GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 19787 of 2604 29th Street LLC, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the inclusionary zoning requirements of Subtitle C § 1001.2(e)(3), to construct a rear addition to the existing flat that is to be converted into a 12-unit apartment house in the RA-1 Zone at premises 2604 29th Street, S.E. (Square 5643, Lot 18).

HEARING DATE: September 12, 2018
DECISION DATE: September 12, 2018

ORDER

SELF-CERTIFICATION

Preliminary Matters

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibit 4.) 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.

Agency Reports

Affected Advisory Neighborhood Commission

The site of this application is located within the jurisdiction of Advisory Neighborhood Commission ("ANC") 7B, which is automatically a party to this application. The ANC submitted a Form 129 indicating that at a regularly scheduled, properly noticed public meeting on August 16, 2018 at which a quorum was present, the ANC took no vote on the application. (Exhibit 43.) Since there was no ANC vote, there is no ANC position in this case.

Form 129 includes space for an ANC to state its issues and concerns and its recommendation. Notwithstanding the absence of any vote, the ANC responded in both spaces, "see attachment." The attachment was entitled "material substance" and stated six concerns. However, the Board cannot consider these to be the ANC's concerns without a vote adopting them.

Board of Zoning Adjustment
District of Columbia
CASE NO.19787
EXHIBIT NO.54

Office of Planning

The Office of Planning ("OP") submitted a timely report recommending approval of the application. (Ex. 36.) OP's report explained that the Applicant is opting in to Inclusionary Zoning ("IZ") requirements in order to use inclusionary bonus density. In this case, opting in to IZ requires that eight percent of the project's gross floor area, or 747 square feet ("sq. ft."), be set-aside as IZ dwelling units, but the Applicant proposes to devote all 1,460.4 sq. ft. of the requested inclusionary bonus density toward two IZ units. OP found the requested bonus density to be consistent with existing development in the RA-1 Zone, which provides for areas predominately developed with low to moderate density, including low-rise apartments. OP also found the proposed development to comply with the development standards for the RA-1 Zone as to height, lot occupancy, side and rear yard, and massing. OP concluded that the requested bonus density would not appear to adversely affect the use of neighboring property given that the development will provide increased side yards and rear yard buffers to allow sufficient light and air to adjacent properties.

The District Department of Transportation

The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the application. (Exhibit 34.) DDOT found that the requested relief would have no adverse impacts on the travel conditions of the District's network. Although DDOT noted that the proposed project has the potential to generate minor impacts to on-street parking, DDOT had no objection to the approval of the requested special exception.

The Hearing

At the public hearing on September 12, 2018, neighbors living on 29th Street and Denver Street, Tyrone Jennifer and Alberta Hargrove, testified in opposition of the application. Both objected to the proposed density of the project and expressed concerns about overcrowding and available parking in the neighborhood. (Hearing Transcript ("Tr.") at 143-148.) Ms. Hargrove's house abuts the rear of the proposed project, and she testified that the demolition work and construction of the addition could damage her property, that the addition may encroach on her property line, and that alley access for residents of 29th, 30th, and Denver Streets could be disturbed. She also questioned whether an existing fence that appears to be on the Applicant's property is actually encroaching onto her neighbor's property.

The Board also heard testimony from ANC Commissioner Hammond Marlin. The Form 129 indicated that Commissioner Hammond Marlin would present the ANC's report. Such a presentation would necessarily be limited to a statement that no vote was taken. However, the Commissioner used her testimony to raise concerns about the proposed project's increased density being inconsistent with the low-rise appearance that characterizes the surrounding apartment types; the potential reduction of available street parking in the surrounding neighborhood; the lack of clarity from the Applicant on whether the units will be rental or ownership; and enforcement of the Applicant's commitment to provide IZ units. Since the ANC took no vote, none of these

positions can be ascribed to it, but must be regarded as the Commissioner's personal view, which the Board will address in its discussion of the merits.

Several letters of opposition to the application were submitted to the case record by neighbors living in the 2900 block of Denver Street. The letters reiterate the concerns that were raised in the public hearing testimony of Mr. Jennifer and Ms. Hargrove. (Exhibits 46, 47, 48, 49, 50, and 51.) In addition, residents of 29th, 30th, Erie, and Denver Streets, and Alabama Avenue and Naylor Road, submitted a petition signed by 46 people who oppose the application because they believe the proposed density will negatively impact the Hillcrest community. (Exhibit 52.)

No letters in support of the application were submitted to the case record.

