

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



**Application No. 19630 of Elodie Goirand and Andreas Xenophontos**, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle D § 5201 from the lot occupancy requirements of Subtitle D § 804.1, to permit an existing rear garage in the R-15 Zone at premises 4540 Lowell Street, N.W. (Square 1608, Lot 68).

**HEARING DATES:** December 20, 2017; February 28, April 25, and May 23, 2018  
**DECISION DATE:** May 23, 2018

**DECISION AND ORDER**

On September, 21, 2017, Elodie Goirand and Andreas Xenophontos, owners of the property for which relief is sought, (the “Applicant” or “Property Owner”) filed an application with the Board of Zoning Adjustment (the “Board” or “BZA”), for a special exception under 11-D DCMR § 5201 from the lot occupancy requirements of 11-D DCMR § 804.1 to permit an existing non-compliant rear garage in the R-15 Zone at premises 4540 Lowell Street N.W. (Square 1608, Lot 68) (the “Subject Property”). For the reasons explained below, the Board voted to dismiss the application.

**PRELIMINARY MATTERS**

Self-Certification. The zoning relief requested in this case was self-certified, pursuant to Subtitle Y § 300.6. (Exhibits 5 (original) and 17 (revised).)

Notice of Application and Notice of Hearing. By memoranda dated October 31, 2017, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 3D, the ANC within which the Property is located, Single Member District 3D01 representative, the Councilmember for Ward Three, the At-Large Councilmembers and the Council Chair. A public hearing was scheduled for December 20, 2017. Pursuant to 11-Y DCMR § 402.1(a), the Office of Zoning published notice of the hearing on the application in the *D.C. Register*. (64 DCR 11500.) On October 31, 2017, OZ sent notice of the public hearing to the Applicant, ANC 3D, the Ward Councilmember, and all property owners within 200 feet of the Subject Property.

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Parties. In addition to the Applicant, ANC 3D was automatically a party in the proceeding. The Board received party status requests in opposition from Stephen Weissman, owner of the property to the east of the Subject Property, at 4536 Lowell Street, N.W. (Exhibit 37) and Peter G. Baker, owner of the property to the west, at 4546 Lowell Street, N.W. (Exhibit 39.) The Board granted both requests for party status in opposition at the public hearing of December 20, 2017. (Exhibit 62.)

OP Report. OP filed a report dated December 28, 2017, in which OP declined to make a recommendation, stating that “the application is not eligible for relief pursuant to the provisions of Subtitle D Sec. 5201.1.” and that “an area variance for lot occupancy or removal of a portion of the improvements is necessary to bring the property into conformance.” (Exhibit 38.) OP confirmed with the Zoning Administrator that special exception relief is only available for additions to existing structures, not for new construction involving a principal dwelling. The Zoning Administrator considered the request to retain the accessory structure as a modification to Order No. 18659, which granted variance relief needed for new construction of a principal dwelling on the site, on the assumption that the rear garage would be demolished so as to not cause the lot occupancy to become noncompliant. OP and the Zoning Administrator considered the current application to be a request to retain that rear garage, and therefore a modification to the new construction allowed.

DDOT Report. DDOT also filed a report dated November 29, 2017, stating that it had no objection to the application. (Exhibit 33.)

ANC Report. ANC 3D submitted a written report to the Board dated December 9, 2017, indicating that at a duly-noticed, regularly-scheduled public meeting, the ANC voted unanimously to recommend denial of the application. (Exhibit 44.) The ANC recommended denial on the basis of concerns about the impacts on light, air, privacy, and neighborhood character. The ANC also raised concerns about the Applicant’s argument that, if denied, he would remove the roof of the garage structure to comply with lot occupancy. (Exhibit 44.) The ANC submitted a second report, dated April 4, 2018, indicating that it again voted to recommend denial of the application. (Exhibit 70.) In its second report, ANC 3D raised the issue that the Applicant incorrectly requests special exception relief and asked the Board to determine that a variance is required. (Exhibit 70.) The ANC provided further discussion in its second written report of its issues and concerns regarding the Applicant’s failure to meet the special exception criteria and the area variance test in this case. (Exhibit 70.)

**FINDINGS OF FACT**

1. The property is located at premises 4540 Lowell Street, N.W. (Square 1608, Lot 68) (the “Subject Property”) in the R-15 Zone.
2. The Subject Property is currently improved with a detached dwelling unit and an accessory garage structure. (Exhibit 15.)

