

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



**Application No. 20062 of Mid City Builders LLC**, pursuant to 11 DCMR Subtitle X, Chapter 9, for special exceptions under the penthouse requirements of Subtitle C § 1500.4, and under Subtitle C § 1504 from the penthouse setback requirements of Subtitle C § 1502.1(c)(1)(a), to construct a new three-story flat with a cellar level, roof deck and a rooftop access penthouse in the RF-1 Zone at premises 802 10th Street, N.E. (Square 933, Lot 47).

**HEARING DATE:** July 31, 2019  
**DECISION DATES:** September 25 and October 9, 2019

**DECISION AND ORDER**

This self-certified application was submitted on April 25, 2019 on behalf of Mid City Builders LLC, the owner of the property that is the subject of the application (the “Applicant”). Following a public hearing, the Board voted to deny the application.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Hearing. By memoranda dated June 13, 2019, the Office of Zoning provided notice of the application and of the public hearing to the Applicant, the Office of Planning (“OP”), the District Department of Transportation (“DDOT”), the Office of Advisory Neighborhood Commissions, the Councilmember for Ward 6, as well as the Chairman and the four at-large members of the D.C. Council, Advisory Neighborhood Commission (“ANC”) 6A, the ANC in which the subject property is located, Single Member District/ANC 6A01, and the owners of all property within 200 feet of the subject property. Notice was published in the *District of Columbia Register* on June 14, 2019. (66 DCR 7148.)

Party Status. The Applicant and ANC 6A were automatically parties in this proceeding. There were no requests for party status.

Applicant’s Case. The Applicant provided evidence and testimony in support of the application from Aaron Ruderman and Matthew Corell.

ANC Report. ANC 6A did not submit a written report to the record for this application.

OP Report. By memorandum dated July 19, 2019, the Office of Planning recommended approval of the zoning relief requested by the Applicant. (Exhibit 29.)

DDOT Report. By memorandum dated July 12, 2019, the District Department of Transportation indicated no objection to approval of the application. (Exhibit 30.)

Persons in support. The Board received letters and heard testimony in support of the application. The persons in support noted that other properties in the square had rooftop decks and asserted that the Applicant's proposal would not unduly affect the privacy of neighboring properties given its proposed size and setback from the front of the property.

## **FINDINGS OF FACT**

1. The property that is the subject of this application is located on the west side of 10<sup>th</sup> Street, N.E. between H and I Streets (Square 933, Lot 47).
2. The subject property is rectangular, approximately 16.4 feet wide and 106 feet deep. The lot area is 1,736 square feet.
3. The subject property is currently vacant but was previously improved with a two-story attached dwelling.
4. The Applicant planned to build a new three-story attached building on the subject property for use as a two-family flat. The third story would have a rear balcony.
5. The new building would comply with applicable development standards, with a building height of 35 feet, lot occupancy of 55%, and a rear yard of approximately 47 feet. (*See* Subtitle E §§ 303.1, 304.1, 306.)
6. The Applicant proposed to construct a roof deck on the new building. The deck would have an area of 156 square feet and would be accessible from the third floor via an internal stair. A metal guardrail, 42 inches in height, would be installed around the deck.
7. The Applicant also proposed to construct a penthouse stair enclosure on the roof. The penthouse would be eight feet, six inches in height and almost 18 feet in length, with an area of 82 square feet. The penthouse would be located along the northern lot line, set back slightly more than 14 feet from the front of the building.
8. The properties abutting the subject property are improved with two-story dwellings, an attached building to the south and a semi-detached building to the north. The majority of buildings on the block are attached dwellings, two stories and approximately 22 feet in height.
9. Properties to the south, fronting on H Street, are located in Neighborhood Mixed Use (NC) zones. Some of these properties are improved with larger buildings, including a new five-story building 50 feet in height in the vicinity of the subject property.
10. The subject property is located in a Residential Flat zone, RF-1.

