GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 17264 of Michael and Jill Murphy, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements of § 403, a variance from the rear yard requirements of § 404, and a variance from the nonconforming structure requirements of § 2001, to construct a deck at the rear of a single-family row dwelling in the CAP/R-4 District at premises 407 E Street, N.E. (Square 812, Lot 42).

HEARING DATE: March 15, 2005
DECISION DATE: March 15, 2005 (Bench Decision)

DECISION AND ORDER

This application was submitted on October 27, 2004, and again, with more specificity, but no substantive change, on December 28, 2004, by Michael and Jill Murphy ("Applicants"), owners of the property that is the subject of this application ("subject property"). The self-certified application requested two variances, from the lot occupancy requirements of 11 DCMR § 403, and the rear yard requirements of 11 DCMR § 404. The variances are necessary to allow the retention of a second-story rear deck, which was constructed during the summer of 2003. Although the Applicants built the deck without the proper permit, the Department of Consumer and Regulatory Affairs ("DCRA") later issued a building permit sanctioning its construction. Subsequently, however, DCRA issued a Stop Work Order, apparently for working without a permit, and at that time, the Applicants realized they needed variance relief to retain the deck.

The Board of Zoning Adjustment ("Board" or "BZA") held a hearing on the application on March 15, 2005, at which it voted 4-0-1 to approve the application, granting the variances, and permitting retention of the deck.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated January 4, 2005, the Office of Zoning ("OZ") gave notice of the filing of the application to the Office of Planning ("OP"), the District Department of Transportation, Advisory Neighborhood Commission ("ANC") 6C, the ANC within which the subject property is located, Single Member District/ANC 6C08, and the Councilmember for Ward 6. Pursuant to 11 DCMR § 3113.13, OZ published notice of the public hearing in the *District of Columbia Register* and on January 12, 2005, sent such notice to the Applicants, all property owners within 200 feet of the subject property, and ANC 6C.

Requests for Party Status. Mr. and Mrs. Nasser Nejad, the Applicants' immediate neighbors, were granted party status to oppose the application. The Nejads claimed that the Applicants' deck blocked their sunlight and negatively impacted their privacy and the drainage of water from their property, allegedly causing damaging moisture and dampness in their home.

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Government Reports. The Office of Planning filed a report with the Board dated March 8, 2005 recommending approval of the variances from the lot occupancy, rear yard, and nonconforming structure requirements. OP opined that the application met the variance tests, and that the deck would not be inconsistent with the Comprehensive Plan, but would be less intrusive than the old, two-level deck.

There were no other government reports filed in this case.

ANC Report. The ANC submitted a letter dated February 28, 2005, stating that, on February 9, 2005, during a properly-noticed meeting with a quorum present, it had considered the application, and voted 7-1 to support it.

Persons in Support. The Board received several letters in support of the application from neighbors, as well as a letter in support from the Capitol Hill Restoration Society which stated that the new deck "substantially reduces the interference with light, air, and privacy when compared with the previous two-story" deck.

FINDINGS OF FACT

1. The subject property is located at address 407 E Street, N.E, in Square 812, Lot 42. It is in an R-4 zone district and within both the Capitol Interest Overlay District and the Capitol Hill Historic District.

2. The property is developed with a three-story row dwelling, which is one in a series of nine row dwellings and is a contributing building to the Historic District.

3. When the Applicants purchased the property in 1997, the row dwelling had a two-level rear deck and was being used as a flat, with one unit consisting of the first floor and the other unit consisting of the two upper floors.

4. The lower level of the old two-level deck consisted of a 14' by 14' wooden platform, extending out from the second floor of the dwelling and topped by an open wooden fence. The upper level consisted of an 8' by 14' wooden platform, extending out from the third floor of the dwelling and enclosed with sight-tight wooden walls.

5. At some point after the Applicants purchased the property, they tore down the two-level rear deck, which had fallen into disrepair and was no longer structurally sound.

6. During June and July of 2003, the Applicants replaced the old two-level deck with a new one-level rear deck, the platform of which is 8' by 14' and extends out from the second floor of the dwelling. This new deck has an open-slatted wooden fence.

7. As the subject dwelling is a contributing building to the Capitol Hill Historic District, the Historic Preservation Office reviewed and approved the construction of the new deck.

