ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

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

June 1, 2004

By Hand Delivery

Mr. Geoffrey Griffis, Chairman
District of Columbia Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, DC 20001

17154

Re: BZA Application No. ~~71754~~ –Bruno Freschi

Dear Chairman Griffis and Members of the Board:

On behalf of Bruno Freschi, the applicant in the above-mentioned matter, enclosed please find the applicant's Proposed Findings of Fact and Conclusions of Law. If you have any questions or concerns, please feel free to contact either of the undersigned.

Sincerely,

Phil Feola

Ashleigh Dale Horne

Enclosure

cc: Dorothy Miller, ANC 2A
Joel Lawson, Office of Planning
Lisa Farrell
Foggy Bottom Historic District Conservancy, c/o John Bond, Esq.
Bruno Freschi

Document #: 1405657 v.1

BZA
Case No. 17154
Exhibit No. 45

Board of Zoning Adjustment
District of Columbia
CASE NO. 17154
EXHIBIT NO. 45

APPLICANT'S PROPOSED FINDINGS OF FACT

AND CONCLUSIONS OF LAW

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BOARD OF ZONING ADJUSTMENT

Application No. 17154 Bruno B. Freschi, pursuant to 11 DCMR § 3103.2 for a variance from the lot width and lot area requirements under section 401, a variance from the lot occupancy requirements under section 403, and a variance from the rear yard requirements under section 404 to allow the construction of a single-family row dwelling in the FBOD/R-3 District at premises rear of 935 26th Street, N.W. (Lot 95, Square 16).

HEARING DATE: May 4,2004

DECISION DATE: June 8, 2004

DECISION AND ORDER

The Applicant in this case is Bruno B. Freschi, the owner of the property located at rear of 935 26th Street, N.W. (Lot 95, Square 16) (the "Property"). Mr. Freschi filed an application with the Board of Zoning Adjustment on February 20, 2004 for area variances under 11 DCMR § 3103.2, to allow the construction of a single-family row dwelling on the Property, which is located in the FBOD/R-3 District. The zoning relief requested in this application is self-certified pursuant to 11 DCMR § 3113.2.

Following a public hearing, the Board voted _____ on June 8, 2004 to approve the application.

PRELIMINARY MATTERS:

1. Application. The application requests area variances under 11 DCMR § 3103.2, to allow the construction of a single-family row dwelling on an alley lot in the FBOD/R-3 District. The original application proposed by Bruno Freschi (the "Applicant") requested variances from the lot area, lot width, lot occupancy, height, and rear yard requirements of the zoning regulations. Prior to submitting the current application, Mr. Freshi obtained concept approval of the proposed project from the Historic Preservation Review Board. As a result of the HPRB design review process, Mr. Freschi lowered the height to meet matter-of-right guidelines. Accordingly, the Applicant withdrew his request for the height variance during the public hearing. The zoning relief requested in this application is self-certified pursuant to 11 DCMR § 3113.2.

2. Notice of Application and Notice of Hearing. By memoranda dated February 25, 2004, the Office of Zoning advised the D.C. Office of Planning, the Zoning Administrator, the Department of Transportation, the Councilmember for Ward 2, and the Advisory Neighborhood Commission (ANC) 2A, the ANC for the area within which the subject property is located, of the application. The Board scheduled a public hearing on the application for May 4, 2004. Pursuant to 11 DCMR § 3113.13, the Office of Zoning, on February 26, 2004, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 2A notice of the May 4th hearing. Notice was also published in the D.C. Register. The Applicant's affidavit of posting and maintenance indicates that two zoning posters were posted beginning on April 19, 2004, in plain view of the public.

3. Requests for Party Status. ANC 2A was automatically a party in this proceeding. The Board granted party status in opposition to the application to the Foggy Bottom Historic District Conservancy ("FBHDC"), members of which reside in the immediate area of the subject property, and Lisa Farrell, who resides at 2523 Queen Anne's Lane, N.W.

