

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**



Application No. 20411 of Marcel and Stacy Clarke, as amended, pursuant to 11 DCMR Subtitle X, Chapter 9, for special exceptions under Subtitle C §§ 1500.4 and 1504 to allow a penthouse on a new flat, not meeting the setback requirements of Subtitle C § 1502.1(a)-(c), and pursuant to Subtitle X, Chapter 10, for area variances from the minimum rear yard requirement of Subtitle E § 306.1 to allow two new semi-detached buildings (flats) in the RF-1 Zone at 2600 4th Street, NE (Square 3551, Lot 1).^{1, 2}

HEARING DATES: March 17 and April 28, 2021
DECISION DATES: April 28, 2021 and September 11, 2024

DECISION AND ORDER

This self-certified application was filed on November 6, 2020 by Marcel and Stacy Clarke, the owners of the property that is the subject of the application (the “Applicants”). Following a public hearing, the Board voted to deny the application.

PRELIMINARY MATTERS:

Notice of Application and Notice of Hearing. By memoranda dated January 5, 2021, the Office of Zoning sent notice of the application and public hearing to the Applicants; the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); Advisory Neighborhood Commission (“ANC”) 5E, the ANC where the subject property is located, the single-member district ANC 5E10; the Office of Advisory Neighborhood Commissions; the owners of all property within 200 feet of the subject property; and the Councilmember for Ward 5 as well as the chairman and three at-large members of the D.C. Council. Notice of the public hearing was published in the *D.C. Register* on December 25, 2021 (67 DCR 014841.)

Party Status. Pursuant to Subtitle Y § 403.5, the Applicants and ANC 5E were automatically parties in this proceeding. The Board received no requests for party status.

¹ The caption has been modified to reflect that the application was amended. The Applicants initially requested solely a variance from the rear yard requirement (Exhibit 4) and later added a request for a special exception under Subtitle C §§ 1500.4 and 1504 to allow a penthouse staircase on each roof (Exhibit 28D).

² Some of the zoning provisions at issue in this proceeding have been amended since the application was filed. This order reflects the zoning provisions in effect at the time of the Board’s vote at the conclusion of the public hearing.

BZA ORDER NO. 20411
PAGE NO. 2

Applicants' Case. The Applicants presented evidence and testimony, including from architects Rob McClennan and My Ly, in support of the application for zoning relief needed to allow the redevelopment of the subject property with two new buildings, each configured as a two-unit flat.

OP Report. By memorandum dated March 5, 2021, OP recommended denial of the variance relief requested by the Applicants. OP was unable to support the request for a special exception because the Applicants' penthouse proposal was directly linked to a proposed building configuration that required a variance for which OP recommended denial. (Exhibit 30.)

DDOT Report. By memorandum dated March 5, 2021, DDOT indicated no objection to approval of the application.³ (Exhibit 29.)

ANC Report. By report dated February 17, 2021, ANC 5E indicated that, at a public meeting on February 16, 2021 with a quorum present, the ANC voted to support the Applicants' request for a rear yard variance but was "neutral" about the request for special exception relief for the penthouse stair enclosure and setbacks. (Exhibit 27.)

Persons in support. The Board received letters in support of the application from persons living near the subject property, who indicated their lack of objection to the Applicants' project.

FINDINGS OF FACT

1. The property that is the subject of this application is a corner lot located at the northwest corner of the intersection of Douglas and 4th Streets N.E., with the address 2600 4th Street, N.E. (Square 3551, Lot 1).
2. The subject property is rectangular, with 40 feet of frontage on 4th Street and approximately 107 feet of frontage on Douglas Street. The lot area is 4,266 square feet.
3. A building restriction line extends along the Douglas Street frontage at a depth of 15 feet from the south lot line.
4. The subject property was improved with a one-story detached building that was used as a principal dwelling. The existing dwelling fronted on 4th Street and had a side yard of approximately five feet on the north side.
5. The Applicants proposed to raze the existing dwelling, subdivide the subject property to create two record lots fronting on Douglas Street, and to construct a new two-unit flat on each new lot.
6. The Applicants designated the lots that would be created in the subdivision as Lot A (on the west) and Lot B (on the east). Lot A would be 58 feet wide and 40 feet deep, with a lot

³ The DDOT report considered the initial application, which requested area variance relief from the rear yard requirements.

area of 2,320 square feet. Lot B would be approximately 48 feet, eight inches wide and 40 feet deep, with a lot area of 1,946 square feet.

