

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19832 of Yasmine Sikder, as amended¹ pursuant to 11 DCMR Subtitle X, Chapter 10, for area variances from the side yard requirements of Subtitle D § 307.1, and the common division wall requirement of Subtitle D § 307.4, to construct a new semi-detached principal dwelling unit in the R-2 zone at premises 308 62nd Street, N.E. (Square 5267, Lot 44).

HEARING DATES: October 24, 2018; November 14, 2018; January 16, 2019
DECISION DATE: February 6, 2019

DECISION AND ORDER

Yasmine Sikder (the “**Applicant**”) filed an application with the Board of Zoning Adjustment (the “**Board**”) on June 22, 2018, which was subsequently amended to request area variances under Subtitle X, Chapter 10 of Title 11 of the DCMR (the “**Zoning Regulations**”, to which all references are made unless otherwise specified) from the minimum side yard requirements of Subtitle D § 307.1 and from the common division wall requirement of Subtitle D § 307.4 (the “**Application**”), to construct a new semi-detached principal dwelling unit in the R-2 zone at premises 308 62nd Street, N.E. (Square 5267, Lot 44) (the “**Property**”). For the reasons explained below, the Board voted to **APPROVE** the Application.

FINDINGS OF FACT

Notice of Application and Notice of Public Hearing

1. Pursuant to Subtitle Y §§ 400.4 and 402.1, the Office of Zoning (“**OZ**”) sent notice of the Application and the October 24, 2018 hearing by a September 14, 2018 letter to the Applicant; Advisory Neighborhood Commission (“**ANC**”) 7C, the ANC for the area within which the Property is located; the Single Member District (“**SMD**”) Commissioner for 7C05; the Office of ANCs; the Office of Planning (“**OP**”); the District Department of Transportation (“**DDOT**”); the Councilmember for Ward 7; the Chairman of the Council; the At-Large Councilmembers; and the owners of all property within 200 feet of the Property. (Ex. 15-27.)

¹ The Applicant amended the application (Ex. 32) to add a variance from the common division wall requirements of Subtitle D § 307.4 the original request for relief. The Applicant further amended the Application by removing a request for a variance from the lot dimension requirements of Subtitle D § 302.1. (Ex. 46).

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2. OZ also published notice of the October 24, 2018 public hearing in the *D.C. Register* on August 31, 2018 (65 DCR 9034) as well as through the calendar on OZ's website.

Parties

3. The Applicant and ANC 7C were automatically parties in this proceeding per Subtitle Y § 403.5. No request for party status was filed.

The Property

4. The Property is 140 feet long by 22 feet wide and contains 3,080 square feet of land area. (Ex. 44.)
5. The Property is rectangular and fronts on 62nd Street, N.E. to the east. The Property abuts a 15-foot wide alley to the south and a 20-foot alley to the west. (Ex. 29 and 44.)
6. Several lots to the rear of the Property, particularly Lots 54 through 58, are also extremely narrow. However, these lots are currently developed with existing, attached row dwellings. (Ex. 44.)
7. The lot to the north of the Property is under separate ownership and currently improved with an existing two-story apartment house. (Ex. 29.)
8. The Property is currently undeveloped. (Ex. 47.)
9. Several other existing buildings in the surrounding neighborhood are also nonconforming in terms of side yard. (Ex. 29 and 44.)
10. The surrounding neighborhood is primarily developed with small apartment houses and some detached and semi-detached principal dwelling units. (Ex. 29.)
11. The Property is located in the R-2 zone.
12. Pursuant to Subtitle D § 300.5, the purpose and intent of the R-2 zone is to provide for areas predominantly developed with semi-detached houses on moderately sized lots that also contain some detached dwellings.

The Application

13. The Application proposed to construct a new, two-story, detached principal dwelling unit (the "**Building**") on a vacant lot. The Applicant revised the initial plans to change the Building's façade. (Ex. 44 and 47.)
14. The Application proposed to provide a three-foot side yard between the Building and the southern property line.