8. Mr. Nejad, the Applicants' adjacent neighbor and the party opponent herein, first complained to the Applicant on April 18, 2004 about alleged impacts of the Applicants' construction. Specifically, Mr. Nejad claimed that rust on his dishwasher and stove and the loosening of bathroom floor tiles were due to the Applicants' remodeling, (which had not yet begun) and particularly to construction in the Applicants' rear yard.

9. In June/July of 2003, when the new deck was built, the Applicants did not have a permit for it, but they attempted to rectify this oversight. DCRA therefore included the deck as part of Building Permit No. B465450, issued on August 27, 2004, which permitted interior renovation work. *See,* Exhibit Number 9.

10. The Applicants extensively renovated the interior of the dwelling. The renovations retained the separate electrical and mechanical infrastructures necessary for a flat, but once the renovations were completed, the Applicants intended to occupy the entire dwelling for the foreseeable future.

11. On October 26, 2004, after the new deck was completed, but before the final completion of the remodeling, DCRA issued a Stop Work Order for the construction at the property, based on a complaint from Mr. Nejad. The nature of the complaint was not evident in the record.

12 It was at this time, *i.e.,* October of 2004, that the Applicants learned that the construction of the new rear deck, now completed for over a year, required zoning relief, and that such relief should have been applied for prior to the deck's construction.

13. The Applicants therefore applied to the Board for relief from the lot occupancy and rear yard requirements of the R-4 district. With the new deck, the lot occupancy of the row dwelling is approximately 78%, where only 60% is permitted in the R-4 district. The new deck decreases the rear yard to approximately 12 feet, where 20 feet is required. 11 DCMR §§ 403 and 404. [1]

14. Even without the new deck, the subject property is nonconforming as to lot width and lot area. Its width is approximately 15 feet, but 18 feet is required in the R-4 district. Its lot area pre-dates the Zoning Regulations, and at 753 square feet, is less than half the 1800 square feet required. *See,* 11 DCMR § 401. While 11 DCMR § 2001 permits additions to nonconforming structures, devoted to conforming uses, Applicants cannot meet the conditions pursuant to which such additions are permitted. *See,* 11 DCMR § 2001.3.

15. The new deck is modest in size and is identical in size to two other decks on the same block.

16. The new deck is significantly less intrusive than the old deck, which had two levels and solid walls around the upper level.

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[1]There were some discrepancies in the record as to the correct lot occupancy and rear yard calculations after the addition of the new deck, but all proffered calculations were such that variance relief was necessary.

17. The new deck projects out over the Applicants' rear yard, and so affords a view of the adjacent rear yards, but not to any significantly greater degree than is already afforded by the rear windows of the Applicants' dwelling.

18. The new deck does not cast any shadow on the adjacent rear yard. It does cast some shadow on the adjacent rear wall, but this abates before noon each day.

19. As the result of a complaint of water damage from the Applicants' immediate neighbor, Mr. Nejad, including the presence of potentially unhealthy mold in the first floor of his home, two inspectors from DCRA visited the Applicants' property. The neighbor claimed that the water damage was due to the blockage of sunlight allegedly caused by the construction of the new deck and due, generally, to the handling by the Applicants' contractor of the water drainage on the Applicants' property.

20. The report of the DCRA inspector, Mr. Myers, dated August 20, 2004, found no leaks, nothing improper, and that all work met all applicable codes and requirements. Moreover, the report emphasized that the neighbor himself could possibly prevent the claimed water damage by making some needed repairs to his own property.[2]

21. Mr. Nejad has not had any qualified professional assess the cause of the mold growth in the first floor of his home.

CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the Zoning Regulations in order to relieve difficulties or hardship where "by reason or exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any Zoning Regulation would "result in particular and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g)(3), 11 DCMR § 3103.2. The "exceptional situation or condition" of a property can arise out of "events extraneous to the land," including the zoning history of the property. *See, e.g., De Azcarate v. Board of Zoning Adjustment,* 388 A.2d 1233, 1237 (D.C. 1978), *and see Monaco v. Board of Zoning Adjustment,* 407 A.2d 1091, 1097 and 1098 (D.C. 1979). Relief can be granted only "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." *Id.* An applicant for an area variance must make the lesser showing of "practical difficulties," as opposed to the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D.C. Board of*

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[2] The report states: "Mr. Gannon [the contractor] dug up the rear of 407 E St., N.E., so Mr. Gaines [the plumbing inspector] and myself to [sic] could see the storm drainage connection. The connection met all applicable codes and was not connected to Mr. Nasser['s] system, nor was it pitched that way. There was not leaks or evidence that the connection was causing a water problem." The report continued: "I emphasized my previous recommendation that Mr. Nasser seal up the connection between his down spout and storm water connection (he had used to [sic] tin to patch up the hole at this location) but he still needed a bead of caulk. He also need[s] to seal up the crevice between his patio and rear wall. A hard rain would trap rain water run off in this area." Exhibit No. 38, third appended document.

