

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19616 of Thomas Jefferson Real Estate, LLC, pursuant to 11 DCMR Subtitle X, Chapter 9, for special exceptions under Subtitle H § 1200 from the lot occupancy requirements of Subtitle H § 704.1, and from the ground floor designated use requirements of Subtitle H § 1101.1, and under Subtitle C § 1504 from the penthouse setback requirements of Subtitle C § 1502.1(c)(4), to construct a new, 49-unit¹ apartment house in the NC-6 Zone at premises 818 Potomac Avenue S.E. (Square 930, Lots 10, 14, 800, 801, 816, 817, 828, and 829).

HEARING DATE: December 6, 2017²
DECISION DATE: December 6, 2017

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2. (Exhibit 5.) In granting the certified relief, the Board of Zoning Adjustment ("Board" or "BZA") made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 6B and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6B, which is automatically a party to this application. The ANC submitted a timely report recommending approval of the application. The ANC's report indicated that at a regularly scheduled, properly noticed public meeting on October 10, 2017, at which a quorum was present, the ANC voted 8-0-0 to support the application. (Exhibit 40.)

¹ The caption was updated to reflect that the project is to construct a 49-unit apartment house, as shown on the revised plans. (Exhibit 44A1-44A2.)

² This case was administratively postponed from the public hearing of November 1, 2017 to that of December 6, 2017. (Exhibit 27.)

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The Office of Planning (“OP”) submitted a timely report dated November 21, 2017, in which it recommended approval of the requests for special exception relief from the ground floor use requirements of Subtitle H § 1101.1 and from the penthouse setback requirements of Subtitle C § 1502.1(c)(4), but recommended denial of the request for special exception relief from the lot occupancy requirement under Subtitle H § 704.1. In recommending denial of the special exception request as to lot occupancy, OP focused on the requirements of Subtitle H § 1200.1 and while OP was satisfied that the Applicant met many of the conditions in that provision, OP singled out those pursuant to Subtitle H §§ 1200.1(a), (b), and (c), and recommended denial because “the proposed building’s size is not in character” with the medium density and mixed-use intentions of the NC-6 zone, the “proposed new building would be out of scale with what is anticipated by this zone,” and a failure to demonstrate exceptional circumstances exist. (Exhibit 47.) The pertinent conditions in Subtitle H § 1200.1 read as follows:

1200.1 The Board of Zoning Adjustment may grant relief from the standards of this subtitle as a special exception subject to the provisions of this section and the general special exception criteria at Subtitle X, Chapter 9:

- (a) The excepted use, building, or feature at the size, intensity, and location proposed will substantially advance the stated purposes of the NC zones, and will not adversely affect neighboring property, nor be detrimental to the health, safety, convenience, or general welfare of persons residing or working in the vicinity;
- (b) The architectural design of the project shall enhance the urban design features of the immediate vicinity in which it is located; and, if a historic district or historic landmark is involved, the Office of Planning report to the Board of Zoning Adjustment shall include review by the Historic Preservation Office and a status of the project's review by the Historic Preservation Review Board;
- (c) Exceptional circumstances exist, pertaining to the property itself or to economic or physical conditions in the immediate area, that justify the exception or waiver;

In its report, OP noted that lot occupancy is restricted on residential uses in the NC-6 zone “to provide for adequate light and air and a sense of open space.” OP claimed that it was not disputing the Applicant’s rationale for building a residential project in a zone that promotes mixed use, but viewed this as “a design choice” and opined that “it can be designed in a way to comply with the zoning requirement.” (Transcript, December 6, 2017 (“Tr.”), p. 219.) OP also asserted that the Applicant had not sufficiently explained how the project would result in an enhanced contextual design, arguing that the Historic Preservation Review Board’s (“HPRB”) review and approval of the concept design did not assess zoning, leading to the conclusion that it was not dispositive. Finally, OP disagreed with the Applicant that the existing historic row house that the Applicant would retain as part of the project and the parking the Applicant would provide in the garage on the property amounted to “exceptional circumstances on the property,”

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per Subtitle H § 1200(c). OP asserted that the row house is an existing feature which occupies only a limited amount of the site and it is the new building that creates the non-conformity for lot occupancy, and the parking being provided would create an oversupply that could be reduced. OP said it was not convinced that these conditions made it difficult to do a project on this site. (Tr., 218.)

