



DONOHUE & STEARNS, PLC

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Via IZIS

Board of Zoning Adjustment for the
District of Columbia
441 4th Street, N.W., Suite 200S
Washington, D.C. 20001

Re: BZA Case No. 20027
520 Groff Court, N.E. (Square 779, Lot 179)
Two-story Side Addition to Alley Dwelling in the RF-3 District

Dear Members of the Board:

On behalf of Kara Benson, the applicant in the above-referenced matter ("Applicant"), please accept this supplemental letter providing legal analysis to support the relief requested in BZA Case No. 20027 as special exceptions. The Applicant was advised to file this analysis to aid the Board in its review of whether the requested relief should be deemed variances or special exceptions.

A. Issue Presented

As set forth in its prehearing statement dated June 26, 2019, the Applicant's proposed addition requires three areas of relief: (i) from the 20-foot height limit to provide a maximum height of 23'-8" (E § 5102); (ii) from the minimum 12-foot setback from the centerline of the north alley to provide only five feet (E § 5106.1); and (iii) from the restriction limiting the ability to extend the nonconforming height of the existing dwelling (23'-8") to the proposed addition (E- § 5201.1(f)). The Office of Planning has advised that relief can only be granted as a variance while the Applicant believes the Zoning Regulations allow the requested relief as a special exception. At issue are Sections 5108 and 5204 of Subtitle E, which appear to limit special exception relief for alley lots solely to the yard requirements. This conflicts with Subtitle E § 5201.2(c), which expressly allows relief from the alley lot setback requirement as a special exception. The question is whether there is a way to harmonize the seemingly contradictory provisions of the regulations so that none of them are rendered meaningless. A copy of Subtitle E, Chapters 51 and 52, are attached for ease of reference as Attachment A.

B. Summary Conclusion

Based on rules of statutory construction, the seemingly contradictory provisions of Subtitle E §§ 5108, 5201.1(c) and 5204 can be harmonized so that all have meaning. As discussed below, this requires reading the special exception yard relief provision under E § 5204 to apply to *new construction* and additions, while special exception relief for the remaining alley lot development parameters only applies to additions or accessory structures under Chapter 51. This is consistent with the legislative history and purpose of the regulations to allow reasonable additions to houses in the residential districts that might not otherwise meet the “exceptional” prong of the variance test. This reading also aligns with earlier drafts of Subtitle E in the 2016 revisions to the Zoning Regulations and the Notice of Proposed Rulemaking published in the *D.C. Register* on May 29, 2015. While the Zoning Commission did not ultimately adopt the May 2015 version, it nevertheless helps inform this inquiry. Harmonizing the conflicting provisions also requires interpreting E § 5100 to apply equally to street-facing lots and alley lots in the RF District, based on a plain reading of the text, which does not exclude alley lots from those provisions.

C. Discussion

1. Background

In 1998, the Zoning Commission added new Section 223 to the 1958 Zoning Regulations (“ZR58”) to allow area relief for additions and alteration to dwellings to be processed as special exceptions instead of variances. The purpose of the amendment was to provide a legal basis for making reasonable additions to single-family dwellings or flats where variance relief was unattainable. The amendment was prompted by a longstanding concern from the Board of Zoning Adjustment that it was forced to deny ordinary additions to a dwelling because homeowners could not meet the “exceptional” prong of the three-part variance test.¹ The text amendment only applied to additions or alterations to a principle residence; new construction on an unimproved lot would still need to meet the variance test if the project deviated from the development parameters. A subsequent amendment in 2007 allowed special exception relief to extend to accessory structures.²

¹ An applicant for a variance must demonstrate that (i) the property is affected by exceptional size, shape or topography or other extraordinary or exceptional situation or condition; (ii) the owner would encounter practical difficulties if the zoning regulations were strictly applied; and (iii) the various would not cause substantial detriment to the public good and would not substantially impair the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. *See* D.C. Code § 6-641.07(g)(3) and 11-X DCMR § 1000.1 (2016); *see also* *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995) (citations omitted).

² *See* Zoning Commission Order No. 07-15 effective October 5, 2007. A 2001 text amendment clarified an internal inconsistency in the language of section 2001.3 to reaffirm that changes to nonconforming structures could be processed as special exceptions even if the property did not conform to the lot occupancy limitations. *See* Zoning Commission Order No. 946 effective September 28, 2001.

