

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Order No. 18878-B for Application No. 18878 of Alba 12th Street, LLC**, pursuant to 11 DCMR § 3103.2, for variances from the floor area ratio (§ 1706); rear yard (§ 774)<sup>1</sup>; and parking (§ 2101.1) requirements to allow the construction of an office building in the DD/C-2-C District at premises at 1017 12th Street, N.W. (Square 316, Lot 821).

<b>HEARING DATE:</b>	December 9, 2014
<b>DECISION DATE:</b>	January 6, 2015
<b>DECISION DATE ON REMAND:</b>	November 1, 2017

**DECISION AND ORDER ON REMAND**

On September 11, 2014, Alba 12th Street, LLC (the “Applicant”) submitted a self-certified application for variances pursuant to the 1958 version of the Zoning Regulations to allow the construction of an office building in the DD/C-2-C District at 1017 12th Street, N.W. (the “Subject Property”). The application requested variances from the maximum floor area ratio (“FAR”) permitted by § 1706 and the minimum rear yard and parking requirements of §§ 774 and 2101.1.<sup>2</sup> The Board of Zoning Adjustment (the “Board” or “BZA”) held a public hearing on the application on December 9, 2014.

On January 6, 2015, the Board voted to grant the application and issued a written order of its decision on September 9, 2015 (“Original Order”). 1101 K Street NW Acquisitions, LLC, (“1101 K Owner”) the current owner of the 1101 K Street, N.W. property (“Adjacent Property”), petitioned the District of Columbia Court of Appeals (“DCCA”) to review that decision to the extent it granted the FAR and rear yard relief.

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<sup>1</sup> This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraphs, are to provisions that were in effect on the date this Application was decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text. Also all zone districts described in this order were renamed as of that date. The repeal and replacement of the 1958 Regulations and the renaming of the zone districts has no effect on the validity of the Board’s decision or the validity of this order.

<sup>2</sup> In its prehearing statement, Exhibit 28, the Applicant also sought a special exception under § 411.11 for the requirements for roof structures under § 770.6. However, the Applicant subsequently modified the proposed project and withdrew its request for that relief.

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On April 13, 2017, the DCCA issued an unpublished Memorandum Opinion and Judgment, *1101 K St., NW Acquisitions LLC v. D.C. Bd. of Zoning Adjustment*, 160 A.3d 1174 (D.C. 2017 Table) (“Opinion”). The Opinion described the three-pronged nature of the variance test and noted that the Board similarly divided its legal conclusion into separate discussions of “Exceptional Circumstances”, “Practical Difficulty”, and “No Detriment to Public Good or Zone Plan.” The Opinion affirmed the Board’s conclusion that the first and second prongs of the variance test were met and did not disturb the Board’s conclusion that granting the variances would not be detrimental to the zone plan.

However, the Opinion found that the Board failed to adequately discuss whether the variance could be granted without substantial detriment to the public good. Specifically, the Opinion concluded that “the BZA did not grapple with the complaints that [Applicant’s] proposed project would obstruct some windows in 1101 K Street, allegedly causing [the 1101 K Property] to lose approximately \$3.2 million in rental revenue.” *Id.* at 5. The Opinion vacated Order No. 18878 and remanded the matter to the BZA “so that it can complete its analysis of the ‘substantial detriment’ prong” of the variance test. *Id.* at 6. Since the grant of the parking variance was not appealed, it remains undisturbed and therefore is not considered as part of this remand.

On November 1, 2017, the Board held a public meeting to deliberate upon the remand issue – that is, whether the granting of variance relief would cause any substantial detriment to the 1101 K Property – and voted to grant the application.

**PRELIMINARY MATTERS<sup>3</sup>**

Procedural Order on Remand. On September 20, 2017, pursuant to 11-Y DCMR § 801.3, the Board issued a Procedural Order On Remand (“Procedural Order”) to request a supplemental report from OP. Given DCCA’s Opinion, the Board sought further information regarding the impact of the FAR and rear yard variances on the light and views available to the 1101 K Property. The Board<sup>4</sup> voted to request this information at a closed meeting held on June 28, 2017. (Exhibit 49).

