GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 17369 of Kenneth and Andrea Pogue, pursuant to 11 DCMR § 3103.2, for a variance from the nonconforming structure provisions of §2001.3 to allow an addition to an existing nonconforming structure, a variance from the lot occupancy provision of § 403, and a variance from the minimum rear yard requirement of § 404, to allow an addition to a single-family dwelling in the R-4 District at premise 1029 4th Street, N.E. (Square 806, Lot 23).[1]

HEARING DATE: October 18, 2005
DECISION DATE: November 1, 2005

DECISION AND ORDER

This application was submitted on May 13, 2005 by Kenneth and Andrea Pogue ("Applicants"), owners of the property that is the subject of the application ("subject property"). The Applicants originally requested several variances, including a use variance, to construct a second-story living quarters over their free-standing garage. After working with the District of Columbia Office of Planning ("OP") and before coming to the Board of Zoning Adjustment ("Board"), they changed the nature of their application and the relief requested. During the proceedings before the Board, they asked for three area variances to enable them to construct a rear addition to their existing single-family dwelling and a second floor over the free-standing garage, with a second-story connection between the two.

The Board held and concluded a public hearing on the application on October 18, 2005. After the hearing, the Board held the record open for further submissions from the Applicant, and set a decision date for November 1, 2005. On that date, at a public meeting, the Board voted 4-1-0 to deny the application.

[1]The caption has been changed from that advertised because the relief requested changed during the proceedings on the application. The original relief requested was three area variances (from §§ 2001.3, 2500.4, and 2500.6) and one use variance (from §2500.5). The Applicants revised their application and their requested relief to the three area variances recited here.

BOARD OF ZONING ADJUSTMENT
District of Columbia
Board of Zoning Adjustment
District of Columbia
CASE NO. 17369
EXHIBIT NO. 30
CASE NO. 17369
EXHIBIT NO. 30

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated May 23, 2005, the Office of Zoning ("OZ") gave notice of the application to OP, the District of Columbia Department of Transportation, Advisory Neighborhood Commission ("ANC") 6C, the ANC within which the subject property is located, Single Member District 6C04, and the Council Member for Ward 6. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing in the *D.C. Register* and mailed notice of the hearing to the Applicants, ANC 6C, and all owners of property within 200 feet of the subject property.

Requests for Party Status. There were no requests for party status.

Applicants' Case. The Applicant, Mr. Pogue, testified that his dwelling is in a terrible state of disrepair, that it is currently unlivable, and that he is seeking variance relief to construct a second-story living quarters over his existing garage to be occupied by him and his wife during the renovation work because they cannot afford both the renovations and the cost of living elsewhere.

Government Reports. The Office of Planning submitted a report to the Board dated October 11, 2005, recommending approval of the application. OP opined that the poor condition of the existing single-family dwelling on the subject property presented an exceptional situation of "unlivable conditions," which, in turn presented a practical difficulty in meeting the strict requirements of the Zoning Regulations.

ANC Report. ANC 6C submitted a July 13, 2005 report to the Board in support of the application, but did not elaborate or explain the reasons for its support.

Persons in Support or Opposition. The Capitol Hill Restoration Society filed a letter with the Board dated September 22, 2005, in opposition to the application. The Society opined that the application should be denied because it did not meet any of the prongs of the variance test and therefore failed to meet the burden of proof.

FINDINGS OF FACT

1. The subject property is located at 1029 4th Street, N.E., Square 806, Lot 23, in an R-4 zone district. It is a corner property at the intersection of 4th and L Streets, N.E.

2. The lot on the subject property is a regularly-shaped rectangle with an area of 2,000 square feet and no slope or unusual topographical feature. It is improved with a 2-story plus basement 960-square foot single-family dwelling and a

detached 290-square foot garage in the rear, which opens onto a 10-foot wide alley.

3. The subject dwelling is at the end of a row of row dwellings facing 4th Street, N.E.

4. The subject property is a substandard lot that predates the adoption of the Zoning Regulations in 1958.

5. The subject property is nonconforming for lot occupancy. The Applicants' dwelling occupies 79.5% of the lot, where 60% is permitted. 11 DCMR § 403.

6. The dwelling was built in 1890, but is not designated as a landmark nor is it located in an historic district.

7. The Applicants propose to remove a shed attached to the rear of the dwelling and to add a second story "au pair" suite over the existing one-story garage. They propose to construct a connecting structure between the second story of the existing dwelling and the above-garage dwelling unit.

8. The second story connector would enable the dwelling and the garage to be considered, for zoning purposes, a single building on the lot. *See,* 11 DCMR § 199.1, definition of "Building."

9. The rear yard of the dwelling is 50 feet long, but is partially occupied by the detached garage, leaving an open yard area of approximately the required 20 feet between the rear of the dwelling and the garage. 11 DCMR § 404.

