY 18, 2004 SUBMISSION OF FOGGY BOTTOM HISTORIC DISTRICT CONSERVANCY

I. INTRODUCTION

On May 18, 2004, the Foggy Bottom Historic District Conservancy ("FBHDC") submitted additional arguments relating to the substance of the application of Mr. Bruno Freschi for area variance relief to constrict a row dwelling on Lot 95 in Square 16 (the "Property"). FBHDC contends that the prior owner of the Property intended it to be used only as a back yard or surface parking lot and that Mr. Freschi should not be allowed to construct anything on the Property. They also argue that the requested variance relief is so great that Mr. Freschi should be required to meet the more burdensome "undue hardship" standard reserved for use variances. They further contend that Mr. Freschi's application should be denied because the practical difficulty was self-imposed. Finally, the FBHDC argues that the new row house should be evaluated as a detached or semi-detached dwelling. FBHDC's arguments are not supported by the case law or the Zoning Regulations and should not preclude the Board of Zoning Adjustment (the "Board" or "BZA") from granting the requested area variance relief.

II. DISCUSSION

A. The Downzoning does not Preclude the Mr. Freschi from Constructing a Dwelling on the Property

During the public hearing of May 4, 2004, the representative of FBHDC argued that Mr. Freschi should not be allowed to construct any dwelling on the Property. FBHDC argues in its

recent submission that Mr. Freschi does not have any rights to develop the Property because he purchased it after it was downzoned to R-3.

When Lot 95 (the "Property") was created, it was located in the R-5-B Zone District and conformed to the requirements of that zone. The Property could have been developed with a matter-of-right dwelling at that time, but the owners chose not to do so. If they still owned the Property, the prior owners who subdivided it would have the right apply for variance relief. All rights attendant to the Property run with the land and may be enjoyed by Mr. Freschi, its current owner. Mr. Freschi does not argue that he is entitled to construct a dwelling on the Property as a matter-of-right. However, he does have the right to apply for variance relief from the Board under § 3103.2 of the Zoning Regulations, which is the subject of this application. Under the Zoning Regulations, Mr. Freschi is entitled to area variance relief if he demonstrates: (1) an exceptional or extraordinary situation or condition; (2) that creates a practical difficulty; and (3) that the granting of the variance will not cause substantial detriment to the public good or substantially impair the intent, purpose or integrity of the zone plan. 11 DCMR § 3103.2. During the public hearing on May 4, 2004 and in his prehearing submissions, Mr. Freschi demonstrated that the proposed project meets the requirements of § 3103.2.

FBHDC also argues that "there was no showing that the subdivision that created this lot was ever intended to create a dwelling lot as opposed to any other permitted alley or backyard use." The FBHDC is mistaken. Lot 95 could not have been created as a record lot unless it complied with the minimum area and other requirements of the Zoning Regulations at the time of the subdivision. Moreover, the Zoning Regulations expressly allow a single family dwelling to be constructed on an alley lot if the lot abuts an alley that is at least thirty feet wide and has street access. 11 DCMR § 2507.2. Lot 95 meets these requirements. Accordingly, the Zoning

Regulations contemplate the use of the Property for a single family dwelling. Furthermore, the intent of the owners who subdivided their property is inapposite here. Prior owners of the Property have used it as an unsightly surface parking lot. Mr. Freschi has requested to use the Property as a one-family dwelling. The proposed use is permitted under the Zoning Regulations, and will bring more benefit to the neighborhood than the parking lot use.

B. Mr. Freschi should not be Required to Demonstrate "Undue Hardship"

Citing *Taylor v. District of Columbia Board of Zoning Adjustment*, 308 A.2d 230, 253 (D.C. 1973), FBHDC contends the variance relief required is so great that the Board should "attach the corresponding greater burdens to this application."

The more stringent "undue hardship" burden of proof applies only to use variances. *See Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). In the context of an area variance, the applicant is only required to demonstrate "practical difficulty." *Id.* In *Taylor*, the D.C. Court of Appeals held that when an area variance is so extreme that has the effect of rezoning a property to allow uses that are not permitted by the underlying zoning it may be treated as a hybrid use/area variance. The applicant in *Taylor* requested area variances to construct twenty-seven row houses in the R-1-B Zone District. *Id.* at 232. The Court found that the row dwellings would almost triple the family density and would be out of character with the other single-family detached properties in the Zone District. Thus, the Court held that the requested area variance was so extreme that it constituted a hybrid use/area variance. at 233.