The Project

The applicant proposes to construct a rear and third story addition to an existing flat, converting it to an apartment house having 12 units. Eight of the units would be included in the addition and since that is less than ten units, compliance with Inclusionary Zoning requirements would not be required. The Applicant wishes to voluntarily subject its property to the Inclusionary Zoning Regulations and to use bonus density available to mandatory Inclusionary Developments to construct a rear and third story addition.

Subsection C § 1001.2(e)(3) provides that for voluntary Inclusionary Developments the "use of the bonus density provided in Subtitle C § 1002 in the … or the RA-1 Zones shall require special exception approval pursuant to Subtitle X, Chapter 9." The RA-1 Zone allows a maximum floor area ratio ("FAR") of 0.9 (7,878.6 sq. ft.), and with the requested bonus density would permit a FAR of 1.08 (9,454.32 sq. ft.). The Applicant indicates that the project would provide a FAR of 1.07 (9,339 sq. ft.).

Although the minimum amount of gross floor area that must be set aside for this development is 747 square feet, the Applicant will devote all 1,460.4 sq. ft. of the requested inclusionary bonus density toward two IZ units.[1]

The RA-1 Zone provides for areas predominantly developed with low- to moderate-density development. The requested bonus density would result in an additional 1,460.4 square feet in the development, which would fit within the existing bulk regulations for the zone.

The development would comply with height, lot occupancy, rear yard, and side yard requirements, and would be consistent with surrounding development, which provides a variety of housing types, including apartment houses.

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[1] OP's report (Ex. 36) indicates that the Applicant will provide 12 IZ units, and the Applicant's statement (Ex. 9) indicates that all units will be affordable. However, at the September 12, 2018 public hearing, the Applicant clarified in its testimony that 2 IZ units will be provided not 12. (Tr. at 117-118.) The remaining units will be market rate, but made available to households with housing vouchers.

The development would provide buffers from adjacent development, including increased side yards and rear yard, and would be consistent with adjacent existing development, including apartment houses located to the south.

The project would comply with or exceed minimum development regulations, allowing sufficient light and air to adjacent properties.

A residential property owned by Ms. Alberta Hargrove abuts the rear of the proposed project. The back of Ms. Hargrove's house and the proposed addition is separated by approximately 85 to 100 feet. A survey was completed showing the existing fence on the Applicant's property not the neighbors. (Tr. at 149-150.)

The Applicant's self-certification indicated that two parking spaces would be required and provided. Later, the Applicant stated that seven spaces would be provided. (Tr. at 134.)

<u>The Merits</u>

The Inclusionary Zoning Regulations are codified in Chapter 10 of Subtitle C of the Zoning Regulations of 2016 (Title 11 DCMR). Residential developments that are subject to the regulations by paragraphs (a) through (d) of 11-C DCMR § 1001.2, must, pursuant to 11-C DCMR § 1003, set aside the greater of a percentage of their residential gross floor area or their achievable bonus density area as Inclusionary Units for households earning 60% or 80% of the median family income depending upon whether the Inclusionary Unit is for rent or for sale, respectively. Developments subject to the Inclusionary Zoning Regulations may utilize a bonus density of up to 20% over the matter of right limits.

Subsection C § 1001.2(e) allows owners of developments that are not subject to the Inclusionary Zoning Regulations to voluntarily participate in the program. The Applicant owns an existing residential development in an RA-1 Zone and wishes to voluntarily participate in the program and to utilize 1,460.4 square feet of bonus density to construct a rear and third story addition. Subparagraph (3) of 11-C DCMR § 1001.2(e) provides that voluntary IZ developments located in in the RA-1 Zone must obtain special exception approval to utilize such bonus density, which the Applicant seeks here.

Pursuant to Section 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07 (g), the Board is authorized to hear and decide, in accordance with the provisions of the regulations adopted by the Zoning Commission, requests for special exceptions. The Zoning Commission has provided that the Board may grant a special exception if in the Board's judgment doing so 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 Maps, subject to specific conditions. (11-X DCMR § 901.2.) In this case, the Zoning Commission established no specific conditions to allow for the special exception to be granted.

The Board concludes that this special exception standard has been met. As noted by OP, the requested bonus density is consistent with existing development in the RA-1 Zone, which provides for areas predominately developed with low to moderate density, including low-rise apartments. The proposed development will comply with the development standards for the RA-1 Zone as to height, lot occupancy, side and rear yard, and massing. The Board also concurs with OP that the requested bonus density will not tend to adversely affect the use of neighboring property given that the development will provide increased side yards and rear yard buffers to allow sufficient light and air to adjacent properties. With respect to Ms. Hargrove's concerns, the Board finds the distance between the back of her house and the proposed addition is sufficient to result in no adverse impacts to her. The addition will not encroach on Ms. Hargrove's property as she asserts, and a survey shows that the existing fence is on the Applicant's property not the neighbor's.