2. Special Exception Relief for Additions, Alterations under ZR16

The ZR58 special exception provisions for residential districts were carried over to the Zoning Regulations adopted in 2016 (“ZR16”). Only additions and alterations to existing structures may be processed as special exceptions. With limited exceptions, any new construction requesting deviations from the development standards must be processed as variances. *See, e.g.*, Subtitle D §§ 5108, 5200, 5201; Subtitle F §§ 5107, 5200, 5201. The provisions addressing zoning relief are organized from the general to the specific, as shown on the attached chart (Attachment B) comparing special exception relief under Subtitles D, E and F.

First, the chapters setting forth the specific development parameters conclude with a general statement that deviations may be permitted as a special exception. *See* D § 5108; E § 5108; and F § 5107. This general provision within the chapter on development parameters applies equally to new construction and additions/alterations; there is no limiting language in this section, *except* in requiring compliance with Subtitle X, Chapter 9 and a second, specific section. For both R and RF Districts, the second limiting provision (both identified as Section 5204 in Subtitles D and E) allows side yard relief as a special exception for alley lots, whether it is new construction or an addition to an existing building.

Next, Chapters 52 of Subtitles D, E, and F describe specific relief from the development parameters. Sections 5200 in each subtitle provide generally that the relief from the development standards may be granted as a special exception (per Chapter 52) and that any other relief must be processed as a variance. Section 5201.1 enumerates the development parameters from which relief can be granted. For the R and RF Districts, special exception relief can be granted for proposed additions with respect to (a) lot occupancy, (b) yards; (c) courts; (d) minimum lot dimensions; (e) pervious surface; and (f) the limitations on enlargement or additions to nonconforming structures as set forth in Subtitle C § 202.2.

Section 5201.2 describes the type of situation to which it applies. For the R, RF and RA Districts, each Section 5201 has the same heading, “Addition to a Building or Accessory Structure,” and each Section 5201.2 provides that special exception relief only applies to an addition to an existing building or a new or enlarged accessory structure. That is, with the exception of side yard relief referenced in D § 5108 and E § 5108 in the R and RF Districts, zoning relief for *new construction* can only be processed as a variance.

Significantly, Section 5201.2 in Subtitle E (the RF District) adds a third circumstance in which special exception relief can be granted. Paragraph (c) provides that “a reduction in the minimum setback requirements of an alley lot” may be processed as a special exception.

- 5201.2 **Special exception relief** under this section is applicable only to the following:
- (a) An addition to a residential building;
 - (b) A new or enlarged accessory structure that is accessory to such a building; *or*

(c) A reduction in the minimum setback requirement of an alley lot.

11 DCMR § 5201.2 (emphasis added).

Subtitle E § 5203 separately addresses special exception relief from the building height requirements. It provides that a height of up to 40 feet maximum is permitted by special exception in the RF Districts, which generally limits building height to 35 feet and three stories, while alley buildings are limited to 20 feet and two stories. *See* Subtitle E §§ 503 and 5102. A special exception from the underlying height requirements for principal residences may be granted, provided an applicant meets six conditions listed as paragraphs (a) through (f). The BZA may *modify or waive* not more than two of the (a) through (f) requirements, provided the modification does not have a substantially adverse effect on the uses or enjoyment of any abutting or adjacent dwelling or property, consistent with E § 5203.1(e). Here, the Applicant seeks one modification, from paragraph (a), which does not allow additional height for buildings on alley lots. This modification would allow the applicant to obtain special exception relief for a height increase of 3’-8” to match the existing row dwelling.

3. Analysis of Office of Planning Position

In its hearing report on BZA Case No. 20027 dated July 5, 2019, the Office of Planning (“OP”) disagrees with the Applicant’s position that the requested relief – (i) minimum setback from the centerline of the alley; (ii) building height; and (iii) an addition to a nonconforming structure – can be granted as special exceptions. Rather, OP states that the relief can only be processed as area variances. OP believes that relief from the alley lot development standards is limited to the provisions of E § 5108, which provides that “[e]xceptions to the development standards of this chapter [51] shall be permitted by special exception if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9, and subject to the provisions and limitations of Subtitle E § 5204.” Section 5204 provides that the “Board of Zoning Adjustment may approve as a special exception a reduction in the *minimum yard requirements* of an alley lot in an RF zone [] pursuant to Subtitle X, Chapter 9.” (emphasis added).

