Government of the District of Columbia
OFFICE OF ZONING

MEMORANDUM

TO: Arnold R. Finlayson, Administrator
Office of Documents and Administrative Issuance

FROM: Alberto P. Bastida, AICP
Secretary to the Zoning Commission

DATE: May 15, 2003

SUBJECT: Publication for the Office of Zoning

Please publish the following in the D.C. Register on May 23, 2003:

1. Z.C. Order No. 910-B (Case No. 01-31TE)
2. Z.C. Notice of Final Rulemaking & Order No. 970 (Case No. 01-22MA);
3. Z.C. Order No. 02-27 (Case No. 02-27); and
4. Z.C. Order No. 02-37 (Case No. 02-37).

Received By

5/16/03
Date

Attachments

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ZONING COMMISSION
District of Columbia
Case 02-37
Exhibit 6

ZONING COMMISSION
District of Columbia
CASE NO.02-37
EXHIBIT NO.6

Zoning Commission Order No. 02-37
Case No. 02-37/16869
(*Sua Sponte* Review of Board of Zoning Adjustment
Application No. 16869 of King's Creek, LLC,)
December 9, 2002

This decision and order arises from the *sua sponte* review by the Zoning Commission for the District of Columbia ("Commission") of an order dated September 23, 2002, of the Board of Zoning Adjustment ("Board") which granted Application No. 16869, filed by Applicant King's Creek, LLC, ("Applicant") requesting variance relief from four provisions of the Zoning Regulations of the District of Columbia, Title 11 of the District of Columbia Municipal Regulations ("DCMR"). The Zoning Commission timely decided at a Special Meeting held on September 30, 2002, to invoke its *sua sponte* review authority, pursuant to DCMR § 3128. As a result of its review of the record and the submission of the Applicant, the Commission reverses in its entirety the Board's order in the case of Application No. 16869.

PRELIMINARY MATTERS

The Board's Decision

The September 23, 2002, decision of the Board granted the Applicant variance relief from (1) § 402, to increase the allowable floor area ratio ("FAR"); (2) § 403, to increase the allowable lot occupancy; (3) § 2001.3, to expand a non-conforming structure; and (4) § 400, to allow a height greater than fifty (50) feet in an R-5-B zone district.[1] The Applicant claimed that its property was unique by virtue of its "irregular" shape and its having been zoned differently in the past. The Applicant centered its uniqueness argument, however, on the architectural significance of the existing building, which it desired to retain. The Applicant was not required to save the structure due to historic preservation constraints. Rather, as the Board opines, the Applicant desired to save it because of its "aesthetic appeal," and because it "adds architectural variety to the area." September 23, 2002 Order of the Board of Zoning Adjustment in Case No. 16869, at

[1]The original application requested three (3) variances and one (1) special exception as to height under § 1403, because it was believed that the subject property was located in the Reed-Cooke Overlay District ("R-C Overlay"). Based on this belief, the Board granted the three (3) requested variances and a special exception pursuant to § 1403. However, it was later determined that the property was not in the R-C Overlay, but only in an R-5-B zone district, the case was re-opened and the Board amended its decision to grant the three (3) originally-requested variances, plus a fourth variance from the height requirements of § 400.

7. (hereinafter referred to as "Board Order") The Board's Order then found that this claimed exceptional situation of the property "would result in peculiar and exceptional practical difficulties upon the owner of the property." Board Order at 8. Based upon this finding, the Board granted an FAR variance of more than double what would be otherwise allowed and height relief that amounted to almost half the height allowed in an R-5-B zone.

Sua Sponte Review

At a Special Meeting held on September 30, 2002, the Commission decided to conduct a *sua sponte* review of the Board's decision in Application No. 16869. The *sua sponte* review concerned all four (4) variances requested by the Applicant.

The Commission sent a letter, dated October 8, 2002, notifying all parties that it would accept into the record their recommendations and arguments regarding its *sua sponte* review. Such recommendations or arguments were due no later than noon on November 29, 2002.

On November 26, 2002, the Applicant, represented by the law firm of Griffin, Farmer & Murphy, LLP, submitted a document entitled "Statement of King's Creek, LLC," arguing in favor of upholding the decision of the Board ("Statement"). The Statement argues that the Applicant's practical difficulties arise out of the retention of the architecturally significant structure on the property, which is non-conforming as to lot occupancy. It further argues that there is no specific limitation on the magnitude of variance relief and suggests that the matter-of-right limitations in the zoning regulations are merely "thresholds for consideration of the appropriateness of a particular project in a particular context." Statement at 7.

