

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17446 of Pauline S. Ney, pursuant to 11 DCMR § 3104.1, for variances from lot occupancy requirements under § 403, and nonconforming structure provisions under subsections 2001.3 and 2002.4, to construct four residential units above existing one-story retail structures in the R-5-B District at premises 2160-2162 California Street, N.W. (Square 2530, Lots 99 and 100).¹

HEARING DATES: March 13, 2006, April 18, 2006
DECISION DATE: June 6, 2006

DECISION AND ORDER

This application was submitted by Pauline S. Ney (“Applicant”), owner of the property that is the subject of this application (“subject property”). The application requested several area variances in order to permit the Applicant to construct three stories, with six residential units, above two existing nonconforming buildings currently housing commercial/retail uses. The existing buildings are located at the corner of California Street, N.W. and Phelps Place, N.W. in an R-5-B zone district.

The Board scheduled a hearing on the application for March 13, 2006. In February, 2006, the Applicant revised the plans to construct a 3-story addition with 6 new units and decided instead to construct a 2-story addition with 4 new units, eliminating the need for rear yard relief. Just before the hearing, on March 8, 2006, the Board received amended plans showing the change and also showing further revisions which eliminated the need for relief from floor area ratio (“FAR”) requirements.

The hearing on the application was begun on March 13, 2006 and completed on April 18, 2006, at which time the Board set a decision date of June 6, 2006. At its June 6, 2006 decision meeting, the Board deliberated on the application and, by a vote of 3-1-1, decided to grant the relief requested.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated October 11, 2005,

¹This application was advertised for “variances from the floor area ratio requirements under § 402, lot occupancy requirements under § 403, rear yard requirements under § 404, and nonconforming structure provisions under subsections 2001.3 and 2002.4, to construct six residential units....” Throughout the proceedings on this application, however, the Applicant modified the design several times to comport with the recommendations of the Historic Preservation Office and the desires of the community. These modifications eliminated the need for the variance from the floor area ratio and rear yard provisions, and reduced the number of new residential units to 4.

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”) 2D, the ANC within which the subject property is situated, the member for Single Member District 2D02, and the Council Member for Ward 2. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing on the application in the *D.C. Register* and mailed such notice to ANC 2D, the Applicant, and all owners of property within 200 feet of the subject property.

Requests for Party Status. ANC 2D was automatically a party to this proceeding. There were twenty-one requests for opposition party status, including one from the Sheridan-Kalorama Neighborhood Council (“SKNC”) and one from the Sheridan-Kalorama Historical Association. The Board requested that the parties join together for greater administrative efficiency and because many of them were alleging that the same, or substantially similar, harm would result if the application were granted.

Four discrete, consolidated parties were proffered, and each was granted party status by the Board. The Sheridan-Kalorama Neighborhood Council, an organization heavily involved in local zoning issues, and the Sheridan-Kalorama Historical Society, bringing a more historic-preservation orientation, were both granted party status. The co-op association of the Woodrow Building was granted party status, and the condominium associations of the California House and the California Court buildings were granted a single, conjoined, party status. These latter two parties represent individuals residing in close proximity to the subject property who variously alleged light, air, traffic congestion, parking, and safety concerns with the Applicant’s project.

The Board also received several letters in opposition to the application, including one from Councilmember Jack Evans, and several petitions signed by individuals in opposition.

Applicant’s Case. At the hearing, the Applicant’s son, Joseph Ney, testified concerning the project and the economic factors driving the need for zoning relief. The architect for the project, Jon Hensley, testified concerning the design of the project. He and Mr. Steve Sher, an expert in zoning and land use planning, testified as to how the project met the variance test.

Government Reports. The Office of Planning filed a report dated March 7, 2006 with the Board, recommending approval of the application as amended to eliminate the need for rear yard and FAR relief. OP treated all three variances requested as area variances and opined that the three prongs of the variance test were met for each request. OP noted that the area devoted to a nonconforming use was to be reduced in size, that a conforming residential use was to be added, and that the “character of the area in general and this streetscape in particular are at variance to the intent of the R-5-B regulations, with most

buildings considerably larger and denser than what is currently permitted.” Exhibit No. 45, OP Report, at 4.