OP Response to Procedural Order. On October 4, 2017, OP issued its response to the Board’s Procedural Order (“Supplemental Report”). OP provided a two-part analysis: (1) a response to the Board’s first question: “Pursuant to 12-A DCMR § 705, what percentage of the Side Windows<sup>5</sup> are required to be covered?” (“Question 1”); and (2) a response to the question: “Assuming that the answer to the first question is zero, what impact would the variances have on the light and

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<sup>3</sup> These Preliminary Matters are not intended to displace the matters made in the Original Order, but to highlight the principal matters that facilitated this remand and decision.

<sup>4</sup> Board Chairman Frederick L. Hill is the authorized agent of the Applicant and therefore recused himself from this case.

<sup>5</sup> The term “Side Windows” refers to the existing north-facing and west-facing windows on the 1101 K Property.

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views that would be available to the 1101 K Street Property?” (“Question 2”). In its response to the Question 1, OP stated that the current relationship between the Subject Property and the 1101 K Property would not require any of the Side Windows to be covered. With respect to Question 2, OP asserted that any impacts would not pose an undue or substantial detriment in the context of the overall impact on the light and views available to the 1101 K Street Property. In reaching this conclusion, OP compared the adverse impacts of a by-right development with the proposed development that would result from the Applicant’s requested variances. (Exhibit 56).

Applicant’s Response to OP Report. On October 27, 2017, the Applicant filed a response to the Supplemental Report. The Applicant supported OP’s analysis as to both Question 1 and Question 2, and cited several submissions that it had previously made into the record. (Exhibit 56). The Applicant also encouraged the Board to consider additional sun studies that aimed to demonstrate the nominal difference between a by-right development and the proposed development as to the impact on light and views.

Supplemental Submission from 1101 K Owner. Also on October 27, 2017, 1101 K Owner filed a response to the Supplemental Report. The submission included: (1) an analysis of the applicable building code provisions on the proposed development, with and without the variance relief; and (2) an analysis of the impacts the proposed development would have on the light and views of the Adjacent Property.

Incorporation of Order. This order incorporates Order No. 18878 in its entirety, except for that portion that concerns the portion of the order remanded to the Board. In the case of any inconsistency between Order No. 18878 and this order, the substance of this Order governs.

**FINDINGS OF FACT<sup>6</sup>**

1. The Subject Property and the Adjacent Property share two interior lot lines that separate the two properties: an east-west interior lot line and a north-south interior lot line.
2. The Adjacent Property is a 10-story office building. On floors six to eight, the Adjacent Property has approximately 748 linear feet of cumulative exterior frontage on K Street, 11<sup>th</sup> Street, 12<sup>th</sup> Street, and the alley between 11<sup>th</sup> and 12<sup>th</sup> Streets. There is marginally less on floors nine and 10 due to setbacks. The majority of the building walls on these frontages is devoted to windows. There is an additional 75 linear feet of building wall, with between 19.6 and 27 linear feet<sup>7</sup> of windows along the interior lot lines shared with the Subject Property. (Exhibit 51).

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<sup>6</sup> These Findings of Fact are not intended to displace the findings made in the Original Order, but to highlight the principal facts upon which the Board decided this remand.

<sup>7</sup> Consultant for Applicant calculated 19.6 linear feet. (Exhibit 44D). Consultant for 1101 K Owner calculated 27 linear feet. (Exhibit 43).

