

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19124 of Eye Street JV LLC, pursuant to 11 DCMR §§ 3103.2 and 3104.1,¹ for a variance from the closed court width and area requirements under § 776, and special exception relief from the penthouse setback requirements under §§ 411 and 777.1, to allow the construction of a new mixed-use residential building in the DD/C-3-C District at premises located on Square 453, Lots 40, 50, 815-819, 821, 835, and portions of a public alley to be closed.²

HEARING DATES: December 8, 2015, and May 24, 2016
DECISION DATES: February 2, March 8, May 24, and September 20, 2016

SUMMARY ORDER

SELF-CERTIFICATION

Pursuant to 11 DCMR § 3113.2, Eye Street JV LLC (the “Applicant”) submitted a self-certified application. (Ex. 5 (original), Ex. 45 (amended).) In granting the certified relief, the Board of Zoning Adjustment (“Board”) 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.

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraphs, are to provisions that were in effect on the date this Application was heard and decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text (“the 2016 Regulations”). The repeal of the 1958 Regulations has no effect on the validity of the Board’s decision or the validity of this order. Pursuant to Subtitle A § 104 of the 2016 Regulations, the construction authorized by this Order is vested as to the area requirements contained in 1958 Regulations as of September 5, 2016.

² The Applicant’s original application dated August 25, 2015 (Exhibit [“Ex.”] 1-15) requested a variance from the court requirements of § 776 and special exception relief from the penthouse setback requirements of §§ 411 and 770.6. Following publication of Z.C. Order No. 14-13 in the *DC Register* on January 8, 2016, which amended the text of the Zoning Regulations insofar as they relate to penthouse height, design, and use, § 770.6 became inapplicable in this case. Instead, § 777.1 of the new penthouse regulations applies, since it renders the provisions of 11 DCMR § 411 applicable to penthouses in Commercial Districts. In addition, the original application requested penthouse setback relief in eight distinct locations (*see* Ex. 11). Since that filing, the Applicant withdrew the need for special exception relief in seven out of eight locations (*see* Ex. 48), such that the only remaining location where penthouse setback relief is needed would be for the 9’-9” tall penthouse that is set back eight feet from the open court wall to the south of the building.

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”) 2C and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 2C, which is automatically a party to this application. ANC 2C submitted a letter to the Board dated October 27, 2015. (Ex. 30.) The ANC letter noted that on Monday, October 19, 2015, at the regularly scheduled, duly noticed meeting of ANC 2C, with a quorum of commissioners and the public present, ANC 2C voted 2:0:0 to approve the project with conditions. The Board modified those conditions at the public meeting of March 8, 2016 to remove the reference to a public park outside the scope of the application and adopted the conditions as revised.

The Office of Planning (“OP”) submitted a report dated December 1, 2015. (Ex. 31.) The OP report recommended approval of the closed court variance, approval of the penthouse setback special exception in five of the eight original locations, and denial of the penthouse setback special exception in three out of the eight original locations. At the December 8, 2015 public hearing on the application, OP testified that based on further evidence presented by the Applicant at the hearing, OP believed that all of the proposed penthouse setbacks met the special exception standards set forth in 11 DCMR §§ 3104 and 411. (*See* 12/8/2015 Transcript, pp. 125-127.)

OP submitted a second report dated February 16, 2016 (Ex. 40), wherein it responded to a report submitted by the National Capital Planning Commission (Ex. 38). This OP report stated that OP had “confirmed with the Office of the Attorney General that interpretation of the Height Act provisions rests solely with the Zoning Administrator,” and that “recent changes approved by the Zoning Commission to the penthouse provisions in the [Z]oning [R]egulations did not impact the provisions of the Height Act, or the long standing Zoning Administrator interpretation of the Height Act.” (Ex. 40, p. 1.) The OP report also confirmed that the Applicant “may request relief from the setback provisions for the proposed penthouse based on the interpretation of the Zoning Administrator, but must adequately address the special exception test.” (Ex. 40.)

Finally, OP submitted a third report dated April 4, 2016 wherein it provided additional information about the relationship between the public alley to be closed and the Board’s consideration of penthouse setbacks. (Ex. 41.)

The District Department of Transportation (“DDOT”) filed a report with the Board on December 1, 2015. (Ex. 32.) The DDOT report stated that it had no objection to approval of the requested variance and special exception relief, and indicated that the “project will have no adverse impacts on the travel conditions of the District’s transportation network.” (Ex. 32, p. 1.)

Variance Relief

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case, pursuant to 11 DCMR § 3103.2, for a variance from the court requirements under 11 DCMR § 776. No parties appeared at the public hearing in opposition to this application for variance relief. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and OP reports filed in this case, the Board concludes that in seeking a variance from 11 DCMR § 776, the Applicant has met the burden of proving under 11 DCMR § 3103.2, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the Applicant in complying with the Zoning Regulations, and that the relief can 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.

Special Exception Relief

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to 11 DCMR §§ 3104.1 and 411. 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.

Based upon the record before the Board and having given great weight to the ANC and the OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 411, and 777.1 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 § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.5, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application is hereby **GRANTED**, and pursuant to 11 DCMR § 3125.8, **SUBJECT TO THE APPROVED DRAWINGS AT EXHIBIT 29B, AS SUPPLEMENTED BY THE DRAWINGS AT EXHIBIT 42C AND EXHIBIT 44D, ALL AS AMENDED BY THE CORRECTED DRAWINGS AT EXHIBIT 48, AND SUBJECT TO THE FOLLOWING CONDITIONS:**

1. The Applicant shall establish a Community Space, permanently, in the proposed new development. This space shall serve to benefit the entire community, in the Single Member District.
2. The Applicant shall provide for the upkeep and maintenance of the immediate surrounding area, including the area around the development on H Street, Eye Street, and 6th Street. The Applicant shall be responsible for the maintenance of the alley, between H Street and Eye Street. The Applicant shall bear the responsibility, including but not limited to the cleanliness, repair, maintenance and security of the alley. Use of the alley shall be amicably shared by all neighbors. Additionally, the occupant of the building shall see to it that there is no unwanted loitering and soliciting activities in the alley.

VOTE:³ **4-1-0** (Frederick L. Hill, Marnique Y. Heath, Anita Butani D’Souza (by absentee ballot), and Anthony J. Hood, to APPROVE; Jeffrey L. Hinkle to DENY.)

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: September 28, 2016

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.

³ The Board previously voted on this case on March 8, 2016 and May 24, 2016 and took its final vote on September 20, 2016. On March 8, 2016, the Board granted relief for closed court and for five roof structure setbacks and denied relief for three other setbacks by a vote of 3-0-2. After reopening the record to revisit its decision and to hold a limited hearing on May 24, 2016, the Board voted on May 24, 2016 to approve closed court relief by a vote of 5-0-0, approve setback relief for an eight-foot east penthouse by a vote of 4-1-0, approve relief for multiple enclosure heights by a vote of 5-0-0, and failed to approve relief for a 15’ 6” west penthouse setback, by a vote of 2-3-0. Revised plans consistent with the Board’s approvals in its decision on May 24, 2016 were filed to the record at Exhibits 47 and 48. On September 20, 2016, the Board reopened the record and approved the amended plans and relief. That is the vote reflected herein.

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.