No submission was received by Advisory Neighborhood Commission ("ANC") 1C, the only other party to the case before the Board.

DECISION

The Commission conducted this *sua sponte* review pursuant to 11 DCMR § 3128.7. Sections 3128.7(a) and (b) authorize the Commission to engage in *sua sponte* review of a Board order "where it appears to the Commission that the Board has exceeded its prerogatives and has thus in effect changed the zoning" and/or "where it appears that a basic policy of the Commission, as expressed in the Zoning Regulations, has been violated as a result of" Board action. The Commission has considered the record before the Board and all properly submitted recommendations and arguments. After such consideration, the Commission hereby reverses the Board's decision to grant the Applicant all four (4) requested variances.

The Board is empowered to grant variances pursuant to § 8 of the Zoning Act of 1938, 52 Stat. 797, 799 (1938), repeated verbatim in 11 DCMR § 3103, when the Board finds that:

> [w]here, 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 any [zoning] regulation ... would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property.

11 DCMR § 3103.2.

Therefore, in order to have even one (1) variance granted, let alone four (4), the Applicant had to make three (3) showings before the Board: 1) that its property was affected by an "extraordinary or exceptional situation or condition"; 2) that such situation or condition resulted in "practical difficulties" to the Applicant[2]; and 3) that variance relief may 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." 11 DCMR § 3103.2. Therefore, any relief granted must not harm the public good and must be consistent with the zone plan as expressed in the regulations.

In the case before the Board, the Applicant claimed that it was necessary to retain the structure existing on the property because of its architectural significance to the neighborhood. According to the Applicant, retaining this structure created an exceptional situation resulting in practical difficulties to the Applicant. The Applicant also claimed an exceptional situation existed because the property was originally developed under the requirements of the then-existing commercial and industrial zones. Therefore, only as a result of the re-zoning of the property to an R-5-B zone district has the building become non-conforming as to lot occupancy and FAR. Lastly, the Applicant claimed the lot's "irregular shape" constituted an exceptional situation.

The structure existing on the property has never been designated a landmark or a contributing building in a historic district. Therefore, the Applicant is not compelled to save the structure. It has chosen to do so. Even assuming that the Applicant needed to retain the structure, it made no showing of how it could use the structure as it is, without zoning relief. In fact, the building was occupied at the time of the application. The Applicant's alleged practical difficulties, which it claims justify variance relief, arise out of the design of the addition to the structure, not out of the existence of the structure itself. There is no nexus between the claimed exceptional situation, caused by the retention of the existing structure and the claimed practical difficulties, caused by the design of the addition to that structure. The Applicant has not shown that it must put an addition on the structure in order to make reasonable use of it, even under its current residential zoning. *See, e.g.,* Board Order No. 16815 of Adams Alley, LLC (November 8, 2002) (The existing building was properly shown to be unsuitable for residential use without the proposed addition.) The Applicant simply chose to design an addition in such a way as to create the need for excessive zoning relief.

Further, the Commission finds that the mere re-zoning of the property does not amount to an exceptional situation or condition, making this property unique. Lastly, although the Applicant claimed that the lot was irregularly shaped, there was no credible evidence of irregularity. The

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[2]The Applicant had to make a showing of "practical difficulties" and not "undue hardship" because all four (4) variances requested were area variances, (as opposed to use variances.) *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972).

lot is essentially a square, encompassing 9,652 square feet and with an 83.2 foot width. It is not particularly narrow, shallow, or irregular in any way. It fronts on a street and backs onto a public alley. Therefore, the Commission concludes that the Applicant has first failed to make a convincing showing of the existence of an extraordinary or exceptional situation or condition of its property. Second, even if the existing structure constitutes an exceptional situation or condition, the Applicant has failed to show that its claimed practical difficulties result from such situation or condition.

An applicant's claimed practical difficulties must not only result from the exceptional situation or condition of its property, but their proof must also bear some reasonable relationship to the magnitude of relief granted. The quantum of proof for the practical difficulties claimed varies with the magnitude of the variance sought. *See, e.g., In the Matter of National Merritt v. Weist,* 41 N.Y.2d 438, 443, 361 N.E.2d 1028, 393 N.Y.S.2d 279 (1977). *De minimus* relief requires lesser proof of practical difficulties. *See, e.g., Gilmartin v. District of Columbia Board of Zoning Adjustment,* 579 A.2d 1164, 1171 (D.C. 1990). Drastic relief such as requested here, however, requires a showing of practical difficulties great enough to merit such relief. After reviewing the record before the Board, the Commission finds that the Applicant failed to make such a showing, leaving the Board without power to grant the relief requested.