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15. The Application proposed to provide no side yard between the Building and the northern property line. (Ex. 44 and 45.)

Zoning Relief

16. Subtitle D § 307.4 requires that a development in the R-2 zone provide a side yard where the development does not share a common division wall with a building on an adjacent property.
17. Subtitle D § 307.4 requires that each required side yard in the R-2 zone is at least eight feet wide.²
18. In order to provide no side yard between the Building and the northern property line and a three-foot side yard between the Building and the southern property line, the Application requested area variances under Subtitle X § 1000 from:
 - (a) the common division wall requirements of Subtitle D § 307.4; and
 - (b) the eight-foot side yard requirement of Subtitle D § 307.1. (Ex. 44-46.)
19. The Application asserted that the Building met the standard for the requested variances because of the Property's narrow lot width is an exceptional condition that could not be mitigated because the Property is bounded by a public alley to the south and a separately owned residential property to the north and, as a result, the Applicant cannot expand the lot. The Application asserted that due to this exceptional condition, if the Property did not receive zoning relief, the Applicant would have practical difficulties as the Property would be incapable of being developed. (Ex. 45.)

OP Report

20. OP submitted a report dated October 12, 2018 (the "**OP Report**") and determined that the Application met the variance standard and recommended approval of the Application. (Ex. 29.)
21. The OP Report stated the exceptional condition justifying the variance is the width of the existing lot, which is exceptionally narrow at 22 feet. The OP Report also noted that the adjacent property is separately owned, and as a result, the Applicant cannot create a conforming lot by combining properties.
22. The OP Report found that the condition of the lot width results in a practical difficulty because requiring the Applicant to provide the eight-foot side yards on either side of the proposed building would result in the Applicant being limited to constructing a six-foot

² Although the Zoning Commission deleted Subtitle D § 307.4 and moved Subtitle D § 307.1 to Subtitle D § 206.3 in Z.C. Case No. 17-23, effective February 22, 2019, per Subtitle A § 301.7, the Application was granted under the Zoning Regulations in effect at the time of the Board's February 6, 2019 vote.

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wide structure. OP concluded that this would effectively prevent the Applicant from developing the Property.

23. The OP Report concluded that the development will not result in any adverse impacts to the light and air available to neighboring properties due to the existence of a side yard on the property to the north and the 15-foot alley to the south.
24. The OP Report concluded that granting the variance will result in no harm to public good because the development would infill an “undeveloped gap” on a residential street, thereby “reinforcing the residential character” of the surrounding neighborhood. OP noted that many of the existing, detached and semi-detached buildings in the neighborhood do not provide compliant side yards and so the Building would not be out of context with the surrounding structures.
25. The OP Report concluded that the proposed development will not result in any substantial harm to the Zoning Regulations. OP noted that the intent of the side yard standards is to ensure sufficient open space between adjacent uses. Due to the existing side yard between the Property and the existing apartment house to the North, and given the proposed three-foot side yard to the south, OP believed that open space will be sufficiently maintained. OP also noted that the proposed development is consistent with prior development in the neighborhood which provided minimal side yards, if any, between uses.

DDOT Report

26. DDOT submitted a report dated October 5, 2018 (the “**DDOT Report**”) stating that it had no objection to the Application. DDOT concluded that the proposed development would not result in any adverse impacts to the District transportation network. DDOT did not raise any concerns regarding the development’s impact on the adjacent public alleys. (Ex. 30.)

ANC Report

27. ANC 7C submitted a written report (the “**First ANC Report**”) stating that at a duly noticed and scheduled public meeting on November 8, 2018, at which a quorum was present, the ANC voted to oppose the Application. (Ex. 43.)
28. The First ANC Report noted two main concerns with the Application:
 - (a) The lack of space in the existing alleys and the impact that the proposed development would have on the ability of emergency response vehicles to access the alleys.