This narrow reading of the provisions has the effect of writing E § 5201.1(c) (allowing special exemption relief from alley lot setbacks) out of the regulations, and otherwise negating the intent of Subtitle E §§ 5108, 5201.1 and 5201.2. Rules of statutory construction dictate a broader interpretation so that no sections are rendered superfluous, and so seemingly contradictory provisions are harmonized. *See Lewis v. Washington Hospital Center*, 77 A.3d 378, 380 (D.C. 2013) (“recognizing ‘the familiar maxim of statutory interpretation that counsels us to consider the statute as a whole, and, if possible, discern an interpretation that will harmonize and accord full force and effect to all of its provisions, without rendering any part meaningless’”) (*citing In re Jacoby*, 945 A.2d 1193, 1198 (D.C. 2008)); *see also School Street Associates v. District of Columbia*, 728 A.2d 575, 579 (D.C. 1999) (“Common rules of statutory construction require us to avoid conclusions that effectively read language out of a statute whenever a reasonable interpretation is available that can give meaning to each word in the statute.”); *Tuten v. United States*, 440 A.2d 1008, 1010 (D.C. 1982), *aff’d*, 460 U.S. 660 (1983);

Cass v. District of Columbia, 829 A.2d 480, 484 (D.C. 2003) (when faced with apparent contradiction, court is charged with deciding whether seemingly inconsistent provisions can be interpreted in a way that would harmonize them).

There is an alternative interpretation that gives meaning to all provisions, consistent with the rules of statutory construction. First, Chapter 52 of Subtitle E can be read to apply to both street-facing lots *and alley lots*. There is no limiting language that would preclude this. Subtitle E § 5200.1 states that the “following provisions [of Subtitle E, Chapter 52] provide for relief to the development standards and regulations in the RF zones as a special exception subject to the provisions of this chapter and the general special exception criteria at Subtitle X, Chapter 9.” Alley lots in the RF District are not excluded and the plain meaning of this provision should apply.³ This interpretation would then give effect and return meaning to E § 5201.2(c) allowing a reduction in the minimum setback requirements of an alley lot.

These provisions can also be harmonized with the seemingly contradictory provision of E § 5204 that would limit alley lot special exception relief to just yard requirements. While Chapter 52 for most part restricts special exception relief to just additions or new/enlarged accessory structures, E § 5204 extends yard relief by special exception to *new construction* on alley lots in addition to expansions of existing buildings. This distinguishing factor allows E § 5204 to be reconciled with E § 5201. Under this reading of Subtitle E, Chapters 51 and 52, all provisions are harmonized and have meaning, consistent with the rules of statutory construction:

E § 5200.1	Applies to all RF property because alley lots are not excluded
E § 5201.1(c)	Now has meaning if alley lots not excluded under E § 5200.1
E § 5204	Distinguished because it allows special exception yard relief to <i>new construction</i> on alley lots (not just additions or accessory structures)

This interpretation of the regulations is consistent with past legislative drafts, which also inform the statutory construction analysis. *Williams v. Kennedy*, No. 17-CV-681, (D.C. July 11, 2019) at 5 (statutory context and structure evident in legislative purpose inform interpretation of regulations) (citations omitted). The September 9, 2013, draft text of Subtitle E did not place any limiting restrictions on special exceptions for alley lot development. *See Zoning*

³ The Court of Appeals has instructed that “[i]n interpreting [] regulatory provisions, we keep in mind the primary rule of statutory construction that the intent of the lawmaker is to be found in the language that he [or she] has used.” *Whitfield v. United States*, 99 A.3d 650, 656 (D.C. 2014) (citing *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C.1983) (citations and internal quotation marks omitted)). “Thus, if the statute’s or regulation’s language is “plain” and allows for no other meaning, we will generally look no further and give the words used the meaning ordinarily attributed to them.” *Whitfield* at 656 (citing *Sullivan v. District of Columbia*, 829 A.2d 221, 224 (D.C.2003) (internal quotation marks omitted).