The Board notes that DDOT found that the requested relief would have no adverse impacts on the travel conditions of the District's network. Although DDOT noted that the proposed project has the potential to generate minor impacts to on-street parking, the Applicant has agreed to provide five more parking spaces than the two proposed, and the Board concludes that this will be sufficient to mitigate impacts on available street parking. Since the Board is relying upon this representation as one of its bases for finding no adverse impact, it is making it a condition of its approval.

Through letters and testimony, members of the public and an ANC Commissioner raised concerns about the proposed project's increased density being inconsistent with the low-rise appearance that characterizes the surrounding apartment types; the potential reduction of available street parking in the surrounding neighborhood; the lack of clarity from the Applicant on whether the units will be rental or ownership; and enforcement of the Applicant's commitment to provide IZ units.

The second issue has been addressed above.

As to the first issue, the project will increase overall density as the Applicant proposes to convert the property from an existing two-story two-unit flat consisting of 2,580 sq. ft. in gross floor area ("GFA") to a three–story 12-unit apartment house consisting of 9,339 square feet in GFA. However, the substantial majority of the proposed increase in density is permitted as a matter of right in the RA-1 Zone without the inclusionary bonus density relief sought by the Applicant.

In the RA-1 Zone, a GFA or FAR totaling 0.9 (7,878.6 sq. ft.) is permitted as a matter of right. Therefore, the maximum 20% of inclusionary bonus density would allow a GFA or FAR totaling 1.08 (9,454.32 sq. ft.). Here, the Applicant seeks a total FAR of 1.07 (9,339 sq. ft.), which amounts to 0.17 FAR or 1460.4 sq. ft. more than the 7,878.6 sq. ft. permitted as a matter of right. Thus, absent any bonus density zoning relief, the Applicant can increase the existing GFA of the property from 2,580 sq. ft. to 7,878.6 sq. ft. because the RA-1 Zone provides for low to moderate density development, including low-rise apartments.

As to the third issue, the Applicant will be required to specify whether the Inclusionary Units will be for sale or rental at the time it files a certificate of inclusionary zoning compliance and therefore the issue is of no relevance here. As to ensuring the Applicant will comply with its commitments, the Zoning Regulations require a minimum set-aside of 747 square feet. However, to ensure that additional IZ gross floor area will be provided, the Board will add a condition of approval requiring two IZ units with a combined gross floor area of 1,460.4 square feet.

In reviewing an application for special exception relief, the Board's discretion is limited to determining whether the proposed exception satisfies the requirements of the regulations and "if the applicant meets it burden, the Board ordinarily must grant the application." *First Washington Baptist Church v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973).) Based on the hearing testimony and the evidence in the case record, the Board finds that the request for special exception relief meets the general special exception standards of Subtitle X § 901.2. Therefore, granting the inclusionary bonus density relief would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and would not adversely affect the use of neighboring properties.

<u>Great Weight</u>

The Board is required to give "great weight" to OP recommendations. (D.C. Official Code § 6-623.04 (2012 Repl.).) In this case, OP recommended approval of the application. The Board has carefully considered OP's recommendation in support of the application and for the reasons stated in this Order agrees that approving the special exception relief is appropriate.

<u>ANC Report</u>

The Board is also required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give "great weight" to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 7B. Here, the ANC through the submission of a Form 129, submitted a report indicating that at a properly noticed meeting, with a quorum present, it took no vote on the application. As a result, there is nothing to give great weight to.

Based upon the record before the Board, and having given great weight to the recommendations made in the OP report filed in this case, the Board concludes that the Applicant has met the burden of proof under 11 DCMR Subtitle X § 901.2, that the Applicant's request to use inclusionary bonus density 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.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 11 – ARCHITECTURAL PLANS AND ELEVATIONS and EXHIBIT 33A - PREHEARING SUBMISSION: TAB A (FLOOR PLANS) - AND WITH THE FOLLOWING CONDITIONS:**

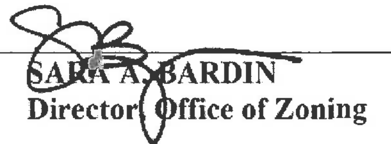
1. For the life of the project there shall be at least seven zoning compliant parking spaces on the property.

2. For the life of the project there shall be two dwelling units with at least 1,460.4 square feet of combined gross floor area that are subject to the provisions of Chapter 10 of Title 11-C DCMR.

VOTE: **5-0-0** (Frederick L. Hill, Peter G. May, Lesylleé M. White, Lorna L. John, and Carlton E. Hart to APPROVE).

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: January 4, 2019

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 § 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.