11. The Residential Flat (RF) zones are residential zones that provide for areas developed primarily with row dwellings, but within which there have been limited conversions of dwellings or other buildings into more than two dwelling units. (Subtitle E § 100.1.) The RF zones are designed to be mapped in areas identified as low-, moderate- or medium-density residential areas suitable for residential life and supporting uses. (Subtitle E § 100.2.)
12. The provisions of the RF zones are intended to: (a) recognize and reinforce the importance of neighborhood character, walkable neighborhoods, housing affordability, aging in place, preservation of housing stock, improvements to the overall environment, and low- and moderate-density housing to the overall housing mix and health of the city; (b) allow for limited compatible non-residential uses; (c) allow for the matter-of-right development of existing lots of record; (d) establish minimum lot area and dimensions for the subdivision and creation of new lots of record in RF zones; (e) allow for the limited conversion of rowhouse and other structures for flats; and (f) prohibit the conversion of flats and row houses for apartment buildings as anticipated in the RA zone. (Subtitle E § 100.3.)
13. The purpose of the RF-1 zone is to provide for areas predominantly developed with row houses on small lots within which no more than two dwelling units are permitted. (Subtitle E § 300.1.)

## **CONCLUSIONS OF LAW AND OPINION**

The Applicant seeks special exceptions under the penthouse requirements of Subtitle C § 1500.4 and under Subtitle C § 1504 from the penthouse setback requirements of Subtitle C § 1502.1(c)(1)(a) to allow a penthouse, without the required setback from a side wall, on a new three-story attached building for use as a flat, with a roof deck, in the RF-1 zone at 802 10th Street, N.E. (Square 933, Lot 47). The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.) to grant special exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, the special exception 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 Map, subject to specific conditions. (*See* 11 DCMR Subtitle X § 901.2.)

Pursuant to Subtitle C § 1500.4, a penthouse is not permitted on the roof of an attached dwelling or flat unless approved as a special exception, provided that the penthouse (a) is no more than 10 feet and one story in height and (b) contains only stair or elevator access to the roof, with a maximum of 30 square feet of storage space ancillary to a rooftop deck.<sup>1</sup> A penthouse must “harmonize with the main structure in architectural character, material, and color.” (Subtitle C § 1500.6.) The Zoning Regulations impose setback requirements restricting the location of a penthouse in the case of a building used as an attached dwelling or flat that is adjacent to a property that has a lower or equal building height permitted as a matter of right. The setback requirements include that any penthouse, roof deck, or guard-rails around a roof deck must be set back from the

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<sup>1</sup> Exceptions to this provision, applicable to screening for rooftop mechanical equipment or a guard-rail required by Title 12 of the DCMR, D.C. Construction Code for a roof deck, are not relevant to this application.

edge of the roof a distance from the side building wall equal to height. (Subtitle C § 1502.1(c)(1)(a).)

The Applicant seeks a special exception to allow a penthouse stair enclosure on the roof of the planned building, an attached building configured for use as a flat. The proposal would meet the requirements of Subtitle C § 1500.4 for special exception approval of a penthouse on the roof of an attached dwelling or flat in that the proposed penthouse would not exceed 10 feet and one story in height and would contain only stair access to the roof, without any storage space. However, the Applicant's proposal would not satisfy the setback requirement of Subtitle C § 1502.1(c)(1)(a) because the new building will be adjacent to properties where the same building height is permitted as a matter of right, and the penthouse would be situated without any setback from the side wall on the northern edge of the property, where a setback equal to height – in this case, eight feet, six inches – is required.

Pursuant to Subtitle C § 1504.1, the Board may grant relief from the setback requirement as a special exception, subject to certain requirements. An applicant for relief must demonstrate that the strict application of the setback requirements would result in construction that is unduly restrictive, prohibitively costly, or unreasonable, or would be inconsistent with building codes. Approval of the requested relief must result in a better design of the roof structure that would not appear to be an extension of the building wall and must result in a roof structure that is visually less intrusive. An applicant for relief must make every effort for the housing for a stairway penthouse to comply with the required setbacks. Relief is appropriate when full compliance with the setback requirements would be unduly restrictive, prohibitively costly, or unreasonable due to operating difficulties, size of the building lot, or other conditions relating to the building or surrounding area. The purpose and intent of the Zoning Regulations must not be materially impaired by the planned penthouse structure, and the light and air of adjacent buildings must not be affected adversely.

