

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



**Application No. 19355 of Stacey Selenfriend and Christopher Pharr**, pursuant to 11 DCMR Subtitle X, Chapter 10, for variances from the nonconforming structure requirements of Subtitle C § 202.2, the lot occupancy requirements of Subtitle E § 304.1, and the rear yard requirements of Subtitle E § 306.1 to permit the location of multiple decks over an existing rear-attached garage in the RF-1 zone at premises 600 9th Street, N.E. (Square 913, Lot 800).

**HEARING DATES:** December 7, 2016, December 14, 2016, February 1, 2017, and March 15, 2017  
**DECISION DATE:** March 15, 2017

**DECISION AND ORDER**

This application was submitted on August 7, 2016 by Stacey Selenfriend and Christopher Pharr, the owners of the property that is the subject of the application (the “Applicant”). The application requested area variances from the requirements for rear yard, lot occupancy, and enlargement of a nonconforming structure to allow multiple rear deck additions over an existing rear-attached garage at a principal dwelling in the RF-1 district at 600 9<sup>th</sup> Street, N.E. (Square 913, Lot 800). After a public hearing, the Board OF Zoning Adjustment (the “Board”) voted to deny the application.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Hearing. By memoranda dated September 21, 2016, the Office of Zoning provided notice of the application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 6 as well as the Chairman and the four at-large members of the D.C. Council; Advisory Neighborhood Commission 6A (the “ANC”), the ANC in which the subject property is located; and Single Member District/ANC 6A02. Pursuant to 11 DCMR Subtitle Y § 402.1, on October 7, 2017 the Office of Zoning mailed letters providing notice of the hearing to the Applicant, the Councilmember for Ward 6, ANC 6A, and the owners of all property within 200 feet of the subject property. Notice was published in the *District of Columbia Register* on October 14, 2016. (63 DCR 12780).

Party Status. The Applicant and ANC 6A were automatically parties in this proceeding. The Board granted a request for party status in opposition to the application from Jamie Lynch, whose property abuts the subject property to the west.

**BZA APPLICATION NO. 19355**  
**PAGE NO. 2**

Applicant's Case. The Applicant provided evidence and testimony in support of the request for variance relief, which was needed to retain the multiple deck addition already constructed by a prior owner without obtaining the necessary permits. The Applicant acquired the property from a bank that did not disclose that the construction had been undertaken without authorization. The Applicant testified that the decks could not be reduced in size because of the way they were constructed. Instead, the Applicant proposed to use the existing decks for recreational purposes in accordance with conditions proposed by the ANC.

OP Report. By memorandum dated December 2, 2016, the Office of Planning recommended denial of the application. (Exhibit 35.)

DDOT. By memorandum dated December 2, 2016, the District Department of Transportation stated that approval of the application would not result in adverse impacts on the travel conditions of the District's transportation network. (Exhibit 36.)

ANC Report. By letter dated February 10, 2017, ANC 6A indicated that, at a properly noticed public meeting on February 9, 2017 with a quorum present, the ANC voted to support the application subject to two conditions that would have required the Applicant to limit use of the decks at night, unless the owner of the neighboring property agreed otherwise, and to remove air-conditioning equipment from the lower deck. The ANC recognized "[t]he situation requiring the relief being sought is unusual" and that the Applicant "inherited this challenging situation through no fault of their own" but also cited neighbors' opposition to the decks and concerns that "[i]f the variances are denied...the decks will remain and eventually could become a greater concern for the owners and neighbors." (Exhibit 42.)

Party in Opposition. Jamie Lynch testified that the decks impair the light, air, and privacy at her property given their close proximity to her residence.

Persons in support. The Board received letters from persons in support of the application. The letters were signed by residents living near the subject property but did not address the requirements for approval of the requested zoning relief.

Person in opposition. The Board received a letter and heard testimony in opposition to the application from the owner of a property across F Street from the subject property. The person in opposition urged the Board to deny the application on the grounds that the deck additions were not consistent with zoning requirements and detracted from the surrounding streetscape.

**FINDINGS OF FACT**

1. The subject property is a corner lot located at the northwest corner of the intersection of 9<sup>th</sup> and F Streets, N.E. (Square 913, Lot 800). The subject property is flat and rectangular, 19 feet wide and 60 feet deep.