7. The building on Lot A would extend approximately 38 feet in width. The building on Lot B would be approximately 32 feet, eight inches wide.
8. Both new buildings would extend to the rear (north) lot line without providing a rear yard.
9. Both new buildings would be three stories and 35 feet in height. The resulting lot occupancy would be 44 percent on Lot A and 43 percent on Lot B.
10. Each building would have a penthouse to provide stair access to a roof deck. Each penthouse would be approximately four feet, three inches in width and nine feet in height.
11. The penthouses would be located next to each other along the lot line shared by Lots A and B. On Lot A, the penthouse would be set back 33 feet, nine inches from the west side wall. On Lot B, the penthouse would be set back approximately 24 feet, four inches from the east side wall.
12. The penthouses would be set back approximately seven feet, five inches from the front of each building and approximately four feet from the rear walls of the buildings.
13. The entrance to three of the dwelling units would be located on Douglas Street. The fourth unit, on Lot B, would be accessible from 4th Street.
14. The west lot line of the subject property abuts a public alley 15 feet wide.
15. The Applicants proposed to provide three vehicle parking spaces (one standard size and two compact spaces) in the western portion of Lot A, accessible from the public alley.
16. The abutting property to the north contains a two-story attached dwelling. Properties to the west, across the public alley, also contain two-story attached dwellings.
17. The surrounding neighborhood is residential in character. Nearby properties in the RF-1 contain a mix of row, semi-detached, and detached buildings. Areas to the south, across Douglas Street, are located in a Residential House (R) zone, R-3, and contain row and semi-detached buildings.
18. The subject property is located in a Residential Flat (RF) zone, RF-1. The purpose of the RF-1 zone is to provide for areas predominantly developed with row houses on small lots within which no more than two dwelling units are permitted. (Subtitle E § 300.1.)
19. The Residential Flat zones are residential zones, which provide for areas developed primarily with row dwellings, but within which there have been limited conversions of

dwelling units. (Subtitle E § 100.1.) The provisions of the RF zones are intended to: (a) recognize and reinforce the importance of neighborhood character, walkable neighborhoods, housing affordability, aging in place, preservation of housing stock, improvements to the overall environment, and low- and moderate-density housing to the overall housing mix and health of the city; (b) allow for limited compatible non-residential uses; (c) allow for the matter-of-right development of existing lots of record; (d) establish minimum lot area and dimensions for the subdivision and creation of new lots of record in RF zones; (e) allow for the limited conversion of rowhouse and other structures for flats; and (f) prohibit the conversion of flats and row houses for apartment buildings as anticipated in the RA zone. (Subtitle E § 100.3.)

CONCLUSIONS OF LAW AND OPINION

The Applicants seek zoning relief – area variances from the rear yard requirements of Subtitle E § 306.1 and special exceptions under Subtitle C §§ 1500.4 and 1504 to allow penthouses not meeting the setback requirements of Subtitle C §§ 1502.1 – to allow two new semi-detached buildings, each configured as a flat with a penthouse stair, on new lots in the RF-1 zone at 2600 4th Street, N.E. (Square 3551, Lot 1).

Rear yard. The Applicants proposed to build a new building fronting on Douglas Street on each new lot. Neither building would provide a rear yard setback along the north lot line, where a minimum rear yard of 20 feet is required pursuant to Subtitle E § 306.1. The Applicants requested an area variance from the rear yard requirements of Subtitle E § 306.1 for each new lot proposed in the application. The Board is authorized under § 8 of the Zoning Act to grant variance relief where, “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property,” the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted 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. *See* also Subtitle X § 1000.1.