The present application does not present the extreme situation represented in *Tyler*. Here, Mr. Freschi requests variance relief which would allow him to construct one row dwelling in the R-3 Zone District – a district designed to permit row dwellings. Further, the proposed project is not out of character with the other properties in the area. Square 16 is developed with row

houses and large apartment buildings. As Mr. Freschi demonstrated during the public hearing, alt least three other properties in Square 16 are single-family row dwellings which are not attached on both sides. Further, the proposed project will not significantly increase the density in the area. It consists of one single-family row house in a Zone District designed to permit row houses. Accordingly, Mr. Freschi should only be required to demonstrate practical difficulty – not undue hardship.

C. Mr. Freschi's Practical Difficulty is not Self-Imposed

Again citing *Taylor*, FBHDC contends the Board should not grant variance relief to Mr. Freschi because the exceptional shallowness of the Property is a "self-imposed condition."

The cause of Mr. Freschi's practical difficulty is the downzoning of the Property from R-5-B to R-3. In 1969, when the lots were created, the Property conformed to the requirements of the R-5-B Zone District. The Property was not downzoned to R-3 until 1992 – over twenty years later. The applicant in *Tyler*, on the other hand, personally created the exceptionally shallow lots that were the subject of his application. Those lots did not conform to the zoning requirements in effect at the time of subdivision. In this case, the downzoning of the Property created the practical difficulty– not the actions of Mr. Freschi.

D. The Proposed Project is a Row Dwelling that is Permitted in the R-3 Zone District

The proposed single-family home is a row dwelling. FBHDC argues that the proposed project should be "redefined" as a "detached or semi-detached dwelling." FBHDC further argues that § 320.1 requires all row dwellings in the R-3 Zone District to be constructed in groups of three.

FBHDC's approach does not make sense in light of the express provisions of the Zoning Regulations and the homes actually constructed in Square 16. Row dwellings are permitted as a

matter-of-right in the R-3 Zone District. 11 DCMR § 320.3(b). Section 320.1 provides that the R-3 District "is designed essentially for row dwellings." That section also provides for row dwellings to be "mingled with one-family detached dwellings, one,-family semi-detached dwellings, and groups of three (3) or more row dwellings." 11 DCMR § 320.1.

The Zoning Regulations define the type of dwelling, in part, by the number of side yards provided. Thus, a "row dwelling" is defined as "a one-family dwelling having no side yards." 11 DCMR § 199.1 (emphasis supplied). A "one-family detached dwelling" is "a one-family dwelling, completely separated from all other buildings and having two (2) side yards." *Id.* (emphasis supplied). A "one-family semi-detached dwelling" is "a one-family dwelling, the wall on one(1) side of which is either a party wall, or lot line wall, having one (1) side yard." *Id.* (emphasis supplied).

The proposed project meets the definition of "row dwelling" because it is a one-family dwelling having no side yards. Under § 320.3(b), a row dwelling is permitted as a matter-of-right in the R-3 Zone District. The proposed project cannot be redefined to be a detached or semi-detached dwelling as requested by FBHDC because it does not meet the requirements of the definitions. Further, as demonstrated during the public hearing on May 4, 2004, Square 16 contains several row dwellings which are not attached to other buildings. One of them, which was constructed only two years ago, was appealed to the Board on other grounds and was upheld. *Appeal No. 16830 of Advisory Neighborhood Commission 2A and Richard J. Price.* If the Board accepts the arguments of FBHDC, it will render a large number of row dwellings in the city nonconforming and will render several sections of the Zoning Regulations meaningless. The Board rejected a similar argument in *Appeal No. 16935 of Southeast Citizens for Smart Development.*

III. CONCLUSION

The arguments presented by FBHDC have no basis in case law or the Zoning Regulations. Accordingly, they should not be considered by the Board in deciding whether to grant the relief Mr. Freschi requests.

Respectfully submitted,

Shaw Pittman LLP

By: _____
Phil T. Feola

_____
Ashleigh Dale Horne

Document #: 1404311 v.1

ShawPittman LLP

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing was sent via first class mail this 26th day of May, 2004 to:

Joel Lawson
Office of Planning
801 North Capitol Street, NW, 4th Floor
Washington, DC 20002

Dorothy Miller
Chair, ANC 2A
2440 Virginia Avenue, N.W.
No. D206
Washington, DC 20037

Foggy Bottom Historic District
Conservancy
c/o John Bond, Esq.
3251 Old Lee Highway
Suite 516
Fairfax, VA 22030

Lisa Farrell
2523 Queen Anne's Lane, N.W.
Washington, DC 20037

Ashleigh Dale Horne

Document #: 1404232 v.1