SUMMARY OF EVIDENCE:

A. Project Description and Applicant's Case

1. The property that is the subject of this application is Lot 95 in Square 16, located at the premises known as rear of 935 26th Street, N.W. The Property is an alley lot located behind and to the east of 935 26th Street, N.W. (Lot 94 in Square 16). Lot 94 is improved with a four-story, 1970s, single-family row dwelling, which also is owned and occupied by Mr. Freschi. Immediately to the south of the Property, are two of the 1960s three story, brick, row dwellings that front on Queen Anne's Lane. Immediately to the north is a four-story apartment building. The Property abuts Hughes Mews, a thirty foot wide alley, to the east. Across the alley to the east is an eight-story apartment building.

2. The Property presently is paved with asphalt. In the past, it has been used for parking by the previous owner of Lot 94 and other residents of Hughes Mews.

3. Pursuant to Zoning Commission Order No. 714, effective April 17, 1992, the Property is located in the Foggy Bottom Overlay District (FBOD)/R-3 Zoning District. Prior to that Order, the Property was located in the R-5-B Zoning District. The Property also is located in a historic district.

4. Lots 94 and 95 at one point comprised a single lot. The lot was subdivided per a subdivision plat dated January 6, 1969. The Property was zoned R-5-B at that time.

5. The existing Hughes Mews row dwelling development was constructed during the 1960's. Most of the row dwellings developed at that time are located on lots which are now substandard and not in compliance with the requirements of the current FBOD/R-3 zoning.

6. Under § 401.3, the minimum lot area for a row dwelling is 2000 square feet, and the minimum lot width is twenty feet. The maximum lot occupancy allowed under the current zoning is sixty percent. The minimum rear yard setback is twenty feet. The maximum allowed height under § 2507.2 is thirty feet. The Property has a lot area of 926.67 square feet and a lot width of 18.17 feet. The proposed project provides a rear yard setback of eighteen feet and has a lot occupancy of 63.3%.

7. The Applicant presented testimony and evidence from Mr. Freschi, who the Board qualified as an expert in architecture, and Gladys Hicks, who the Board qualified as an expert in zoning.

8. Mr. Freschi testified about the land uses prevalent in the area. Mr. Freschi observed that the area is essentially residential with a mix of densities including major, ten story condominiums and smaller, single-family row dwellings.

9. Mr. Freschi also explained the proposed project. He stated that the proposed project consists of a three-story, thirty-foot tall single-family row dwelling with a roof deck and a bay window. It features two bedrooms, a den, three bathrooms, and a garage. Mr. Freschi noted that the total square footage of the proposed row dwelling is between 1,700 and 1,730 square feet. He stated that the proposed project will occupy sixty-three percent of the Property and will provide an eighteen foot rear yard. The Property is 18.17 feet wide and 51 feet deep. Because the Property is situated between the rear yards of the Queen Anne's Lane row dwellings and the side lawn of a five-story apartment building, it will not be attached to another row dwelling on

either side at the time of construction. The proposed project will be constructed from lot line to lot line and will provide no side yards.

10. Mr. Freschi testified as to similar row dwellings located in the area. He submitted evidence showing photographs of three unattached row dwellings located on Hughes Mews, none of which provides a side yard.

11. Mr. Freschi also testified about the review process before the Historic Preservation Review Board ("HPRB"). He noted that the HPRB initially expressed concern about the proposed height of the house and the penthouse located on the roof. In response, Mr. Freschi lowered the height by 1.6 feet, which allows the proposed project to be constructed within the matter-of-right height requirements. Mr. Freschi also removed the equipment initially housed on the roof and limited the use of the roof structure so as to provide only roof access. Mr. Freschi also relocated the roof access structure to the north side of the Property to reduce any impact on the row dwellings to the south.