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3. The Applicant notes that in 2012, major renovations were undertaken on the dwelling and that building permits for an addition were approved by the Department of Consumer and Regulatory Affairs (“DCRA”). (Exhibit 15.)
4. Based on concerns that the height and lot occupancy of the structure exceed the Zoning Regulations and that the existing structure was razed during construction, DCRA re-examined the building permits that allowed the construction of the addition and accessory structure on the Subject Property. (Exhibit 10.)
5. DCRA found that, because the existing structure had been razed during the construction process, the project would be considered new construction, rather than an addition. Therefore, zoning relief was required from the side yard setback requirements of § 405.9 and the Wesley Heights Overlay front yard setback requirements of § 1543.4, under the Zoning Regulations of 1958, which were in effect at that time. (*BZA Order No. 18659 of Elodie Goirand and Andreas Xenophontos* (2014), p. 1-2.)
6. The Applicant filed BZA Application No. 18659 to seek relief from these requirements. In Order No. 18659, the Board noted that the application originally requested special exception relief under § 223 rather than a variance from § 405.9, but stated that the Zoning Administrator considered the Applicant’s project one of “new construction” since the dwelling unit had been demolished, and therefore the project was not eligible for relief as an addition under § 223.<sup>1</sup>
7. In Order No. 18659, the Board granted area variances from the side yard and front yard setback requirements, based on the assurance from the Applicant that lot occupancy will be below the matter-of-right limit. (*BZA Order No. 18659 of Elodie Goirand and Andreas Xenophontos* (2014), p. 6, Finding of Fact No. 14.)
8. The current lot occupancy of the Subject Property is approximately 34%, where a maximum of 30% is permitted as a matter of right in the R-15 Zone under 11-D DCMR § 804.1. (Exhibits 17 and 40.) As noted by DCRA, the demolition of the accessory garage structure would be required to reduce the lot occupancy to meet the regulatory requirement, if the appropriate zoning relief is not sought from the BZA. (Exhibit 40.)
9. On September 21, 2017, the Property Owner submitted a self-certified application to the Board requesting a special exception under 11-D DCMR § 5201 from the lot occupancy requirements of 11-D DCMR § 804.1. (Exhibit 17.) The Applicant indicated that no new construction is proposed, but that relief was needed for the existing structures to comply with the lot occupancy requirements. (Exhibit 1.)

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<sup>1</sup> Section 223 of the Zoning Regulations of 1958 allowed special exception relief from certain development standards in the case of additions to an existing structure or construction of a new accessory structure. Those provisions were carried over to the Zoning Regulations of 2016, and are found in Subtitle D § 5201, as they relate to R zones.

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10. Subtitle D § 5201 allows special exception relief from development standards, including restrictions on lot occupancy and the enlargement of nonconforming structures, in the case of an addition to a one-family dwelling or a new or enlarged accessory structure that is accessory to such a building.
11. In its report, OP also opined that the special exception requested under Subtitle D § 5201 is not applicable in this case and noted that “an area variance for lot occupancy or removal of a portion of the improvements is necessary to bring the property into conformance.” (Exhibit 38.)
12. In a letter submitted to the record, the Office of the Zoning Administrator at DCRA opined that “the Property requires variance relief, not the special exception relief requested in this application, because the Property is currently in violation of the lot occupancy requirements of the Zoning Regulations (§ D-804.1) due to a failure to demolish the garage as shown on page 2 of Exhibit 10 in BZA Application 18659 which granted relief based on repeated assertions that the Property was in compliance with the 30% lot occupancy maximum for the R-15 Zone (then WH/R-1-B).” (Exhibit 40.)
13. DCRA further noted that “since the current violation is due to a failure to complete this garage demolition promised as part of the request for relief in BZA 18659, this current request for relief is effectively a modification to BZA 18659, in which the Board determined that then-Section 223 special exception relief was not available as the existing structure had been razed and so as new construction the relief required in BZA 18659 was deemed to be a variance.” (Exhibit 40.)
14. In addition, DCRA noted that the Applicant did not request relief from the maximum gross floor area (“GFA”) requirement of Subtitle D § 802.1 in the current application. DCRA indicated that such relief would be needed and that relief for GFA would also be a variance. (Exhibit 40.)
15. At the public hearing on December 20, 2017, the Board informed the Applicant that the relief requested is insufficient and continued the hearing to allow the Applicant an opportunity to amend the application to request variance relief. (BZA Public Hearing Transcript of December 20, 2017, pp. 240-242, and 248-256.)
16. After agreeing to amend his application, the Applicant asked for a postponement of the continued hearing to revise the application and submit supplemental information. (Exhibit 64.) The Board granted his postponement request. (Exhibit 66.)
17. The Applicant did not amend the application to request variance relief, and on March 12, 2018, the Applicant instead requested that the Board review the application as a special exception. (Exhibit 67.)

## **CONCLUSIONS OF LAW**

Under the Board's Rules of Practice and Procedure in Subtitle Y § 300.6, an applicant may submit a "certification by an architect or attorney certifying the required zoning relief" in lieu of a memorandum from the Zoning Administrator stating what zoning relief is required. (11-Y DCMR § 300.6.) When applicants self-certify the relief required, pursuant to Subtitle Y § 300.6(b), they undertake the risk that the relief requested is not correct or complete. Accordingly, in determining whether to grant or deny relief, the Board will typically not make a determination as to whether the relief requested in a self-certified application is sufficient. The Board is not required, however, to decide a self-certified application when the Board finds "no plausible basis to conclude that the relief requested is sufficient." (*BZA Order No. 18263-B of Stephanie and John Lester* (2013), p. 10.) If the Board makes such a finding, it may dismiss the application on its own motion.