Commission (“Z.C.”) Case No. 08-06A, Exhibit 7E. Relief from the development parameters was available through the general provisions for RF Districts in proposed Chapter 12. *Id.* This was reinforced in December 2014 draft text, which now included specific text allowing alley lot development to seek special exception relief through the general relief provisions of the RF District. Proposed Section 907.1 provided that “special exception relief criteria of E chapter 10 shall apply to buildings on alley lots in the R [sic] zones.” *See* Z.C. Case No. 08-06A, Exhibit 890E, November 14, 2014. The incorrect zone designation was revised in the Commission’s Notice of Proposed Rulemaking dated December 2014 and filed in the record on May 28, 2015. *See* Z.C. Case No. 08-06A, Exhibit 898E; *see also* 62 *D.C. Reg.* 7337-40 (Pt. 2, May 29, 2015) (“The special exception criteria of Subtitle E, Chapter 10 shall apply to buildings on alley lots in RF zones.”).⁴ These drafts support the longstanding intent to allow reasonable additions to dwellings in the residential districts through special exception relief, including alley lots. Significantly, there is no evidence of any intention to exclude alley lots from special exception relief and to impose the higher burden of proof of a variance on these homeowners. To the contrary, in addition to the draft regulations cited that show a consistent intent to allow alley dwelling additions by special exception, an OP slide presentation dated November 7, 2013, indicates an early intention to allow alley lot relief from the lot area and alley setback requirements as a special exception. Z.C. Case No. 08-06A, Exhibit No. 267 at 12.

Unfortunately, there is no testimony or evidence of record in Z.C. Case No. 0806A that resolves these changes. Without explanation, the final published version of Subtitle E introduced new language in Sections 5108 and 5204 in Subtitle E (formerly Chapters 9 and 10 in Subtitle E) that would only permit special exception relief from the yard requirements for alley lots in the RF District. *See* Transcripts in Z.C. Case No. 08-06A, September 21 and November 15, 2015, and January 14, 2016 (word search “alley”); *see also* OP Reports, Z.C. No. 08-06A, Exhibits 1092 and 1093 (October 19, 2015; Exhibit 1097 (November 6, 2015)).⁵ The ambiguity and inconsistency introduced to the final regulations undermines the reliability of this change. In fact, by action taken July 8, 2019, the Zoning Commission set down for hearing text amendments in Z.C. Case No. 19-18 to modify and clarify these ambiguities. The proposed text would clarify that relief from the alley setback requirements and additions to nonconforming alley dwellings can be processed as special exceptions. *See* Z.C. Case No. 19-13, Exhibit 2 (Proposed Subtitle E Chapters 51 and 52). This further supports the intent that relief from the alley lot development parameters should be processed as special exceptions.

By recognizing the plain meaning of E § 5200.1 to apply equally to both street-facing lots and alley lots, it also allows nonconforming alley dwellings to expand or extend an existing nonconformity — in this case, the 23’-8” height — as a special exception. Relief from the height provision is also permitted by special exception pursuant to E § 5203.2. This section specifically allows the Board to “grant as a special exception a maximum building height for a principal residential building and any additions thereto of forty feet (40 ft.),” subject to the

⁴ Excerpts of the relevant draft regulations are included at [Attachment C](#).

⁵ While Attachment 1 to the OP Report dated November 6, 2015, indicates the need to coordinate the language for alley lot chapters for other zones (see page 7), there is still no explanation or discussion anywhere as to why special exception relief for alley lots was limited to yard requirements in the R and RF zones but not the RA districts. Thus, it is impossible to discern the Commission’s rationale for adopting this change.

enumerated conditions of (a) through (f). Condition (a) provides that the building cannot be on an alley lot, which would seem to preclude special exception relief in this case. However, Subtitle E § 5203.2 specifically allows the Board to waive up to two of the enumerated conditions in (a) through (f). Here, the Applicant requests to waive only one condition — paragraph (a) — to allow a modest height increase to match the existing dwelling, which would be consistent with the historic row of alley dwellings dating from 1890. The special exception process ensures that the Board will review the application to ensure that the proposed deviation will not have any substantial adverse effects on any abutting or adjacent dwelling or property. *See* Subtitle E §§ 5201.3 and 5202.1. The Applicant notes that many of these conflicting provisions should be resolved

D. Conclusion

Based on the foregoing, the Applicant believes that the requested relief can be processed as special exceptions. Nevertheless, the Applicant believes it meets the test for both special exception and variance relief as set forth in its supplemental statement dated June 26, 2019. The Applicant fully supports OP's analysis and recommendation that the application meets the higher burden of proof for variance relief from the height, alley setback and nonconforming structure provisions of Subtitle E and respectfully requests the Board to approve the application.

Respectfully submitted,

DONOHUE & STEARNS, PLC

By: 
Mary Carolyn Brown

Attachments

cc: Joel Lawson, OP
Jonathan Kirschenbaum, OP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Applicant's foregoing submission was served by email this 15th day of July, 2019, on the following:

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