12. Mr. Freschi submitted a staff report and recommendation, which was adopted by HPRB. The report first noted that Mr. Freschi had reduced the footprint and height of the proposed rooftop penthouse in response to HPRB's concerns. The report found that the Property's distance from any of the lower, historic buildings in the area, and the proximity of three and four story non-contributing structures suggests that the height of the proposed building is not incompatible with the character of the historic district. The report recommended that the Board approved the scale and general massing of the concept.

13. Mr. Freschi further testified regarding the difficulties of designing a house on the Property. Mr. Freschi first observed that the Property is an exceptionally narrow and shallow lot. He noted that the primary challenge resulting from this condition was achieving a habitable,

livable home that would provide adequate living space and adequate light and air. He further incorporated the pattern of three windows per floor, which is the prevailing fenestration pattern for existing buildings in the area. Mr. Freschi testified that the rear yard variance is required in order to accommodate a bay window. He explained that the bay window is necessary to provide more light, of a better quality, to the main rooms of the house. He further noted that the bay window provides a better aesthetic on the rear elevation and makes the top three floors of the house more livable. He testified that the bay window would result in little impact on neighboring properties because it does not exist at the ground level, has a footprint of only two feet, and is located to the north side of the Property away from the row dwellings to the south.

14. Mr. Freschi concluded that the granting of the requested variances would not create a detrimental effect on the zone plan or the neighborhood, because the proposed project represents a contextual design that reflects the height, massing, and window fenestration predominant in the area. In addition, Mr. Freschi stated that he designed the proposed project to complement both the row dwellings located in the Hughes Mews development to the south and the existing modern, high-rise condominium and apartment buildings located to the north and east of the Property. Accordingly, the proposed project will provide an appropriate buffer between the row dwelling and high-rise uses. Mr. Freschi again noted that the proposed row dwelling is similar to at least three other unattached row dwellings located on Hughes Mews.

15. Gladys Hicks testified about the zoning implications of the proposed project. She testified that the use as a single-family row dwelling is permitted as a matter-of-right use on the Property. However, due to the lot's unusually small size, any building on the Property would require variance relief. In order to construct a single-family house on an alley lot, the width of the alley must be thirty feet and must provide access to a dedicated street. The maximum height

allowed, measured from the mid point of the front of the structure to the ceiling height of the top story is thirty feet. Ms. Hicks testified that Hughes Mews and Queen Anne's Lane, the alleys abutting the Property and providing access to 26th Street, are both thirty feet wide.

16. Ms. Hicks testified that she had performed research at the Office of the Surveyor and the Office of Zoning and determined that the row dwellings along Queen Anne's Lane and Hughes Mews were located in the R-5-B Zone District in the early 1960's. She further testified that those row dwellings would not meet the width of lot and lot area requirements of the current FBOD/R-3 zoning.

17. Ms. Hicks further testified as to the uniqueness of the Property and the propriety of variance relief. She determined that the downzoning of the Property after the lot had been platted was a unique and exceptional situation which results in a peculiar and practical difficulty for Mr. Freschi. She further testified that the construction of a single-family row dwelling on this site would not violate the purpose or intent of either the FBOD or the R-3 Zone District.

18. Ms. Hicks testified as to the characterization of the structure under § 199.1 of the Zoning Regulations. She stated that the proposed project meets the definition for a "row dwelling" because it is a single-family home which will be constructed from lot line to lot line. Section 199.1 defines a row dwelling as a one-family dwelling having no side yards.

19. Ms. Hicks also testified that the proposed project is not affected by § 401.6 of the Zoning Regulations, which requires all lots created after February 15, 1966 that are to be used as single-family dwellings to provide a certain amount of street frontage. Ms. Hicks testified that § 401.6 is superceded by § 2507, which specifically permits the construction of a one-family dwelling on a lot that abuts an alley that is at least thirty feet wide.

20. Ms. Hicks testified that the rooftop penthouse does not require a special exception. She observed that the Office of the Zoning Administrator had interpreted the setback requirements for roof structures on a row dwelling to apply only to the front and rear setback. She testified that the proposed rooftop structure meets the setback requirements for the front and the rear of the Property.