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3. The FAR variance increases the permissible square footage of the Subject Property, but not its overall permitted volume, so it would not affect light or view conditions. It is the rear yard variance that impacts the dimensions of the Subject Property and its distance from the 1101 K Street Property's west-facing windows on the north-south interior property line.
4. The District's building regulations incorporate the International Building Code ("IBC"). To accommodate the IBC to the District's urban context, the District has supplemented the IBC with regulations permitting DCRA to grant flexibility from the IBC with conditions designed to ensure that safety is not compromised. This flexibility is relevant to the windows on or near both interior lot lines separating the Subject Property from the Adjacent Property, and in evaluating any adverse impact that might result from granting variance relief.
5. For the portions of buildings on interior lot lines, the DC Building Code defines "Fire Separation Distance" as the distance from a building's face to the closest interior lot line. (Exhibit 51).
6. Under standard IBC rules, the Adjacent Property has a Fire Separation Distance of less than one foot from the east-west interior lot line and from the north-south interior lot line. With these Fire Separation Distances, none of the existing windows on the interior lot lines would be permitted. However, in the District, 12A DCMR §§ 705.8.7.1, 705.8.7.4, and 705.8.7.5 enable greater flexibility for the inclusion of window openings on or near adjacent construction or property lines.
7. Because the Adjacent Property's windows on both the east-west and north-south interior lot lines shared with the Subject Property are already existing, none – or zero percent – of the windows on the Adjacent Property are required to be covered. However, future construction, such as the Applicant's proposed project, would necessitate compliance-related changes.
8. The light and views available to the Adjacent Property would be impacted if the Applicant's proposed project is constructed to a by-right maximum size or to the size permitted by the rear yard variance granted under the Original Order.
9. If the Applicant's proposed project is constructed by-right, the maximum building dimensions permitted by C-2-C Zone District could be: 25 feet wide (full lot width), 105 feet tall (12<sup>th</sup> Street's right of way width plus 20 feet), and 25.48 feet deep along the east-west interior lot line (50.48-foot lot depth minus 15-foot required rear yard). The construction of such a by-right building would require the closing of all of 1101 K Street Property's north-facing side windows along the east-west interior property line shared with the Subject Property, eliminating those windows' light and views. Furthermore, it would alter views from the west-facing windows for the Adjacent

Property along the north-south interior property line shared with the Subject Property. Those windows, which now afford view to 12<sup>th</sup> Street from a distance of approximately 50 feet across the Subject Property, would look at the back of the Subject Property from a distance of 15 feet. In sum, a maximum, by-right construction would block light and views for the Adjacent Property along both the east-west and north-south interior lot lines shared with the Subject Property, and reduce, through shadowing, the amount of natural light available through the Adjacent Property's west-facing windows during afternoon hours.

10. More specifically, a by-right building on the Subject Property would:
  - a. Block light and views along the east-west interior lot line for the Adjacent Property's north-facing windows on floors six through 10. This would be needed to comply with the Fire Separation Distance provisions of the DC building codes.
  - b. Block the Adjacent Property's existing views of 12<sup>th</sup> Street from approximately 19 ½ windows on floors six through 10 along the north-south interior lot line. These windows are approximately 50.5 feet from the 12<sup>th</sup> Street right of way. The new views would be of the rear wall of the new building on the Subject Property, which would be approximately 15 feet away. The rear wall on the Subject Property would not be permitted to have windows in the absence of a covenant in accordance with the DC Building Code.
  - c. Reduce through shadowing, but not eliminate, the amount of light available through the Adjacent Property's west-facing windows along the north-south interior lot line between approximately 1:00 PM and the time that other existing 5-11 story buildings to the west now cast shadows on these windows. Unless otherwise blocked by interior partitions, the Adjacent Property building area that would receive less natural light from the west would continue to receive light from windows facing on the alley to the north.
11. With the approved variances, the Applicant's proposed project could occupy the full width and depth of its lot and be 105 feet tall. The granted relief provides that a future construction is not required to have a rear yard. The construction of a larger building enabled by the approved variances would require the same north-facing window closings and have the same light and views impact along the east-west interior lot line as noted in Findings of Fact Nos. 10 and 11. However, such construction would also require the closing of all of the Adjacent Property's west-facing windows on floors six through 10 along the north-south interior lot line shared with the Subject Property. This would eliminate all light and views available to those windows, and all views from those windows that would otherwise extend to the 15-foot distant rear wall of a maximum by-right building on the Subject Property. These west-facing windows occupy approximately 75% of a 25-foot-long building face. That building face is

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approximately 3% of the approximately 823-foot building perimeter on floors six through 10 of the Adjacent Property.