- (b) The proposed three-story building would be out of character with the surrounding two-story buildings in the neighborhood.³
- 29. The ANC submitted a subsequent written report (the “**Second ANC Report**”) stating that at a duly noticed and scheduled public meeting on January 10, 2019, at which a quorum was present, the ANC voted again to oppose the Application. (Ex. 52.)
- 30. The Second ANC Report did not repeat its previous concern about the Building’s negative impact on the character of the neighborhood. However, the Second ANC Report reiterated the ANC’s previous concerns regarding the alleys and the maneuverability of emergency vehicles.

Persons in Opposition

- 31. The Board received a letter in opposition from Vonda James, the owner of the adjacent property to the north, 312 62nd Street, N.E., who opposed the Application because of the belief that the Property “was not conducive for the proposed structure” and that the Building would not “flow” with the other structures in the neighborhood. (Ex. 51.)
- 32. Mary Gaffney, ANC Commissioner for SMD 7C05, submitted a letter in opposition on behalf of the neighbors of 62nd Street, N.E. and the members of the Northeast Boundary Civic Association stating their concerns that the development would restrict the ability of Fire and EMS vehicles and garbage trucks from accessing the alley and that the Building would be out of character with the existing buildings in the neighborhood. (Ex. 50.)
- 33. Commissioner Gaffney testified at the January 16, 2019 hearing on behalf of the ANC and contended that the opinion of the ANC was that the existing property was simply too narrow to accommodate the Building and that the Board should deny the variance on that basis.
- 34. The ANC did not submit a written report adopting Commissioner Gaffney’s testimony as that of the ANC, as required to be granted great weight by the Board. (*See* 11-Y DCMR § 406.6; D.C. Official Code 1-309.10(d)(4).)

CONCLUSIONS OF LAW

- 1. The Board is authorized to grant variances from the requirements of the Zoning Regulations where:
 - (i) “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other

³ All plans submitted for Board review, both original and revised, show a two-story building, but the revised plans did change the façade design.(Ex. 7, 38 and 44).

- extraordinary or exceptional situation or condition of a specific piece of property,”
- (ii) 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 the property,” and granting the requested variance would not cause
 - (iii) “substantial detriment to the public good” or
 - (iv) “substantial impairment to the intent, purpose, and integrity of the Zone plan as embodied in the Zoning Regulations and Map.” (Section 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(3) (2018 Repl.); Subtitle X § 1000.1.)
2. The Application’s request for relief from the side yard requirements of Subtitle D §§ 307.1 and 307.4 qualify as area variances because they are requirements “that affect the size, location, and placement of buildings and other structures ...”. (Subtitle X § 1001.3(a).) An applicant for an area variance must prove that an extraordinary condition of the property would result in “peculiar and exceptional practical difficulties” by demonstrating first that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. (*Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990); Subtitle X § 1002.1(a).)
3. “The ‘exceptional condition’ requirement may be satisfied by a characteristic of the land, *see Fleischman v. District of Columbia Bd. of Zoning Adjustment*, 27 A.3d 554, 561 (D.C. 2011); ‘[a] condition inherent in the structures built upon the land,’ *Capitol Hill Restoration Soc’y, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 942 (D.C. 1987); or prior zoning actions regarding the property, *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097–98, 1100 (D.C. 1979). ‘The extraordinary or exceptional conditions affecting a property can arise from a confluence of factors; however, the critical requirement is that the extraordinary or exceptional condition must affect a single property.’ *Metropole Condo. Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1082–83 (D.C. 2016).” *Ait-Ghezala v. District of Columbia Bd. of Zoning Adjustment*, 148 A.3d 1211, 1217 (D.C. 2016).