**BZA APPLICATION NO. 19355**

**PAGE NO. 3**

2. The subject property is improved with a three-story principal dwelling that fronts onto 9<sup>th</sup> Street. The building has been enlarged with a one-story rear addition used as a garage, accessible via F Street, and with two rear decks. The decks are attached to the second and third floors of the dwelling above the garage.
3. The decks were built without zoning approval or building permits by a prior owner of the subject property, possibly beginning around 2003. The Applicant purchased the property from a bank in 2013, obtaining it out of foreclosure without knowledge of the illegal construction.
4. A wooden lattice was installed on three sides of the lower deck between the top of the garage and the bottom of the deck. Wooden fences topped by smaller lattices were installed as guardrails along the edges of both decks, which are connected by means of a staircase. Air conditioning equipment for the Applicant's residence is housed on the lower deck.
5. The subject property is nonconforming with respect to lot occupancy, rear yard, and lot area. Existing lot occupancy is 100 percent, where a maximum of 60 percent is permitted as a matter of right. (Subtitle E § 304.1.) The subject property lacks a rear yard setback, where a minimum of 20 feet is required. (Subtitle E § 306.1.) Like the garage addition, both of the rear decks extend from the dwelling to the rear property line; absent the decks, the dwelling would be set back from the rear lot line approximately nine feet on the second floor and 15 feet on the third floor. The subject property has a lot area of 1,140 square feet, where a minimum of 1,800 square feet is required. (Subtitle E § 201.1.)
6. The property abutting the subject property to the west (812 F Street, owned by the party in opposition) is improved with a two-story dwelling. The eastern side yard of that dwelling is approximately four feet, nine inches deep. The eastern wall of the dwelling contains six windows with views of the garage and decks at the Applicant's property.
7. The area surrounding the subject property is densely developed primarily with two-story attached dwellings. A school and recreation center are located to the east across 9<sup>th</sup> Street from the Applicant's dwelling.
8. The subject property and its environs are located in an RF-1 zone. Provisions of the RF-1 zone are intended, among other things, (i) to 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; and (ii) to allow for the matter-of-right development of existing lots of record. (Subtitle E § 100.3(a), (c).)
9. The purpose of the RF-1 zone is to provide for areas predominantly developed with attached 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 area variances from requirements for enlargement of a nonconforming structure under of Subtitle C § 202.2, for lot occupancy under Subtitle E § 304.1, and for rear yard under Subtitle E § 306.1 to permit the location of two decks over an existing rear-attached garage in the RF-1 zone at premises 600 9<sup>th</sup> Street, N.E. (Square 913, Lot 800). The Board is authorized under § 8 of the Zoning Act to grant variance relief where, “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 the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that 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. (See 11 DCMR Subtitle X § 1000.1.)

Extraordinary or exceptional situation. For purposes of variance relief, the “extraordinary or exceptional situation” need not inhere in the land itself. *Clerics of St. Viator, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974). Rather, the extraordinary or exceptional conditions that justify a finding of uniqueness can be caused by subsequent events extraneous to the land at issue, provided that the condition uniquely affects a single property. *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 942 (D.C. 1987); *DeAzcarate v. District of Columbia Bd. of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978) (the extraordinary or exceptional condition that is the basis for a use variance need not be inherent in the land but can be caused by subsequent events extraneous to the land itself.... [The] term was designed to serve as an additional source of authority enabling the Board to temper the strict application of the zoning regulations in appropriate cases....); *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097 (D.C. 1979) (for purposes of approval of variance relief, “extraordinary circumstances” need not be limited to physical aspects of the land). The extraordinary or exceptional conditions affecting a property can arise from a confluence of factors; the critical requirement is that the extraordinary condition must affect a single property. *Metropole Condominium Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1082-1083 (D.C. 2016), citing *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990).

The Applicant claimed the existing decks themselves as an exceptional situation, noting that the Applicant purchased the property after the decks were constructed and without knowledge of the illegal construction. In its report, the Office of Planning concurred, noting that the subject property “is impacted by the exceptional condition that there are existing, non-permitted decks that existed when the current owner purchased the property.” The Office of Planning also found an exceptional situation in that “the previous owner, a bank, did not disclose at the time of the purchase the non-permitted nature of the decks.” (Exhibit 35.)

The Board agrees that the Applicant's situation is unusual in that the decks were installed without permission and that the Applicant acquired the property without knowledge of the violation. However, the Board was not persuaded that the subject property displays any extraordinary or exceptional situation or condition that would warrant approval of variance relief. None of the factors variously cited as exceptional – the presence of unauthorized construction, the Applicant's acquisition of the property from a bank out of foreclosure, the bank's failure to disclose the lack of permits for the decks – is an extraordinary condition uniquely affecting the Applicant's property. Nor has the Applicant claimed any extraordinary situation of the subject property by reason of its exceptional narrowness, shallowness, or shape; rather, the subject property is a typical lot in its location, without any unusual physical characteristics other than the existing improvements.