ANC Report. The Board received a report from ANC 2D dated March 6, 2006 unanimously recommending denial of the requested relief. The ANC cited concerns about historic preservation compliance, air quality, traffic congestion, and the request for a greater FAR than allowed as a matter-of-right. The ANC, in its resolution attached to the letter to the Board, suggested that the Applicant continue negotiating with the neighborhood regarding the development of the subject property.

The Board received a second report from the ANC which was based on a review of the Applicant’s final revised plans and stated that the Applicant had attempted to address the neighborhood’s concerns. The report further stated, however, that, based on these concerns and on potential effects on the Woodrow Building, the ANC had, on April 17, 2006, adopted a resolution against the Applicant’s project.

FINDINGS OF FACT

The Subject Property and the Surrounding Neighborhood

1. The subject property is located at address 2160 and 2162 California Street, N.W., at the corner of California St., N.W. and Phelps Place, N.W.
2. The subject property is comprised of Lots 99 and 100 in Square 2530, and is located in an R-5-B zone district.
3. The property has approximately fifty feet of frontage along California Street, and approximately seventy-eight feet of frontage along Phelps Place, and contains approximately 4,000 square feet of land area.
4. The property is located within the Sheridan-Kalorama Historic District and is improved with two single-story plus basement buildings found to be contributing buildings to the historic district.
5. Both buildings will be retained by the Applicant, but both are nonconforming as to use and structure.
6. Each building houses a lawful commercial use which pre-dated the Zoning Regulations, but would not be allowed under the Regulations today, making them nonconforming uses. *See*, 11 DCMR § 199.1, definition of “Use, nonconforming.”

7. One of the retail uses is a deli/grocery store and the other a real estate office and art gallery. At the request of the community, the Applicant will retain the deli/grocery use.
8. Both existing buildings are nonconforming as to lot occupancy and rear yard. Together, they cover 71% of Lots 99 and 100, whereas the R-5-B district permits only a 60% lot coverage. The rear yard is 10 feet, six inches deep, whereas 15 feet is required. *See*, 11 DCMR §§ 403 and 404, respectively.
9. The neighborhood surrounding the subject property consists primarily of multi-family residential buildings, but across Phelps Place, to the west, is a church and associated school.
10. The two existing buildings on the subject property, even taken together, constitute one of the smallest structures in the vicinity. Immediately adjacent to the property to the east is an attached three-story building with a FAR of 2.6 and a footprint of 1,084 square feet, for a lot occupancy of 66%. Next to this three-story building sits a larger 9-story building with a FAR of 5.1 and a footprint of 11, 090 square feet, for a lot occupancy of 57%. *See*, Exhibit No. 44, Attachment D.
11. Immediately south of the property, fronting on Phelps Place, is the five-story Woodrow Cooperative Building, with a FAR of 3.4 and a footprint of 3,199 square feet, for a lot coverage of 69%. Immediately across California Street are two taller buildings, the first at six stories, 3.4 FAR, and a footprint of 6,579 square feet, and the second at six stories, 3.3 FAR, and a footprint of 6,152 square feet. *See*, Exhibit No. 44, Attachment D.
12. Of the 14 buildings closest to the subject property, all except two have a FAR above the R-5-B maximum of 1.8. Of these two, one has the maximum-permitted FAR of 1.8, and the other has a FAR of .9. *See*, 11 DCMR § 402.4. *See also*, Exhibit No. 44, Attachment D.
13. Most of the surrounding buildings were constructed prior to the 1958 publication of the current Zoning Regulations, and most of them far exceed the current area maxima set forth in the Regulations. Therefore, the character of the neighborhood is not what would be expected in an R-5-B district, but is significantly denser and more built-up.