Exceptional Condition

4. The Board concurs with OP’s analysis and concludes that the preexisting and unusually narrow shape of the lot presents an exceptional condition satisfying the variance requirement. While other lots in the vicinity of the Property are also narrow, the Property is unique in that it is currently vacant and is therefore, not covered by the provisions governing existing nonconforming structures.

Practical Difficulty

5. The Board concludes that the exceptional condition of the narrow, vacant lot creates practical difficulties because compliance with Subtitle D §§ 307.1 and 307.4 would require the Applicant to provide 16 feet solely for side yards, thereby limiting the

proposed structure to only six feet in width. This would in essence preclude any meaningful residential development on the site.

No Substantial Detriment to the Public Good

6. The Board concludes that the existence of a side yard on the property to the north, and the alley to the south, would provide adequate separation for the Property and mitigate any potential impacts to light and air.
7. The Board accepts the conclusions of the OP Report that many of the existing properties in the surrounding neighborhood also have nonconforming side yards and, as such, the Property would not be out of character with surrounding development.

No Substantial Impairment to the Zoning Regulations

8. The Board concurs with OP's analysis that the intent of the side yard regulations is to ensure that sufficient open space is provided between uses. Given the configuration of the existing site including the deep rear yard and the side yard provided by the property to the north, the Board feels that an adequate amount of open space will be maintained.
9. The Board also concludes that the Applicant's proposed development would fill in an undeveloped lot with a semi-detached residential structure, which meets the intent of the R-2 zone.

“Great Weight” to the Recommendations of OP

10. The Board is required to give “great weight” to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2018 Repl.) and Subtitle Y § 405.8.)
11. The Board concludes that the OP Report, which provided an in-depth analysis of how the Application met each of the requirements for the requested area variance relief, is persuasive and concurs with OP's recommendation that the Application be approved, as discussed above.

“Great Weight” to the Written Report of the ANC

12. The Board must give “great weight” to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 7C. (§ 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) (2012 Repl.) and Subtitle Y § 406.2.) To satisfy this great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978).

13. The Board concludes that the concerns raised by the ANC Reports that the Building would limit the space available on the alley did not constitute “legally relevant issues” as regulation of the public rights of way is beyond the scope of the Board’s authority. The Board notes that the DDOT Report did not raise any concerns regarding the impact of the proposed development on the alleys. The Board also credits the testimony of both the Applicant and OP that the proposed Building would be constructed solely on the Property and would not encroach onto the existing alleys as per the plans at Exhibit 44.
14. The First ANC Report also raised the concern that the Building did not conform with the two-story buildings in the neighborhood. The Board does not find this concern persuasive because the Application consistently proposed a two-story building, not a three-story building as stated in the First ANC Report, and the plans approved by this Order, with which any development must comply, show the Building with only two stories. The Board accepts the conclusions of OP that other buildings in the vicinity are nonconforming with regards to side yards.

DECISION

Based on the case record, the testimony at the hearing, and the Findings of Fact and Conclusions of Law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for area variances from the minimum side yard requirements of Subtitle D § 307.1 and from the common division wall requirement of Subtitle D § 307.4.

It is therefore **ORDERED** that this application is hereby **GRANTED**, subject to the following **CONDITION**:

1. Development of the Property that uses the relief granted in this Order shall comply with the approved plans at Exhibit 44⁴ as required by Subtitle Y § 604.10.

VOTE: 4-0-1 (Frederick L. Hill, Lorna L. John, Lesylleé M. White, and Robert E. Miller to APPROVE; Carlton E. Hart not participating.)

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

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

⁴ Self-Certification. The zoning relief requested in this case was self-certified, pursuant to Subtitle Y § 300.6 (Exhibit 46). In granting the requested self-certified relief subject to the plans submitted with the Application, the Board makes no finding that the requested relief is either necessary or sufficient to authorize the proposed construction project described in the Application and depicted on the approved plans. 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 such application that would require additional or different zoning relief from that is granted by this Order.

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: October 8, 2019

PURSUANT TO 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 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 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.

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.