In this case, the Applicant proposes to modify the Board's prior approval of new construction of a principal dwelling in order to retain an existing accessory structure. The accessory structure, together with the new construction previously approved, resulted in an existing lot occupancy of 34.6% where a maximum of 30% is permitted under 11-D DCMR § 804.1. Though the Applicant asks that the Board consider the self-certified request for special exception relief under Subtitle D § 5201, the Board finds that there is no plausible basis to conclude that the requested relief is sufficient in this case. Relief from the lot occupancy requirements of Subtitle D § 804.1 is permitted as a special exception under Subtitle D § 5201 only when the relief pertains to construction of:

- (a) An addition to a building with only one (1) principal dwelling unit; or
- (b) A new or enlarged accessory structure that is accessory to such a building.

The Board concludes that the application does not seek relief for an addition to a principal dwelling unit, nor does it seek relief for a new or enlarged accessory structure that is accessory to an existing principal dwelling unit. Instead, as the Board has previously found in Order No. 18659, this project was characterized by DCRA as new construction that included a principal dwelling, therefore the special exception provisions – found in § 223 of the Zoning Regulations of 1958 and in Subtitle D § 5201 on the Zoning Regulations of 2016 – are not applicable to this case. (Finding of Fact No. 6.) As noted by the Zoning Administrator, the Applicant's request is to retain an accessory building that was supposed to be demolished under Order No. 18659 and must therefore be viewed as a request to modify the approval of the new construction to permit the non-demolished structure to remain. Because the special exception provisions of Subtitle D § 5201 do not apply in this case, the Board concludes that variance relief must be sought in order for the Applicant to achieve compliance with the Zoning Regulations.

In reaching the conclusion that the relief certified by the Applicant is not sufficient, the Board credits the recommendation of the Office of Planning. In its written report, OP opined that the special exception requested under Subtitle D § 5201 is not applicable in this case and noted that "an area variance for lot occupancy or removal of a portion of the improvements is necessary to

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bring the property into conformance.” (Exhibit 38.) The Board further credits the written response from the Office of the Zoning Administrator at DCRA, indicating that the application would require variance relief from the lot occupancy requirements, for the reasons described above, and noting that additional variance relief from the maximum gross floor area requirement of Subtitle D § 802.1 would be required for compliance with the Zoning Regulations. (Exhibit 40.)

Based on the finding that the relief sought is not sufficient, the Board gave the opportunity for the Applicant to amend the application in order to request variance relief. After initially agreeing to revise the application, the Applicant subsequently submitted a motion requesting that the Board consider the application as a special exception instead. (Exhibit 67.) The Board declines to consider the requested relief by the Applicant, as the Board has concluded that there is “no plausible basis” that the special exception relief requested is sufficient. (*See BZA Order No. 18263-B of Stephanie and John Lester* (2013), p. 10.) The Board voted to dismiss the application accordingly.

**Great Weight**

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 in this case. (Exhibit 38.)

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 3D submitted two written reports, both recommending denial of the application. (Exhibits 44 and 70.) The “great weight” requirement, however, extends only to “issues and concerns that are ‘legally relevant.’” (*Concerned Citizens of Brentwood v. D.C. Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C. 1993) quoting *Bakers Local 118 v. D.C. Bd. of Zoning Adjustment*, 437 A.2d 176, 179 (D.C. 1981).)

Relevant to the legal issue before the Board here, in its second report, the ANC raised the issue that the application requires variance relief, rather than the special exception relief requested. (Exhibit 70.) The Board concurs with the ANC’s finding on this issue and voted to dismiss the application on that basis. The ANC raised additional issues and concerns in its reports that deal with the merits of the special exception criteria and of the variance test, as well as issues related to the zoning history of the property and DCRA’s enforcement. (Exhibits 44 and 70.) As the Board has dismissed the application before reaching the merits of the case, the concerns related to the special exception criteria and variance test are no longer legally relevant. The ANC’s issues relating to DCRA’s enforcement action and the proposal to remove the roof of the accessory structure are not within the Board’s jurisdiction. Thus, they too are not legally relevant.

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Based on the record before the Board, and having given great weight to the reports filed by OP and the ANC, the Board concludes that there is no plausible basis to conclude that the relief requested is sufficient.

It is therefore **ORDERED** that the application is hereby **DISMISSED**.

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

**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. BARDIN**  
**Director, Office of Zoning**

**FINAL DATE OF ORDER:** November 20, 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.