12. Overall, with respect to floors six to ten of the Adjacent Property, a variance-based construction would require the elimination of approximately 19 to 20 linear feet of windows along the north-south interior lot line that would not otherwise have to be blocked under the maximum, by-right scenario discussed in Findings of Fact Nos. 10 and 11.
13. If the proposed project is constructed under the approved variances scenario, approximately 1,000 square feet of interior work space on floors six through 10 of the Adjacent Property, located directly behind the existing west-facing windows, would have western light eliminated. However, depending on how interior partitions are configured, the distance between an interior work space and an exterior window could continue to receive light from north-facing windows that are no farther than 25 feet away.

**CONCLUSIONS OF LAW**

“The BZA is authorized to grant an area variance where it finds that (1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.” *Ait-Ghezala*, 148 A.3d at 1216 (internal quotation marks omitted); *see also* D.C. Code § 6-641.07 (g)(3) (2012 Repl.); 11 DCMR § 3103.2 (2016). The findings of fact and conclusions herein, per the Opinion issued by DCCA, focus on the third prong. *See 1101 K Street Acquisitions, LLC* at 6 (vacating Order No. 18878 and remanding matter to BZA “so that it can complete its analysis of the ‘substantial detriment’ prong” of the variance test). The Board’s decision must rationally flow from findings of fact supported by substantial evidence in the record as a whole. *See Oakland Condo. v. District of Columbia Bd. of Zoning Adjustment*, 22 A.3d 748, 756 (D.C. 2011) (citation omitted).

*No Substantial Detriment to the Public Good*

On remand, the Board concludes that the Applicant’s proposed project will not result in a substantial detriment to the public good. The rear yard variance would have an impact on the light and views currently available to the Adjacent Property, but such consequences would not impose an undue or substantial detriment, particularly when compared to the impacts that would result from a by-right development on the Subject Property. Additionally, while there are potential “Fire Separation Distance” issues that would require the 1101 K Owner to seal several windows on both the east-west and north-south interior lines, the Board is not prepared to deny variance relief on this ground. The Board has held that “property owner is not entitled to a view across another person’s property without an express easement.” BZA Order No. 18787; *and see* Z.C. 12-02. In

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addition, DCCA has concluded that, as pertains to the Zoning regulations, “one may obstruct his neighbor’s windows at any time.” *Hefazi v. Stiglitz*, 862 A.2d 901, 911 (D.C. 2004). Most of the windows at issue would have to be covered even under a by-right development scenario.

In reaching its conclusion, the Board credits the submissions of OP (Exhibit 51), the Applicant (Exhibit 56), and 1101 K Owner (Exhibit 56). Ultimately, the Board was not persuaded that the difference between a by-right and variance-based construction was so significant that the granting of variance relief would result in a substantial detriment to the 1101 K Owner. Under either scenario, Applicant’s proposed project would impact the light and views available to the Adjacent Property. The difference with the variance-based construction is that it would require the closing of all of the Adjacent Property’s west-facing windows on floors six through 10 along the north-south interior lot line, but these window closings only encompass 19-20 linear feet that would not otherwise have to be blocked under the maximum by-right scenario. Furthermore, these west-facing windows occupy about 75% of a 25-foot-long building face, which, in turn, is just 3% of the approximately 823-foot building perimeter on floors six through 10 of the Adjacent Property. Given this nominal impact, the Board is not convinced that this rises to a level of detriment that is substantial and warrants denial of the requested relief. The Board is not convinced that there would be any significant loss in property value, and finds it reasonable to expect that the 1101 K Owner will reconfigure internal work space to accommodate for a loss of natural light.

Having once again determined that the Application meets the third prong of the variance test, the Board once more grants the application.

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

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

**VOTE: 3-0-2** (Carlton E. Hart, Lesylleé M. White, and Robert E. Miller to APPROVE;  
Frederick L. Hill recused; one Board seat vacant)

**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:** February 11, 2019

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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.