Practical difficulties. An applicant for an area variance is required to show that the strict application of the zoning regulations would result in "practical difficulties." *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995), quoting *Roumel v. District of Columbia Bd. of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980). A showing of practical difficulty requires "[t]he applicant [to] demonstrate that ... compliance with the area restriction would be unnecessarily burdensome...." *Metropole Condominium Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1084 (D.C. 2016), quoting *Fleishman v. District of Columbia Bd. of Zoning Adjustment*, 27 A.3d 554, 561-62 (D.C. 2011). In assessing a claim of practical difficulty, proper factors for the Board's consideration include the added expense and inconvenience to the applicant inherent in alternatives that would not require the requested variance relief. *Barbour v. District of Columbia Bd. of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976).

The Applicant argued that, absent the requested variance relief, "the Applicant must either allow the illegal condition to continue or remove illegal decks," causing the Applicant to face "potentially huge liabilities" if the illegal condition continued or to incur "huge and unanticipated costs estimated to exceed \$160,000.00" if the decks were removed, besides creating the need for a new variance before the decks could be rebuilt. The Board does not find that the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to the Applicant as the owner of the subject property. The Applicant provided no evidence to substantiate the claimed cost of removing the illegally constructed decks, which the Applicant described as "a very rough estimate" of the actual cost. (Transcript ("Tr.") of March 15, 2018 at 59-60.) The Applicant also acknowledged that no attempt had been made to seek reimbursement from the bank that sold the property to the Applicant without disclosing the zoning violations.<sup>1</sup> (Tr. at 62.) The cost of removing the unauthorized decks is not a practical difficulty arising from the strict application of the Zoning Regulations that would give rise to a need for variance relief but rather

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<sup>1</sup> According to the Applicant, the subject property was purchased out of foreclosure from a bank that "as trustee, transferred title in fee simple absolute by a special warranty deed dated July 9, 2013" but "did not inform the Applicant that the existing decks were illegal. Under a special warranty deed, [the bank] was obligated to inform the Applicant as [sic] that the decks were illegal." (Exhibit 43.)

**BZA APPLICATION NO. 19355**  
**PAGE NO. 6**

an expense created by the prior owner who undertook the illegal construction and, according to the Applicant, the bank that sold the property without disclosing the defect, for which the Applicant could seek the appropriate financial remedies.

Nor was the Board persuaded that, without the requested variance, the Applicant “would be denied the beneficial use” of the property. The subject property is improved with a large dwelling that would remain useful as a principal residence even without the deck additions. According to the Applicant, their request for permits needed to undertake certain renovations to the interior of the dwelling was denied due to an outstanding stop-work order associated with the rear deck addition, and therefore approval of the requested variance relief was needed to avoid the “practical difficulty” of not being able to make the desired changes to the dwelling. However, removal of the unauthorized decks would also correct the zoning violation and remove the impediment arising from the stop work order.

No substantial detriment or impairment. The Applicant contended that approval of the application would not cause any substantial detriment to the public good because “the existing decks are strictly for use by the Applicant incident to the residence.” (Exhibit 7.) However, the Board was not persuaded by the Applicant’s claim that the decks would “not have a substantially adverse effect on the use and enjoyment of any abutting or adjacent dwelling or property.” (Exhibit 13.)

Contrary to the Applicant’s assertions, the Board concurs with the party in opposition that the close proximity of the decks to the abutting property creates noise impacts and adversely affects the light, air, and privacy available to that property. The decks are built to the rear lot line of the Applicant’s property such that the only separation between the decks and the side wall of the adjoining residence, which contains six windows, is the side yard, less than five feet deep, on the neighboring property. Given the three-story height of the deck addition relative to the prevalence of lower buildings in the vicinity, the use of the decks could also adversely affect the enjoyment of nearby properties by diminishing the privacy available to those properties and by creating adverse noise impacts. As noted by the Office of Planning, the third-story deck created a “strong degree of additional shadow ... on the property to the north.” (Exhibit 35.) The Applicant’s property, at 100 percent lot occupancy and with no rear yard, is nonconforming with zoning requirements; the addition of the decks, which are not nonconforming but were built illegally, adversely affected the use of neighboring properties and therefore a grant of variance relief for the decks would result in substantial detriment to the public good.

Nor was the Board persuaded by the Applicant’s claim that “[c]onsidering the detriment to the public good where the decks have existed for over 10 years is not meaningful,” especially when the Applicant was “not aware of any complaints on record having been made about the decks....” (Exhibit 43.) The Board heard testimony from the party in opposition describing the ongoing

**BZA APPLICATION NO. 19355**  
**PAGE NO. 7**

negative consequences of the decks on the use of her property<sup>2</sup> and the unsuccessful efforts by neighbors to seek enforcement action soon after the decks were constructed.<sup>3</sup> The Board does not agree that the mere passage of time is sufficient to warrant a finding of no substantial detriment to the public good associated with the deck addition in this case.