Zoning Adjustment, 287 A.2d 535, 541 (D.C. 1972). The Applicant in this case, therefore, had to make three showings: exceptional condition or situation of the property, that such exceptional condition or situation results in "practical difficulties" to the Applicant, and that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The subject property is smaller and narrower than required in the R-4 zone district. The lot area of the subject property is less than half that required. The property is therefore nonconforming as to both lot area and lot width. Accordingly, the property meets the first prong of the variance test in that the lot is exceptionally small. The property also presents an exceptional situation. The deck at issue in this case was built as a replacement for a previously existing deck that had fallen into disrepair. The new deck was permitted by DCRA approximately a year after the deck was built in DCRA's issuance of a building permit for interior renovation, Building Permit No. 465450. That interior renovation work was predicated in part on the existence of the deck.

The Board finds that this confluence of factors – replacement of an existing deck in disrepair, followed by DCRA sanctioning of the new deck as well as other construction predicated in part on the existence of the deck - constitutes an exceptional zoning history. Accordingly, the subject property is exceptional with respect to its small size and its zoning history.

The practical difficulty to the Applicants if the Zoning Regulations are strictly applied is manifest – Applicants would be required to remove the new deck. Removal of the deck would necessitate re-configuration of the interior of their dwelling. Further, if the dwelling were to be converted back to its previous use as a flat (a matter-of-right use in this R-4 zone), the resident of the upper floors would have no rear yard access.

As to the last prong of the variance test, the new deck does not impair the public good nor does it impair the intent or integrity of the Zone Plan or Regulations. The new deck is a small rear addition which cannot be seen from the street frontage of the dwelling and it has been approved by the historic preservation authorities. It is a significant improvement over the old, two-level deck, which had become an unsafe eyesore in the neighborhood. The new deck will not have a substantial negative impact on the light, air, or privacy of adjoining properties. The deck is open to the sky, with an open-slatted fence, which appears to be approximately 3 to 4 feet tall.

While the opposition party, Mr. Nejad, asserted that the new deck blocks sunlight to his property and thereby causes moisture to accumulate in his dwelling and unpleasant odors and health problems as a result therefrom, the evidence in the record does not support that conclusion. The report of the DCRA Inspector specifically found no connection between Mr. Nejad's problems and Applicants' deck. (Finding of Fact No. 20.) The Board also notes that there is no evidence in the record of complaints of moisture damage related to either the old two-level deck or the newly constructed deck from students who rented and resided in Mr. Nejad's home for approximately 7 years prior to Mr. Nejad's re-establishment of the dwelling as his personal residence. Finally, the Board does not agree that the new deck will impair the privacy of Mr. Nejad's rear yard to any greater extent than it may already be impaired by the rear windows on the adjacent dwellings. Mr. Nejad's row dwelling sits between two attached row dwellings, the

rear windows of which have a view into his rear yard. Also, the privacy of Mr. Nejad's rear yard is no more compromised with the new deck than it was with the old, two-level deck.

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgment of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. Both the Office of Planning and ANC 6C recommended granting the variances requested here and the Board agrees with these recommendations.

Based on the record before the Board and for the reasons stated above, the Board concludes that that Applicant has satisfied the burden of proof with respect to the application for variances from the lot occupancy requirements of § 403, the rear yard requirements of § 404, and the nonconforming structure requirements of § 2001. It is therefore **ORDERED** that the application be **GRANTED.**

VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, and John A. Mann, II to grant; No Zoning Commission member participating or voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each voting member has approved issuance of this Order granting this application.

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

FINAL DATE OF ORDER: NOV 0 4 2005

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPLICATION NO. 17264

As Director of the Office of Zoning, I hereby certify and attest that on NOV 0 4 2005, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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