10. The construction of the second story connector would eliminate any rear yard on the subject property because there would be no area "open to the sky." *See,* 11 DCMR § 199.1, definition of "Yard."

11. The Applicants' proposal would not increase the already nonconforming lot occupancy, and might actually reduce it slightly, while adding approximately a foot and a half to the open area behind the dwelling.

12. The Applicants also own and rent out the dwelling attached to the subject dwelling.

13. The Applicants have lived in the dwelling since 1992, and, as of the date of the hearing, had never done any renovations to it.

14. The subject dwelling is in poor condition and the Applicants refer to their need to renovate it as "exigent circumstances."

15. Underground water and rains have eroded the foundation of the subject dwelling, causing structural damage throughout the dwelling. Rain water bleeds through the exterior brick and the seals around the windows. Mold and mildew permeate the basement, resulting in odors and unhealthy air.

16. The Applicants will not be able to live in their house during its extensive renovations and propose to live in the second-story dwelling unit to be constructed over the garage.

17. The Applicants state that they cannot afford to simultaneously renovate their dwelling and pay to live elsewhere, and so need to construct the over-garage dwelling unit to occupy during the renovations.; [2]

18. Once the renovations are complete, the Applicants intend to move back into the dwelling; therefore, the Applicants' "exigent circumstances" are temporary in nature.

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 of 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 the structures existing on the property itself. *See, e.g., Clerics of St. Viator v. D.C. Board of Zoning Adjustment,* 320 A.2d 291, 293-294 (D.C. 1974). 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." D.C. Official Code § 6-641.07(g)(3), 11 DCMR § 3103.2.

---

[2] Applicants did not provide a comparison of costs for living elsewhere during renovation and costs for construction of the over-garage dwelling unit.

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

The Applicants initially claimed that the exceptional condition of the property was that the dwelling was uninhabitable and that they needed to engage in extensive and expensive repairs and renovations in order to make it habitable again. They then argued that strict application of the zoning regulations would create practical difficulties for them because it would prevent them from constructing an alternative abode over their garage where they seek to live while the renovations are on-going. They testified that they could not afford both the necessary renovations and the cost of living elsewhere during the renovations period.

A poorly maintained dwelling, even so poorly maintained as the Applicants here claim, does not amount to an extraordinary situation as envisioned by the Zoning Act and Regulations. Such poor maintenance is not an extraordinary feature of the land or even of the building, but rather a temporary condition that any property may fall subject to and that may be remedied. Many dwellings are in need of maintenance, even serious maintenance, repair, and/or renovation. Accordingly, such a condition is not considered unique or exceptional under zoning law.

Applicants argued alternatively that their lot was exceptional because it was a substandard lot that predated the Zoning Regulations. However, they demonstrated no nexus between that condition and the practical difficulty they were alleging. In order for the Board to grant variance relief, it must find not merely that there is a unique or exceptional condition and that the Applicant is experiencing a practical difficulty in complying with the zoning regulations, but that the practical difficulty arises out of the unique or exceptional condition. "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 of exceptional situation or condition of the property,* the strict application of any Zoning Regulation would "result in particular and exceptional practical difficulties ...." D.C. Official Code § 6-641.07(g)(3), 11 DCMR § 3103.2.

In this case the Applicants allege a practical difficulty in affording to rent elsewhere while renovating their home. However, there is no evidence that this difficulty arises out of the exceptional condition that the property is a substandard lot predating the regulations. Nor does the exceptional condition even prevent them from renovating their

home in accordance with the Zoning Regulations. Applicants' claim that "[t]he requested variance would permit us to save thousands of dollars and allow us to monitor the overall demolition and renovations while still being close by" are economic reasons unrelated to the exceptional condition of their property and therefore cannot justify variance relief.

The last prong of the variance test is no impairment of the public good or of the intent and integrity of the Zone Plan and Regulations. The Board need not reach this issue because if either of the previous tests has not been met, variance relief may not be granted. In this case, the practically difficulty test has not been met. Accordingly, variance relief may not be granted regardless of whether this last prong is met.

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 acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. The ANC did not explain why it supported the application, as set forth above, therefore there are no issues or concerns that the Board can address. OP also supported granting the application, but the Board finds OP's analysis unpersuasive. OP correctly points out that, due to the extent of the nonconforming lot occupancy of the subject dwelling, it is likely that any addition to the dwelling would require zoning relief. However, as explained fully above, there must be a nexus between that condition and the practical difficulty alleged, and that nexus is absent in this case.

For the reasons stated above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to the application for a variance from the nonconforming structure provisions of § 2001.3, a variance from the lot occupancy provision of § 403, and a variance from the minimum rear yard requirement of § 404. Accordingly, it is therefore **ORDERED** that the application be **DENIED.**

Vote: 4-1-0 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II and John G. Parsons to deny; Curtis L. Etherly, Jr. to grant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT.
Each concurring Board member approved the issuance of this order.

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

FINAL DATE OF ORDER: MAY 18 2006

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."