The Proposed Project

14. The Applicant proposes to add two new floors on top of the two existing buildings and the ground floors of each will be reconfigured and connected,

- making the buildings one building for zoning purposes. *See*, 11 DCMR § 199.1, definition of “Building.” (Hereinafter, they will be referred to as one building.)
15. The ground floor of the existing building, now housing the nonconforming uses, will be structurally altered, necessitating a variance from 11 DCMR § 2002.4 to permit such alterations.
 16. The reconfiguration of the existing ground floor will reduce the amount of space devoted to nonconforming uses, and will result in one residential unit on the ground floor.
 17. The total lot occupancy of the building will continue to be 71%, necessitating a variance from 11 DCMR § 2001.3, to allow an addition to a nonconforming structure not complying with the lot occupancy maximum.
 18. The height of the existing building plus addition will be approximately 42 feet to the parapet. A 50-foot height is permitted in this R-5-B zone district. *See*, 11 DCMR § 400.1.
 19. On the roof of the addition, condenser units, a fire stair enclosure, and a trellis, part of a rooftop recreation area, will be placed, all of which comply with the Zoning Regulations, and none of which will be visible from the street. The roof will also support a zoning-compliant elevator enclosure and trash chute extension.
 20. The façade of the addition will be set flush with the façade of the existing building to anchor this prominent street corner.
 21. The second floor of the building (the first floor of the addition), will contain two two-bedroom residential units, and will exceed the maximum permitted lot occupancy of 60% by 2.7%, thereby necessitating a variance from 11 DCMR § 403.
 22. The third floor of the building will contain one two-bedroom unit, but will not exceed the maximum permitted 60% lot occupancy.
 23. The rear wall of the existing building, facing the northern wall of the Woodrow Building, is set 10 feet, 6 inches from the property line dividing the subject property and the lot on which the Woodrow Building stands.

24. The Woodrow Building was constructed directly on the property line dividing its lot with the subject property.
25. Both floors of the addition will feature relatively large, open-air terraces abutting the property line between the subject property and the Woodrow Building to the south.
26. The rear wall of the first floor of the addition will be set back eight feet, nine inches from the rear wall of the existing building, and therefore, will be 19 feet, three inches from the northern wall of the Woodrow Building. *See*, Exhibit No. 47, Amended Plans at A-3.
27. The rear wall of the second floor of the addition will be set back 19 feet, nine and one-half inches from the rear wall of the existing building, and therefore, will be 30 feet, three and one-half inches from the northern wall of the Woodrow Building. *See*, Exhibit No. 47, Plans at A-3.
28. The addition has been designed to complement the Italian Renaissance Revival-inspired architecture of the existing building, whose attractive brickwork and large arched windows, with ornamental spandrels in-between, wrap around the corner of California Street and Phelps Place.
29. The Applicant will remove the current stucco façade of the existing building and restore the original façade finish underneath.

The Variance Test

Extraordinary or Exceptional Situation or Condition

30. Because the building on the subject property has been found to be contributing to the Sheridan-Kalorama Historic District, no permit to alter it may be issued without the approval of the Historic Preservation Review Board (“HPRB”). If HPRB makes an adverse recommendation, the permit may not issue unless it is shown to be in the public interest or that a failure to issue the permit will result in unreasonable economic hardship to the owner. *See*, D.C. Official Code § 6-1105 (2001).
31. In order to obtain HPRB’s recommendation of approval, the existing building must be retained essentially “as is,” and the Applicant is constrained to build around it, instead of having the freedom to raze it, or even partially demolish it, and build within the parameters of the Zoning Regulations.
32. Instead of recommending that the addition be set back from the two existing facades, HPRB allowed the Applicant to set it flush with the existing façades,

- but only provided that the Applicant retain a building conservation specialist and undertake a high-quality restoration and rehabilitation of the historic façades.
33. The subject property has two facades, one along California Street, and one along Phelps Place, necessitating the creation of two pedestrian-friendly street frontages and the costly restoration and rehabilitation of both historic facades.
 34. Since the building is already over the lot occupancy maximum for the R-5-B district, any addition would necessitate a variance from § 2001.3, which prevents any expansion of a building nonconforming as to lot occupancy.
 35. This R-5-B zone permits, as a matter-of-right, only residential uses (with a few exceptions not relevant here), but the past use of the existing building for commercial purposes means that there are no existing “core” elements, such as elevators or stairways, which are necessary for a residential use.
 36. Due to the nature of the existing historic building, new steel columns and footings will be installed to structurally support the addition, requiring cutting through the existing structure to the basement level.
 37. The historic deli/grocery in the existing building is unique in the area, and will be retained by the Applicant.