The Applicant testified that the planned penthouse had to be situated along the northern property line due to the narrowness of the lot, stating that a central location for a staircase providing access to the roof could not satisfy the setback requirement and would have created some “dysfunctional flows in the third level” of the building. (BZA Public Hearing Transcript of July 31, 2019 at 6.) According to the Applicant, the penthouse would not be visually intrusive because it would not be visible from 10<sup>th</sup> Street due to its front setback and because of the presence of taller buildings in the vicinity, some with rooftop penthouses. The Applicant contended that the proposed penthouse would not adversely affect the light, air, or privacy available to neighboring properties due to its size and location. The Office of Planning agreed, stating that “full compliance with a 1-to-1 side setback would be impossible” on the narrow lot, and that a partial setback would result in an inefficient layout of the top floor of the building. (Exhibit 29.) OP acknowledged that “[l]ocating the penthouse on the north property line could result in an appearance of a taller wall along a common lot line” but concluded that the proposed location, “well back from the front and the rear, would minimize visibility from most vantage points [for most] pedestrian traffic.” (*Id.*)

Based on the findings of fact, the Board concludes that the application does not satisfy the requirements for special exception approval consistent with Subtitle C § 1504. The Applicant

considered at least two alternatives to the proposed penthouse: a rooftop hatch and an open stair from the third-floor balcony. The Applicant rejected those options, citing concerns about ease of use, water infiltration, and cost with regard to the roof hatch. The Applicant asserted that a rear stair would occupy a large area of the balcony and would require a railing that would not comply with height or setback requirements. The Board was not persuaded that other available options for providing access to the roof deck, which would comply with most if not all zoning requirements, would be unsuitable in this case, and therefore is unable to find that the strict application of the setback requirements would result in construction that is unduly restrictive, prohibitively costly, or unreasonable.

The Board is also unable to find that approval of the requested relief would result in a better design of the roof structure that would be visually less intrusive. The Applicant acknowledged being unable to build a penthouse that would not appear to be an extension of the building wall. With a height in excess of eight feet, the proposed penthouse would be more visually intrusive than the other options identified as capable of providing access to a roof deck. While the front setback would limit its visibility from directly across the street, the proposed penthouse would be readily visible from other locations along 10<sup>th</sup> Street, where most nearby buildings have two stories and are considerably lower in height than the Applicant's new three-story building. The additional height and visibility of the proposed penthouse, appearing as an extension of the building wall, would be disruptive to the character and nature of the nearby rowhouses. That change in character would not be mitigated by the presence of taller buildings in the neighborhood, in light of the lower density character and appearance in the immediate vicinity of the subject property.

The Board is unable to conclude that approval of the requested special exceptions would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and would not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, as is required for approval of the application under Subtitle X § 901.2. Approval of the application would not satisfy the requirements of Subtitle C § 1504 and would not be consistent with the purposes of the RF zones to recognize and reinforce the importance of neighborhood character and improvements to the overall environment to the overall housing mix and health of the city, and to allow for the matter-of-right development of existing lots of record.

The Board is required to give "great weight" to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2012 Repl.)) For the reasons discussed above, the Board does not agree with OP's recommendation that the application should be approved in this case.

The Board is also required to give "great weight" to the issues and concerns raised by the affected ANC. (Section 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)(3)(A) (2012 Repl.)).) In this case, ANC 6A did not submit a report stating any issues or concerns to which the Board can give great weight.

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has not satisfied the burden of proof with respect to the request for special exceptions under the

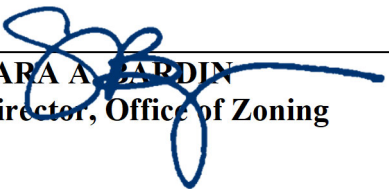
penthouse requirements of Subtitle C § 1500.4 and under Subtitle C § 1504 from the penthouse setback requirements of Subtitle C § 1502.1(c)(1)(a) to allow a penthouse, without the required setback from a side wall, on a new three-story attached building for use as a flat, with a roof deck, in the RF-1 zone at 802 10<sup>th</sup> Street, N.E. (Square 933, Lot 47). Accordingly, it is **ORDERED** that the application is **DENIED**.

**VOTE: 4-0-1** (Frederick L. Hill, Carlton E. Hart, Lorna L. John, and Peter G. May voting to DENY; no other Board member participating.)

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

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

**ATTESTED BY:**

  
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**SARA A. GARDIN**  
**Director, Office of Zoning**

**FINAL DATE OF ORDER:** June 8, 2020

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.