Similarly, the Board does not conclude that the Applicant's willingness to comply with the conditions recommended by ANC 6A would be sufficient to avoid substantial detriment to the public good.<sup>4</sup> The conditions would be difficult to enforce and insufficient to avoid adverse impacts on the use of neighboring properties. The ANC noted "the strong and warranted opposition of neighbors due to the poor aesthetics of the decks, and noise and privacy issues that they cause to the immediate neighbor" but proposed the conditions based on its belief that "the only public good ... resulting from this [zoning approval] is if the decks are inspected to ensure their safety and their use [is] restricted to minimize the potential impact on nearby neighbors." (Exhibit 42). The Board agrees with the ANC and with the testimony in opposition to the application that the deck addition poses a substantial detriment to the public good.

The Board also concludes that the requested variance could not be granted without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. Approval of any request for a variance without a showing of an exceptional situation of a specific property, practical difficulty upon the owner as the result of the strict application of the Zoning Regulations, and a lack of substantial detriment to the public good would substantially impair the purpose and intent of the zone plan. As a relatively large building on a relatively small lot – even without the unauthorized decks, the subject property is nonconforming with respect to

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<sup>2</sup> The party in opposition testified that "There's a complete lack of privacy ... you can see from the decks, directly into the bedroom itself.... I have to keep my shades drawn at all times subject to whomever may be out there enjoying the use of their decks at my expense. There's impact to natural light...." (Tr. at 80.)

<sup>3</sup> Joseph Fengler, the owner of property across F Street from the subject property, testified that "...the deck was built illegally 10 years ago, and there were complaints 10 years ago. Many neighbors called [the Department of Consumer and Regulatory Affairs] and asked for them to come out and inspect it, and unfortunately at that time, you know, 12, 13 years ago, they just didn't have the manpower to do it and it was to a frustration of a lot of us that live there." (Tr. at 69.) Adverse impacts associated with the use of the decks included late-night noise from parties held on the decks. (Tr. at 73.)

<sup>4</sup> The conditions proposed by ANC 6A were:

1. Use of the lower deck (which is level to the second floor windows of 812 F Street, N.E.) shall cease by 10 pm. Use of the upper deck (which is above the roof line of 812 F Street, N.E.) shall cease by 11 pm. Should exceptions be needed or desired, 600 9<sup>th</sup> Street N.E. owners will discuss with 812 F Street, N.E. owner to seek permission, which may be reasonably accommodated. Should property owners of 600 9<sup>th</sup> Street N.E. and 812 F Street, N.E. (current or future) discuss and mutually agree that these accommodations are no longer necessary, these restrictions may be voided.
2. Assuming the owners of 600 9<sup>th</sup> Street N.E. are granted a variance by the BZA, they will apply for permits within 30 days of BZA approval to move the 5 ton HVAC unit currently housed on the 2<sup>nd</sup> floor deck to the roof. This unit will be moved as soon as feasible upon receipt of any necessary permits. As the 1.5 ton HVAC unit on this deck is currently too old to move, owners of 600 9<sup>th</sup> Street N.E. will move this unit to the roof when it is replaced at the end of its useful life, or within 10 years, whichever is sooner.

**BZA APPLICATION NO. 19355**  
**PAGE NO. 8**

lot area, lot occupancy, and rear yard – the Applicant’s building cannot be enlarged without zoning relief. Approval of the requested variance relief would not be consistent with the intentions of the RF-1 zone to recognize and reinforce the importance of neighborhood character, preservation of housing stock, and improvements to the overall environment to the overall housing mix and health of the city, or to allow for the matter-of-right development of existing lots of record. As OP noted, “... with a 100% lot occupancy, and especially 100% lot occupancy at the second and third stories, the impacts [of the deck addition] seem to harm the intent of the [Zoning] Regulations to support livable neighborhoods through the provision of adequate light, air and privacy.” (Exhibit 35.)

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 concurs with OP’s recommendation that the application should be denied 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 voted to support the application, subject to two conditions. However, the ANC’s report stated issues and concerns about illegal construction and the neighbors’ objections to the decks, and the ANC’s vote was predicated on its assumption that “whether or not the zoning relief being sought is granted or rejected, the decks will remain” at the subject property. (Exhibit 42.)

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 area variances from requirements for enlargement of a nonconforming structure under of Subtitle C § 202.2, for lot occupancy under Subtitle E § 304.1, and for rear yard under Subtitle E § 306.1 to permit the location of two decks over an existing rear-attached garage in the RF-1 zone at premises 600 9<sup>th</sup> Street, N.E. (Square 913, Lot 800). Accordingly, it is **ORDERED** that the application is **DENIED**.

**VOTE: 4-0-1** (Frederick L. Hill, Lesylleé M. White, Carlton E. Hart, Michael G. Turnbull to DENY; one Board seat vacant).

**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



**BZA APPLICATION NO. 19355**  
**PAGE NO. 9**

**FINAL DATE OF ORDER:** September 6, 2018

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.