Practical Difficulties

38. Placement of necessary core elements is limited by the size of the property, the dual street frontage, and the need for minimal disruption of the historic building, including its fenestration and doorways, as well as by the retention of the commercial use on the first floor.
39. Because of the limitations on the placement of the necessary core elements, excess lot occupancy is needed in order to successfully place them while retaining the minimum number of reasonably-configured residential units to make the project feasible.
40. The retention of the historic deli/grocery further limits the Applicant’s flexibility of design and placement with respect to both the core elements and the residential units.
41. The retention of the historic deli/grocery also undermines the economic viability of the project because commercial rents are estimated to be \$2.70 per

- square foot per month, while residential rental rents are estimated to be \$3.20 per square foot per month.
42. The retention of the deli/grocery further undermines the economics of the project because the basement must be maintained as its storage area, at an estimated monthly rent of only \$.50 per square foot.
 43. In order to abide by HPRB's recommendations, the Applicant must use more expensive materials and finishes for the restoration of the historic facades and for the exterior walls of the addition.
 44. In order not to disrupt the historic facades, the Applicant cannot enlarge, or significantly change, the entrance on either California Street or Phelps Place. Therefore, the entrance to the residential units and an entrance corridor to the upper levels must be provided through the existing door, further limiting the Applicant's design flexibility.
 45. The higher construction costs generated by the unique conditions of the property render the construction of a minimum of 4,000 square feet of residential space and approximately 2,300 square feet of retail space necessary in order to make the project economically viable. These square footages, coupled with the space necessary for the core elements, expand the second floor of the building slightly beyond the allowable lot occupancy.

No Harm to Public Good or Zone Plan

46. The variance relief requested is minimal. Even the smallest addition to the building would require relief from § 2001.3. The lot occupancy relief requested is only 2.7%, and the only floor for which the relief is requested actually covers less of the lot than the existing building. The relief from § 2002.4 is for interior structural alterations, which will have no perceptible effect on the exterior of the building.
47. The residential units being added to the existing building are a matter-of-right use in this R-5-B district.
48. Even with the addition, the building will be one of the few buildings in the neighborhood to be within the maximum permitted FAR of 1.8.
49. The height of the building will be less than that of most surrounding buildings and less than permitted in the R-5-B zone.

50. California Street is 50 feet wide, therefore, the California Street façade of the proposed addition will be at least 50 feet from the nearest building across California Street, and Phelps Place is 60 feet wide, therefore the Phelps Place façade will be at least 60 feet from the church and school, located on the other side of Phelps Place. *See*, Exhibit No. 47, Survey attached to Amended Plans.
51. The rear façade of the addition will be treated with reflective, light-colored materials to maximize reflected light to nearby buildings.
52. Although no parking is required, the Applicant has offered to provide scooter parking in the building basement and is considering other transportation/parking alternatives in response to community concerns.
53. The Applicant will repair and restore the existing historic building, with whose architecture the proposed addition is compatible.
54. The design, size, and massing of the proposed addition is in harmony with the character of the neighborhood.
55. The Applicant's retention of the historic deli/grocery on the property, where it has been located for almost 90 years, will serve the public good.

CONCLUSIONS OF LAW²

Introduction

The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of

²There was some question as to whether all or some of the variances requested by the Applicant should have been treated as use variances, and not as area variances, resulting in the application of the more stringent “undue hardship” test. To support the proposition that the “undue hardship” test should have been applied, the Board was directed to the *Lenkin* case, which has strikingly similar facts to the instant case. *Lenkin v. D.C. Board of Zoning Adjustment*, 356 A.2d 428 (D.C. 1981). The underlying Board order which was appealed to the D.C. Court of Appeals and resulted in the *Lenkin* decision specifically stated, however, that the applicant in that case sought area variances.

The Board has carefully analyzed both the *Lenkin* decision and the underlying order and does not find that the Court of Appeals mandated that any particular variance relief request in *Lenkin* was a use variance. Instead, the Court stated that it operated under the standards set forth in *Wolf v. D.C. Board of Zoning Adjustment*, 397 A.2d 936, 942 (D.C. 1979): “[d]eterminations with respect to the treatment and classification of proposed variances are best made, we think, on an ad hoc basis, by the agency from whose regulations those variances are sought.” The Court, therefore, leaves it up to the Board to determine whether any given variance is an area variance or a use variance. Based on all the evidence in the record, and for all the reasons stated, the Board concludes that all the variances sought by the Applicant in the instant case are area variances.

exceptional topographical conditions or other extraordinary or exceptional situation or condition” of the property, the strict application of the Zoning Regulations would “result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of such property.” D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. The “exceptional situation or condition” of a property can arise out of structures existing on the property itself. *See, e.g., Clerics of St. Viator v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 293-294 (D.C. 1974). Relief can only 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.” D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2.