The Commission also finds that with regard to the height and FAR variances, the Board failed to take into account the magnitude of the relief it was granting. It therefore exceeded its prerogative and, in effect, re-zoned the subject property. A variance must not be granted lightly and never on the basis that a project is popular or has exceptional merit. Before granting a variance, the Board must seriously consider only the legally relevant aspects of the request, including the magnitude of the relief requested. *See, e.g., In the Matter of National Merritt v. Weist, supra,* at 441. ("[T]he magnitude of the desired area variance ... is significant since the greater the variance in area restrictions the more severe the likely impact upon the community.") *See also, Sasso v. Osgood,* 86 N.Y. 2d 374, 633 N.Y.S.2d 259, 657 N.E.2d 254 (NY 1995). (Discussing recent New York law establishing new area variance test, one factor of which is "whether the requested variance is substantial.") If the relief granted is too great and out of all proportion to the practical difficulties claimed, it can amount to a de facto amendment of the zoning regulations or map and a re-zoning of the property. The Board is without power to amend the zoning regulations or map to change a property's zoning. *See,* D.C. Official Code § 6-641.07(e).

In the instant case, the FAR and height relief granted by the Board was extraordinary, resulting in a de facto re-zoning of the property. In an R-5-B District, the matter-of-right permitted density is 1.8 FAR. 11 DCMR § 402.4. The density of the building extant on the site is 1.9 FAR. The Board granted the Applicant's variance to permit it to construct a building with a density of 3.9 FAR--more than double the matter-of-right FAR of 1.8. The matter-of-right FAR permitted in the next two less restrictive zone districts, R-5-C and R-5-D, would only be 3.0 and 3.5, respectively. The Board permitted the Applicant an FAR of 3.9, which would not be permitted as a matter-of-right until an R-5-E district. The matter-of-right height in an R-5-B District is fifty (50) feet (with no limit on the number of stories). 11 DCMR § 400.1. The Board granted the Applicant variance relief to a height of 69.7 feet. The matter-of-right height in the next less restrictive zone district, R-5-C, is only sixty (60) feet. A matter-of-right height of 69.7

feet would not be available until an R-5-D District. These leaps are just too great to be countenanced in the absence of truly exceptional circumstances, none of which exist here. The Commission finds that the Board's FAR and height relief is tantamount to a de facto re-zoning of the property.

The Commission thus concludes that all the variance relief granted by the Board "substantially impair[s] the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." 11 DCMR § 3103.2. Variance relief must be consistent with the intent and purpose of the zone plan as expressed in the regulations. Matter-of-right lot occupancy, FAR and height maximums are just that--maximums. Variance relief is provided to avoid unfair situations, (S*ee, Goreib v. Fox,* 274 U.S. 603, 607 (1927)), but it must be exercised reasonably, keeping in mind that the matter-of-right standards set forth in the regulations are considered the maximum optimal conditions in the particular zone. *See, e.g., Abel v. Zoning Bd. of Appeals of City of Norwalk,* 172 Conn. 286, 374 A.2d 227, 229 (Conn. 1977). (It must be recognized that area requirements are the "embodiment of the legitimate expectations of the community and surrounding property owners.") Variance relief is available, when the required proofs are made, but variance relief of the magnitude granted here, wholly unconnected to the claimed exceptional situation or condition, and out of all proportion to the dubious practical difficulties claimed, does violence to the zone plan as embodied in the zoning regulations and map. Accordingly, the Commission finds that the Board, by granting the Applicant's requested variance relief, violated a basic policy of the Commission, as expressed in the regulations.
Based upon the foregoing, the Commission reverses in its entirety the Board's Order in Case No. 02-37/16869.

No motions to reconsider this decision may be submitted. The Zoning Commission is only authorized to decide motions to reconsider filed by parties to contested cases heard under § 3022 of its rules of practice and procedure. 11 DCMR § 3029.5. *Sua sponte* reviews concern contested cases that were heard by the Board pursuant to Chapter 31. Any motion to reconsider this decision will be rejected for filing by the Office of Zoning or, if inadvertently filed, will be returned to the person submitting the motion. Any person receiving such a motion should disregard it.

So ordered.

The Commission, on December 9, 2002, voted to **REVERSE** in its entirety the Board's decision and to **ADOPT** this order on a vote of 5-0-0 (Peter G. May, Carol J. Mitten, James H. Hannaham, Anthony J. Hood, and John G. Parsons in favor.)