The Applicants argued that the subject property faced an exceptional situation especially as a result of the lot dimensions and the building restriction line, which would require the siting of the new buildings 15 feet away from the front lot line, thereby reducing the buildable area of the lot.⁴ According to the Applicants, the proposed Lots A and B would be large enough to comply with the minimum lot dimension requirements applicable in the RF-1 zone, and the planned new buildings would meet the applicable lot occupancy requirements. However, due to the existence of the building restriction line coupled with the relatively narrow depth of the lot, the resulting lots were not large enough to provide both viable dwellings and a compliant rear yard. According to

⁴ The Applicants estimated that approximately 1,600 square feet, or 38 percent, of the subject property was “off limits” due to the building restriction line. (Exhibit 33; Transcript of March 17, 2021 at 136.)

BZA ORDER NO. 20411
PAGE NO. 5

the Applicants, the variances were needed to avoid practical difficulty because the building restriction line precluded the redevelopment of the subject property with two flats, for a total of four dwelling units, in buildings fronting on 4th Street. Conversely, the Office of Planning was not persuaded that the existence of the building restriction line created any exceptional situation that gave rise to practical difficulty to the Applicants. According to OP, the Applicants' property did not face any exceptional situation since the size of the subject property was typical for a corner lot in its vicinity, and the application did not demonstrate any practical difficulty to the Applicants because the subject property could be developed, consistent with the building restriction line, with a semi-detached building fronting on 4th Street.

The Board was not persuaded that the application demonstrated either that the subject property faced an exceptional situation or that the strict application of the Zoning Regulations would result in a practical difficulty to the Applicants, as the owner of the subject property, sufficient to warrant approval of the requested variances. The Applicants' proposal would require a significant degree of variance relief, given that the Zoning Regulations require a rear yard at least 20 feet deep and the Applicants proposed not to provide any rear yard setback for either new building. The degree of relief requested in this application was not *de minimis* in nature. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1172 (D.C. 1990) (Board may consider whether a variance is *de minimis* in nature and whether for that reason a correspondingly lesser burden of proof rests on the applicant).

The Board credits the testimony of the Office of Planning in concluding that the subject property did not exhibit any exceptional situation or condition. The subject property is regularly shaped and did not exhibit any unusual aspects related to size or topography. A building restriction line is not an unusual feature and did not create a practical difficulty except in the context of the Applicants' plan to create two new buildings with a total of four dwelling units at the subject property. Generally, an applicant's desire to utilize property for a certain use is not by itself sufficient to create an extraordinary or exceptional situation or condition under the zoning regulations, *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 540 (D.C. 1972).

The Board agrees with the Office of Planning that the requested variances cannot be approved without causing substantial detriment to the public good and substantial impairment of the zone plan. Approval of the application would allow two new buildings – as proposed, rear walls extending at a height of 35 feet for a distance of approximately 70 feet – without any setback from the north lot line. The lack of a rear yard would adversely affect the light, air, and privacy available to the abutting lot and would not be consistent with the development standards applicable in the RF-1 zone or with the intent of the RF zones to recognize and reinforce the importance of improvements to the overall environment to the overall housing mix and health of the city and to allow for the matter-of-right development of existing lots of record.

Penthouses. The application also requested special exceptions under Subtitle C § 1500.4 to allow a penthouse on the roof of each new building and under Subtitle C § 1504 from the penthouse setback requirements of Subtitle C § 1502.1 (one-to-one setback required). The Board is

authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.), to grant special exceptions, as provided in the Zoning Regulations, when, in the judgment of the Board, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions. (*See* 11 DCMR Subtitle X § 901.2.)