An applicant for area variances must make the lesser showing of “practical difficulties,” as opposed to the more difficult showing of “undue hardship,” which applies in use variance cases. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). Because area variances are being sought in this case, the Applicant had to make three showings: exceptional condition of the property, that such exceptional condition results in “practical difficulties” to the Applicant, and that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The Area Variance Test

Exceptional Situation or Condition

The subject property is affected by exceptional conditions which constrain its development. The subject building is a contributing building to the Sheridan-Kalorama Historic District, and any building permit for its alteration is therefore subject to the approval of HPRB. When presented with a 2-story and a 3-story option for the addition, HPRB would not recommend approval unless the addition were limited to 2 stories, effectively preventing the Applicant from building to the maximum height permitted in the R-5-B zone. HPRB permitted the façade of the addition to be constructed flush with the façade of the existing building, but also required that the Applicant employ more expensive materials and finishes than might otherwise have been used in order to maintain consistency between the existing and new facades.

The existing building has two important street frontages, further complicating the design of the addition. Pursuant to HPRB’s recommendations, both street frontages need to be made consistent with the existing historic façades, therefore, the more costly materials must be used for not only one building front, as would be the norm, but for two.

The history of nonconforming commercial uses in the existing building presents further exceptional situations for the Applicant. The space within the existing building devoted

to the nonconforming deli/grocery use will be structurally altered, resulting in the need for a variance from § 2002.4. The existence of this space, configured for retail although in a residentially-zoned district, presents the Applicant with an exceptional situation. If a new residential building were constructed in this zone, no retail space would be permitted. As the space already exists and creates no detriment to the public good, it would be wasteful to do away with it in order to avoid the necessity of wholly interior structural alterations and a de minimus lot occupancy variance.

The history of nonconforming use also creates the exceptional situation of a building in a residential zone with no necessary residential “core” elements. These elements must now be introduced by the Applicant. Moreover, without this first floor commercial use, the Applicant could devote the entire first floor to residential use, easing both financial pressure and the pressure of historic preservation-related design constraints. Instead, the Applicant is retaining the deli/grocery at least partially because the neighborhood feels strongly that it should be retained. Therefore, the Board concludes that the potential loss of the deli/grocery if the variances are not granted would undermine the public good. *See, Williams v. D.C. Board of Zoning Adjustment*, 535 A.2d 910, 911 (D.C. 1988). (“As part of [a variance] analysis, the BZA may also consider potential hardship to the public if the variance is not granted.”)

Practical Difficulty

The unique situation and circumstances of the subject property cause practical difficulties to the Applicant in complying with the Zoning Regulations. The historic facades restrict the internal design of the addition because an existing doorway must be used to access the upper-floor residential units. No new doorway or any significant change to an existing doorway is possible. The need to maintain the integrity of the existing historic building, particularly its façade, and to match it, as recommended by HPRB, also adds an economic burden to the project. The Applicant is forced to design around the building, while trying to abide by both the Zoning Regulations and the dictates of HPRB.

While it is true that HPRB is an advisory body and its guidance comes in the form of “recommendations,” it is also true that without HPRB’s sign-off indicating that historic preservation requirements have been met, the Applicant cannot obtain a building permit to alter its building without a potentially costly and time-consuming procedure before the Mayor’s Agent. To prevail before the Mayor’s Agent, an applicant must meet the heavy burden of showing that the issuance of its permit “is necessary in the public interest, or that failure to issue [its] permit will result in unreasonable economic hardship to the owner.” *See, D.C. Official Code § 6-1105* (2001). It therefore behooves Applicants to work with, and comply with, HPRB’s recommendations, and this can result in the need for zoning relief. The Board recognizes that merely being located in a historic district does not rise to the level of an “exceptional situation” in the context of the variance test.