B. Government Reports and Testimony

1. The District of Columbia Office of Planning ("OP") reviewed the application for compliance with the standards for granting an area variance. In its report dated April 27, 2004, the Office of Planning determined that variances to lot area and lot with are unavoidable if a dwelling is to be developed on the Property. OP recommended that the requested lot occupancy and rear yard setback variances, however, be denied. OP observed that a side yard setback may be required and that a special exception may be required for the roof structure setback. Even so, OP stated that it does not have any major concerns with approving a side yard setback variance or roof structure setback special exception, if required. OP also observed that the provision of a minimal side yard along the south elevation could lessen the detrimental public impacts on neighboring properties. OP determined that the FBOD was intended to reduce the potential density in the area, and concluded that the addition of the row dwelling represents a density of development that may generally be in excess of what is considered "moderate" density. OP noted that the proposed project will not negatively impact traffic in the ally but may impact light, air, and privacy for the adjacent lots to the south.

2. In testimony during the public hearing and presentation of the report to the Board, the Office of Planning noted its concern that the proposed project may be considered a semi-detached or detached dwelling based on past BZA cases. Such an interpretation would require the applicant to provide at least one side yard. The representative of OP testified that the

question is difficult and that he did not have an opinion about whether the proposed project should be considered a detached or semi-detached dwelling. OP also clarified that the addition of one row dwelling to the area would not necessarily cause the density of development to be in excess of moderate density. However, OP stated that the density of development could be increased beyond the intent of the Zoning Regulations if all similar lots were developed in the future.

3. OP also stated that the application was referred to the National Park Service and Water and Sewer Authority. The National Park Service noted no concern with the proposed project. The Water and Sewer Authority also noted no concern, provided neither water nor sewer pipes are installed to the garage.

4. The Department of Housing and Community Development ("DCHD") also reviewed the application. DCHD recommended against approval, finding Square 16 is already densely developed. DHCD expressed concern that the size and scale of the proposed house is too large for the existing lot. It also expressed concern that the proposed house will affect the light, air, and views of the adjacent apartment buildings and alley dwellings.

C. Support of Advisory Neighborhood Commission (ANC 2A)

1. The ANC voted on April 21, 2004 to support the application for all requested variances. The ANC report, adopted by a vote of 3-0, noted with approval that Mr. Freschi had modified the project to accommodate changes suggested by HPRB and the Commission of Fine Arts. The ANC found the changes to be acceptable and voted unanimously to approve the project. Commissioner Dorothy Miller of ANC 2A also testified at the hearing that the ANC supports the application and looks forward to having more residential development in the area.

D. Parties and Persons in Opposition to the Application.

1. Lisa Farrell testified in opposition to the application. Ms. Farrell testified that she owns a row dwelling located at 2523 Queen Anne's Lane, immediately abutting the Property to the south. She testified that the proposed house was too big for such a small lot and that it would significantly affect light and air, privacy, and the property values of her home. She also argued that the height of the proposed row dwelling was too tall and that the side wall would be located eighteen feet from her house. She further contended that the proposed roof deck would enable the occupant of the proposed project to see into her house. She further argued that the application requested too many variances and that the granting of the application would defeat the purpose of the Zoning Regulations.

2. During cross-examination, Ms. Farrell stated that her house is approximately 2,100 square feet, which is 400 square feet larger than the proposed project. Ms. Farrell also stated that her lot is fourteen feet wide, which is four feet narrower the Property. Finally, she stated that her house is twenty-nine feet tall, which is only one foot shorter than the proposed project.