The Applicant responded to OP's objections to granting lot occupancy relief and argued that its request for this relief should be approved as it met the conditions of Subtitle H § 1200.1 and Subtitle X § 901.2, namely: (1) the project would advance the purpose of the zone and not adversely affect neighboring property, (2) consideration of the HPRB's approval is warranted when determining the element of the enhanced contextual design of the project, and (3) the Applicant demonstrated exceptional circumstances on the property based on its retention of the existing historic structure on the site and the requirement to honor a prior parking easement for 13 spaces.

The Applicant's proposal is to redevelop a long-fallow site, which has been used primarily as a surface parking lot for more than 20 years, into a four-story residential building. The lot occupancy requirement in the zone for a residential use is 75%, and the Applicant's proposed building is at 78%.

In response to OP, the Applicant asserted that all the conditions in Subtitle H § 1200.1 were met. First, the Applicant claimed that the requested lot occupancy relief is minimal and "highly unlikely to have an adverse effect on neighboring property." The Applicant indicated that because the location of the property was too isolated to engender enough foot traffic to support a retail use on the property despite its commercial zoning, the Applicant needed to design it for residential use, thus leading to the request for lot occupancy relief. The Applicant argued the project would substantially advance the purpose of the zone and not adversely affect neighboring property, noting that the project would "replace a surface parking lot with an attractively-designed structure with 49 residential units, bringing important vitality to a moribund corner of the Lower Barracks Row neighborhood." The Applicant further noted that this building is of a height and scale and is set in relation to the neighboring property so as not to impose a burden on access to light and air. (Exhibit 52.)

As to the condition of appropriate architectural design, the Applicant noted that the HPRB had already considered the project and approved it, thereby substantiating the consistency of the character of the building with the historic district. Because the criteria that HPRB uses to review new construction in a historic district is to determine that the new project is consistent in scale and character and will not have an adverse impact on the historic context, this review supports the conclusion that the project is consistent in scale and character and will not have an adverse impact on the historic district. (Tr., p. 209-210, Exhibit 52.) The Applicant provided evidence to demonstrate that the building's size and its design was consistent with the character of the neighborhood, and noted that it had gone through three different designs, all of which were

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reviewed by the community, and added that the community as well as HPRB is in support of the one being proposed.

Finally, the Applicant argued how the project's design was constrained by two exceptional conditions of the property, namely: the presence of an existing historic structure which must be retained as a contributing structure and an existing parking easement for 13 spaces for the use of an adjacent commercial property. The Applicant provided testimony and other evidence for why these two factors should be considered exceptional conditions of the property for the purpose of meeting the criteria of Subtitle H § 1200.1. In response to OP, the Applicant also noted that the NC-6 zone in the 2016 Zoning Regulations incorporated the restrictions of the former Eighth Street Southeast Neighborhood Commercial Overlay District (ES) from the 1958 Zoning Regulations, but allowed these more restrictive provisions to be waived by special exception and did not require a variance. Thus, while exceptional conditions on the property had to be shown, it did not mean that so would practical difficulties, as in a variance.

As to the retention of a historic structure on the property being an exceptional condition of the property, the Applicant noted that "were it not for that small historic building, the project would meet lot occupancy." (Tr., p. 210.) The Applicant further argued that its request was relatively minimal, insofar as the lot occupancy requirement is 75% and the proposed building would be at 78% lot occupancy and only for two stories. The Applicant concluded that since the overage is partly due to the presence of the modest historic building on the property, which must be retained, this should be considered an exceptional condition of the property. (Tr., p. 211.)