See, Capitol Hill Restoration Society v. D.C. Board of Zoning Adjustment, 534 A.2d 939, 942 (D.C. 1987). The Board also recognizes, however, that when a building is subject to HPRB review, the specific design constraints imposed by HPRB as a condition to its approval can create practical difficulties in constructing a building within the parameters of the Zoning Regulations, as is the case here.

Designing around the historic building has resulted in a practical difficulty in placing the core elements necessary for a multiple dwelling. A multiple dwelling is a matter-of-right use in this R-5-B district, but such a building requires certain core elements such as a stairway and/or elevator. The project will include no elevator, and because of the size of the building, will only contain a single exit stair. The Applicant's architect stated that the maximum permitted distance from a single exit stair to an exit is 50 feet; therefore, the stair must be located in the center of the building. This central location further constrains the freedom of design, resulting in the need for a slightly over-maximum lot occupancy on the second floor.

Retaining the deli/grocery in the building enhances the public good, but further restricts placement of the core elements, and drives the need for the variance from § 2002.4 in order to permit structural alterations to the building. Retention of the deli/grocery also creates economic practical difficulties because commercial rental rates are significantly lower than residential rates. Therefore, the unique circumstance of the existence of a strongly-desired nonconforming use directly leads to the practical difficulty in complying with § 2002.4 and indirectly leads to the need for a greater-than-permitted lot occupancy to maintain financial feasibility.

Proof of economic burden is relevant to the decision of whether to grant area variances. *Tyler v. D.C. Board of Zoning Adjustment*, 606 A.2d 1362, 1366-1367 (D.C. 1992). The Court in *Tyler* specifically stated that "increased expense and inconvenience to applicants for a variance are among the proper factors for BZA's consideration." *Id.*, at 1367, quoting *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990). The Board concludes that in the instant case, the Applicant has demonstrated both structural and economic practical difficulties in complying with the Zoning Regulations.

No Harm to Public Good or Zone Plan

By decreasing the amount of space devoted to nonconforming uses and adding a conforming residential use, the proposed addition to the building will actually make it more conforming to the Zone Plan than it is presently. Further, the magnitude of the variances requested is small. The lot occupancy variance is merely seven tenths of a percent over the 2% flexibility granted by the Zoning Regulations to the Zoning Administrator. *See*, 11 DCMR § 407. Therefore, the lot occupancy variance is *de minimus*, with a "correspondingly lesser burden of proof" resting on the Applicant. *See*,

Gilmartin v. D.C. Board of Zoning Adjustment, 579 A.2d 1164, 1171 (D.C. 1990). Nor will the variances alter the exterior configuration of the building. Two stories will be added, but the height is within the height permitted in the zone. Even with the grant of the variances and the increase in height, the resulting building will actually be smaller than many of the surrounding buildings and will fit harmoniously into the character of the neighborhood.

The Board finds it significant that the Applicant is not asking for any relief not necessitated by the existing nonconformities. A variance pursuant to § 2001.3 permits an addition to an existing nonconforming structure. Any addition to the existing building, even if constructed within all the parameters of the Zoning Regulations, would require this relief. The second variance requested is a variance from the permitted lot occupancy of 60%, but ironically, the Applicant is asking for a lot occupancy variance of more than permitted (60%), but *less than exists* (71%). The last variance requested is from § 2002.4, which prohibits structural alterations to a structure housing a nonconforming use. The structural alterations proposed are internal to the building and are necessitated by the fact that the Applicant is keeping the nonconforming deli/grocery at the request of the neighborhood, yet if it were removed, this last variance, and perhaps the lot occupancy variance as well, would not be necessary.

The opposition, specifically the residents of the Woodrow Building, claimed a loss of light, air, and privacy and an increase in noise if the project were allowed to go forward. Any increase in the height of the existing building would likely have some effect on the Woodrow Building, but the question for the Board is whether this effect rises to the level of requiring denial of the variance relief. The Board answers this question in the negative.