3. FBHDC also testified in opposition to the application. FBHDC argued that the lot was too small for a dwelling, that any development on the lot would be inappropriate, and that the lot was not a "buildable lot." FBHDC further contended that the proposed project does not qualify as a row house and that a row house must be part of a development of at least three attached buildings. FBHDC also argued that the applicant had not demonstrated undue hardship because he purchased the Property after it had been subdivided and after the FBOD/R-3 Zone District had been in place for many years. Finally, FBHDC argued that the area was downzoned for the purpose of preventing the construction of dwellings on substandard lots.

4. In addition, letters in opposition to the application were received from members of the surrounding neighborhood. Generally, these letters argued that the application should be denied because it requests too many variances.

FINDINGS OF FACT:

1. The Applicant is seeking area variance relief from three sections of the Zoning Regulations; § 401.3 – minimum lot area and minimum width of lot; § 403.2 – percentage of lot occupancy; and § 404.1 – minimum rear yard setback.

2. The Applicant proposes to construct one single-family dwelling comprising approximately 1,700 square feet of residential space and a garage. It will have a building height of thirty feet, which is the height permitted by § 2507.4. The lot area of the Property is 926.67 square feet, which is 1073.33 square feet less than the 2000 square foot minimum lot area required under § 401.3. The additional variance relief the applicant requests is minor. The width of lot for the Property is 18.17 feet, only 1.83 feet less than the 20 foot requirement set forth in § 401.3. The applicant proposes a rear yard of 18 feet, which is only 2 feet less than the 20 feet required by § 404.1. The proposed project will have a lot occupancy of 63.3%, which is only 3.3% greater than the maximum lot occupancy of 60% permitted under § 403.2.

3. Based on the testimony of Mr. Freschi, the report of HPRB, and the report and testimony of ANC 2A, the Board finds the applicant has designed the project in a way that will complement the neighborhood and that will minimize any adverse impacts on adjacent properties. The design is sensitive to both the single-family row dwellings to the south and the more modern, multi-family high-rises to the north and east.

4. Based on the photographic evidence submitted by the applicant, the Board finds the Hughes Mews neighborhood contains several row dwellings which provide no side yards and which are not, and cannot be, attached on either side to another building.

5. Based on the testimony of Mr. Freschi, Ms. Hicks, and ANC 2A, the Board finds that OP's concerns that the proposed project will increase the density in the area beyond what is contemplated in the Zoning Regulations are unfounded. The addition of a modest single-family dwelling in a residential Zone District will not adversely affect the density of the area.

6. The Board credits the testimony of Ms. Hicks that the Zoning Administrator has traditionally interpreted the roof structure setback provisions for row dwellings to apply only to the front and rear setback.

CONCLUSIONS OF LAW AND OPINION:

A. The Requested Variances

The Board of Zoning Adjustment is authorized under the Zoning Act of 1938, approved June 20, 1938 (52 Stat.797, as amended; D.C. Code § 5-424(g)(2)), to grant area variances as provided in the Zoning Regulations. To be entitled to an area variance under 11 DCMR §3103.2, the Applicant must demonstrate: (i) the property is unique because of its size, shape, topography, or another exceptional or extraordinary situation or condition; (ii) the owner would encounter practical difficulties as a result of the strict application of the D.C. Zoning Regulations; and (iii) 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.

The Board concludes that the applicant has met the test for the granting of the requested area variance relief. It finds the subject property is affected by an exceptional or extraordinary situation or condition, that the strict application of the Zoning Regulations will result in practical

difficulties to the applicant, and that the intent, purpose, and integrity of the Zone Plan will not be impaired by granting the requested variances.

The Board concludes that the Property is affected by an extraordinary and exceptional situation in that the Property was platted under the R-5-B zoning in effect at that time and met all the requirements of the R-5-B Zone, but subsequently was "down-zoned" to the FBOD/R-3 Zoning District. This resulted in a lot that is exceptionally narrow and shallow under the current zoning.

The Board also concludes that a strict application of the Zoning Regulations will result in practical difficulty to the applicant because no dwelling can be constructed on the Property under the current Zoning Regulations. In addition, the applicant faces practical difficulties in designing a project that will provide adequate light and air to the interior living space while maintaining the pattern of fenestration prevalent in the other dwellings in the Hughes Mews neighborhood.