Pursuant to Subtitle C § 1500.4, the Board is authorized to approve a penthouse on a semi-detached building (flat) as a special exception, provided that the penthouse (a) is no more than 10 feet in height and contains no more than one story and (b) contains only stair or elevator access to the roof, with a maximum of 30 square feet of storage space ancillary to a rooftop deck. In this case, the Applicants proposed a penthouse on each building that would not exceed the height limits and would contain only stair access, with no storage space.

Pursuant to Subtitle C § 1502.1, a penthouse must be set back from the edges of the roof on which the penthouse is located at a distance equal to its height from the front, rear, and side building walls of the roof. In this case, the required setbacks for the penthouses would be nine feet from each building wall. As proposed, each of the penthouses would meet the setback requirement on only one side.

The Board is authorized under Subtitle C § 1504 to grant relief from the penthouse setback requirements of Subtitle C § 1502.1 as a special exception, subject to specific restrictions. The Applicant asserted that the proposal satisfied the applicable restrictions, largely due to the planned configuration of the two proposed buildings. The Applicant contended that the strict application of the setback requirements would reduce building efficiency because of the attendant restrictions on the interior layouts, especially with respect to the location of the building core and internal staircases. The Applicant also argued that the proposed design would minimize visibility by allowing the two penthouses to appear as a single penthouse in the center of a single building and not as an extension of a building wall. The Board did not agree, concluding instead that the need for relief from the penthouse setback requirements was related to the Applicant's proposed design of new buildings that would be shallow in depth at 25 feet, which precluded the provision of penthouses with compliant setbacks. The Applicant acknowledged that roof access could be provided using a roof hatch, although the Applicant described that option as "undesirable for both access to mechanical equipment as well as recreation use." (Exhibit 28A.) Under the circumstances, the Board concludes that approval of relief from the setback requirements would materially impair the intent and purpose of the penthouse regulations, especially considering that the Applicant's proposal would provide penthouses without any setback on three sides of each proposed building.

Subtitle X, Chapter 9. The application did not meet the requirements for approval of a special exception under Subtitle X § 901.2. For the reasons discussed above, the Board concludes that approval of the application would not be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. Under the circumstances of the application, which proposed two new buildings without any rear yard setback and without meeting the penthouse

BZA ORDER NO. 20411
PAGE NO. 7

setback requirements on three sides of each building, the Board also finds that approval of the application would tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map because of a lack of compliance with penthouse requirements.

Great weight. The Board is required to give “great weight” to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2012 Repl.).) For the reasons discussed above, the Board agreed with OP’s recommendation to deny the request for area variances from the rear yard requirements of Subtitle E § 306.1.

Under Section 13(d) of the Advisory Neighborhood Commission Act of 1975, the Board is required to give “great weight” to the issues and concerns raised by the affected ANC. (D.C. Official Code § 1-309.10(d)(3)(A) (2012 Repl.).) In this case, ANC 5E voted to support the Applicants’ request for variances from the rear yard requirements and to remain “neutral” on the request for special exceptions to allow the planned penthouses. The Board credits the views of ANC 5E but for the reasons discussed above did not find that the application met the requirements for approval of the variance relief requested.

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has not satisfied the burden of proof for special exceptions under Subtitle C §§ 1500.4 and 1504 to allow a penthouse on a new flat, not meeting the setback requirements of Subtitle C § 1502.1(a)-(c), or for area variances pursuant to Subtitle X, Chapter 10 from the minimum rear yard requirement of Subtitle E § 306.1 to allow two new semi-detached buildings (flats) in the RF-1 zone at 2600 4th Street, N.E. (Square 3551, Lot 1). Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: 4-0-1 (Frederick L. Hill, Lorna L. John, Chrishaun S. Smith, and Michael G. Turnbull voting to deny the request for an area variance from rear yard requirements; Carl H. Blake not participating)

VOTE: 3-1-1 (Frederick L. Hill, Robert E. Miller, and Chrishaun S. Smith voting to deny the request for special exceptions from the penthouse requirements; Carl H. Blake opposed; Lorna L. John not participating)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: December 10, 2024

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

IN ACCORDANCE WITH THE 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, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.