The opposition's own real estate expert, when discussing the possible loss of light to units in the Woodrow Building, stated that the greatest effect would be on 3 units out of a total of 15 in the building. The discussion centered on the first through third floors of the Woodrow Building, because the fourth and fifth floors would be minimally affected, if at all. It was clear that the first through third floor rear units would be more affected because "there are rather large windows there on [the] front apartments." *See*, April 18, 2006 transcript at 354, line 13. The units in the front of the building have large windows facing onto Phelps Place.

The three units most affected would be those in the rear of the first, second, and third floors, but the light to the first floor, at least, is already blocked by the 3-story row dwelling adjacent to the subject property to its east. As stated by the opposition's expert, "The first floor is already pretty dark, so --- because it's already down there." *See*, April 18, 2006 transcript at 355, lines 9-10. Further, the testimony of this expert and a resident of the Woodrow showed that all of these rear units have windows on three sides of the

building; therefore, even with the new addition to the north, these units will still have western and southern exposures. *See*, April 18, 2006 transcript at 361, lines 2-6, and at 369, lines 1 & 4-5.

The Applicant has also taken precautions to reduce any negative effects on the availability of light and air to the Woodrow Building. Mindful of the fact that the Woodrow Building was constructed on the property line, the Applicant has set back both of the floors of the new addition a considerable distance and will clad their rear walls in reflective materials. After a careful parsing of the evidence, the Board concludes that the project will cause no diminution of light or air to nearby buildings, including the Woodrow Building, sufficient to constitute a substantial detriment to the public good.

Nor will the addition cause any significant loss of privacy or increase in noise. The considerable setbacks help ameliorate any question of loss of privacy, and four new residential units is not too dense for the neighborhood, nor will it produce an inordinate amount of noise. The noise of the scooters was highlighted by the opposition, but the Applicant's project has no parking requirement. The possibility of scooter parking was included in the application to encourage scooter use in an attempt to alleviate the neighborhood's anxiety regarding the possible increase in automobile use due to the addition.

The Board was not persuaded that automobile use generated by the addition of 4 units would have a substantial negative effect on the area. There was much unsupported fear expressed that the addition would exacerbate traffic congestion and safety issues in the area, but the Board concludes that the addition, although it may result in automobile use, will not result in a sufficient increase in traffic to constitute a substantial detriment to the public good.

Several individuals in opposition also alleged that the Applicant's project would somehow destroy a claimed "open and spacious area," variously called a "village square," "town square," or "plaza." There is no actual "plaza" area, but it is apparent that members of the community liken the open feeling of the sidewalk and the intersection of California Street and Phelps Place to such an area. The Board, however, was not persuaded that this modest addition of two stories would have any substantial negative effect on this sidewalk/intersection area. The Board understands that the community may congregate on the corner, or on the sidewalk near the deli/grocery, but neither the corner, nor the sidewalk, nor the deli/grocery will be substantially changed by this project.

Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code

§§ 1-309.10(d) and 6-523.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. OP recommended approval of the final version of the application and the Board agrees.

In its first report, ANC 2D recommended denial of the application due to concerns about historic preservation compliance, air quality, traffic congestion, and the greater-than-permitted FAR. The ANC's first decision pre-dated the Applicant's removal of the need for the FAR variance. The final design presented to the Board *did* comply with the 1.8 FAR, but the ANC, in its second report to the Board addressing the final design, again voted against the Applicant's proposed development, based on neighborhood opposition and potential effects on the Woodrow Building.

The Board, in the above order, has addressed all the ANC's concerns. As to historic preservation, the HPRB also reviewed, and recommended approval of, the project. On all these issues, the Board is satisfied that the ANC's concerns have been sufficiently acknowledged and analyzed.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to variance relief from the lot occupancy maximum of § 403, and from the nonconforming structure and use provisions of §§ 2001.3 and 2002.4. It is therefore **ORDERED** that (pursuant to Exhibit 47 – Plans) the application is **GRANTED**.

VOTE: **3-1-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr. and John A. Mann II to approve; Ruthanne G. Miller to deny. No Zoning Commissioner participating.)

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

Each voting Board member has approved the issuance of this Order granting the application.

ATTESTED BY: _____


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

MAY 04 2007

FINAL DATE OF ORDER: _____

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, 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 PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 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, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

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.

lm

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17446

As Director of the Office of Zoning, I hereby certify and attest that on **MAY 4, 2007**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning 

TWR