Finally, the Board finds that granting the requested variance relief will not cause substantial detriment to the public good and will not impair the intent, purpose, and integrity of the Zone Plan. Pursuant to 11 DCMR § 320, the R-3 Zone District is designed essentially for row dwellings. The proposed project also furthers several goals of the Foggy Bottom Overlay District. The proposed project will maintain and enhance the low scale residential character of the neighborhood as described in 11 DCMR § 1521.2. It also will enhance the low scale harmony of rhythmic townhouses prevalent in the area. 11 DCMR § 1521.3(a). Moreover, the applicant has accommodated the concerns expressed by Ms. Farrell and FBHDC by lowering the height of the building and the roof structure and by relocating the bay window and roof structure away from the dwellings abutting the Property to the south.

B. Characterization of the Use

Row dwellings are permitted as a matter-of-right in the R-3 Zone District. 11 DCMR § 320.3(b). The Zoning Regulations defines the term "row dwelling" as "a one-family dwelling having no side yards." 11 DCMR § 199.1. A side yard is not required in the R-3 Zone District except for one-family detached dwellings and one-family semi-detached dwellings. 11 DCMR §§ 405.9, 405.1, 405.2, 405.6. Under § 405.3, however, all new one-family dwellings that do not share a common division wall with an existing building or a building being constructed together with the new building must have a side yard on each resulting free-standing side. 11 DCMR § 405.3.

Prior BZA determinations addressing this issue have not been clear. For example, in *Appeal No. 16811 of David and Janet Pritchard*, we held § 405.3 precluded the owners from constructing an addition that would convert their semi-detached dwelling to a row dwelling as a matter-of-right. The proposed addition would have extended the house to the entire width of the lot. However, the house would not be attached on one side because the subject property adjoined the rear yards of five row dwellings. We concluded that, although a row dwelling is a matter-of-right use in the R-4 District, § 405.3 required the owners to provide a side yard for the unattached wall because it was the "resulting free standing-side." However, we effectively overturned *Pritchard* in *Appeal No. 16935 of Southeast Citizens for Smart Development. SCSD* involved the appeal of building permits for a series of "semi-detached dwellings," each of which provided one lot line wall and one side yard. The houses were not attached to each other and were separated by only one side yard. SCSD claimed the lot line walls were "free-standing walls" under *Prichard* and, as a result, also required a side yard. We upheld the permits, reasoning that SCSD's argument would lead to the absurd result of rendering meaningless the Zoning Regulations which permit a semi-detached dwelling as a matter-of-right use. We further

concluded that § 405.3 requires only one side yard for one family semi-detached dwellings, and stated "[t]o the extent *Pritchard* suggests otherwise, it is overruled."

In this application, we find the proposed project is appropriately characterized as a "row dwelling" under 11 DCMR § 199.1. The proposed project clearly meets the definition of "row dwelling" under § 199.1 because it is a "one-family dwelling having no side yards." Row dwellings are expressly permitted in the R-3 Zone District. To characterize this project as a one-family detached dwelling would lead to an absurd result. The R-3 Zone District provides for a minimum width of lot of 20 feet. This lot width applies regardless of the configuration of other lots surrounding the subject lot. To require an eight – foot side yard on each side of a dwelling that is constructed on a 20-foot lot would result in the requirement of a 4-foot wide dwelling. As we explained in SCSD, such an interpretation would lead to an absurd result in that it would render meaningless those provisions of the Regulations which permit row dwellings as a matter-of-right use. Further, such an interpretation would render nonconforming numerous row dwellings in the District which are not attached to other buildings.

The Board concludes that the proposed row dwelling requires no side yards.

VOTE:

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, FAIA

Director, Office of Zoning

FINAL DATE OF ORDER:_____

Document #: 1403214 v.1

Document #: 1403214 v.1