Secondly, the Applicant asserted that the lot occupancy overage is due in part to the need to accommodate 13 parking spaces which are required by a prior BZA order and easement to serve the large commercial building at the southeastern corner of the square. To meet the design constraints, including the parking easement, as well provide the parking required by the Zoning Regulations, the Applicant designed the garage using a mechanical parking stacking method and described how were its garage design to be altered, even minimally, this would result a "cascading effect" with so many parking spaces being lost that it could not satisfy the parking requirements. The Applicant testified that "to make the building work, it has to have a certain width at that ground floor. ... if it shrinks any amount, even nominally, then it causes this cascading effect of having to move the car elevator. And because of the presence of the historic building, where it is, there's no other way to enter the building to get underneath to provide the parking spaces...So, the elevator has to be in the place that it is, ...If it moves even a foot, then it causes the cascading effect of having to rearrange everything." (Tr., p. 223.) Thus, the Applicant asked for the parking easement to be considered an exceptional condition of the property for purposes of meeting the criteria of Subtitle H § 1200.1.

The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the grant of the application with two conditions. DDOT's recommended conditions included requests that two additional short-term bicycle parking spaces, including one

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inverted U-rack, and one electric vehicle charging station in the parking garage be provided. (Exhibit 38.) The Board adopted both of DDOT's conditions in this order. (Exhibit 48.)

A letter in support of the application from Michael Stevens, AICP, Capitol Riverfront BID, was submitted to the record. (Exhibit 50.)

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for special exceptions under Subtitle H § 1200 from the lot occupancy requirements of Subtitle H § 704.1, and from the ground floor designated use requirements of Subtitle H § 1101.1, and under Subtitle C § 1504 from the penthouse setback requirements of Subtitle C § 1502.1(c)(4), to construct a new, 49-unit apartment house in the NC-6 Zone. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

The Board is required to give great weight to the recommendation of the Office of Planning (D.C. Official Code § 6-623.04 (2001).) Great weight means acknowledgement of the issues and concerns of the Office of Planning. As noted in this Order, OP recommended approval of the requests for special exception relief from the ground floor use requirements of Subtitle H § 1101.1 and from the penthouse setback requirements of Subtitle C § 1502.1(c)(4), but recommended denial of the request for special exception relief from the lot occupancy requirement under Subtitle H § 704.1.

After reviewing the record, the Board agreed with OP's recommendations as to granting relief from the ground floor use requirements of Subtitle H § 1101.1 and from the penthouse setback requirements of Subtitle C § 1502.1(c)(4), but was not persuaded by OP's recommendation to deny the special exception for lot occupancy. Rather, the Board was persuaded by the Applicant's evidence and testimony and found that all the criteria and its burden under Subtitle H §§ 704.1 and 1200.1 and Subtitle X § 901.2 were met, specifically the Board found that the Applicant met all of the conditions of Subtitle H § 1200.1(a)-(g). The Board found that the proposed building would be in scale with the neighborhood and would not adversely affect neighboring property, as well as was satisfied by the design of the building in the context of the neighborhood. The Board was persuaded by the Applicant's testimony and other evidence that retention of the existing historic structure and the parking easement constituted exceptional conditions on the property that constrain the Applicant's design choices and warrant granting this special exception relief.

The Board is also required to give great weight to issues and concerns raised by the affected ANC (D.C. Official Code § 1-309.10(d).) ANC 6B submitted a report stating that it supported the requested relief. (Ex. 40.)

Based upon the record before the Board and having given great weight to the OP and ANC reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11

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DCMR Subtitle X § 901.2, and Subtitle H §§ 1200, 704.1, and 1101.1, and Subtitle C §§ 1504 and 1502.1(c)(4), that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR Subtitle Y § 101.9, the Board has determined to waive the requirement of 11 DCMR Subtitle Y § 604.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBITS 44A1-44A2 AND WITH THE FOLLOWING CONDITIONS:**

1. The Applicant shall provide two additional short-term bicycle parking spaces (one inverted U-rack).
2. The Applicant shall provide one electric vehicle charging station in the parking garage.

VOTE: **4-0-1** (Frederick L. Hill, Lesylleé M. White, Carlton E. Hart, and Robert E. Miller, to APPROVE; 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. YARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: January 9, 2018

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.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, 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 PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y

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§ 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, 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. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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.