

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



**Application No. 17537 of Victor Tabbs**, pursuant to 11 DCMR § 3104.1, for a special exception under Section 223, to construct an addition that would convert a row dwelling into a flat not meeting the percentage of lot occupancy at premises 740 13<sup>th</sup> Street, S.E. (Square 1045, Lot 97) in the R-4 District.

**Hearing Dates:** November 21, 2006 and December 12, 2006  
**Decision Date:** January 23, 2007

**DECISION AND ORDER**

Victor Tabbs (“the Applicant”) filed an application with the Board of Zoning Adjustment (the “Board”) pursuant to 11 DCMR §§ 223 and 3104.1 for a special exception to construct a three-story-plus-cellar addition to a single family dwelling at premises 740 13<sup>th</sup> Street, S.E. (Square 1045, Lot 97) (“the subject property”). Mr. Tabbs is the owner of the subject property. The public hearing was conducted on December 12, 2006. On January 23, 2007, the Board granted the application by a vote of 4-1-0. An explanation of the facts and law that justify the Board’s determination follow.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Hearing. The application was filed on July 11, 2006. By memoranda dated July 17, 2007, the Office of Zoning notified the following agencies that the application had been filed: the D.C. Office of Planning (“OP”); Advisory Neighborhood Commission (“ANC”) 6B, the ANC for the area within which the subject property is located; the ANC Commissioner for the affected single-member district, ANC 6B-07; the District Department of Transportation; and the Ward 6 Councilmember.

The Board scheduled a public hearing on the application for November 21, 2006. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on September 6, 2006, mailed the applicant, owners of all property within 200 feet of the subject property, and ANC 6B notice of the hearing. On September 13, 2006, a corrected notice of hearing was sent to those same persons correcting the address for the premises. On October 2, 2006, another corrected notice of hearing was mailed indicating that the case involved a request for a special exception pursuant to section 223 for lot occupancy and a request for a variance

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for the limitation on the number of floors under section 400.1. The Applicant subsequently amended the application to remove the request for variance relief.<sup>1</sup>

On November 21, 2006, the Board postponed the hearing until December 12, 2006, because the Applicant had not posted a notice of the hearing on the property as required by 11 DCMR § 3113.14.

On November 27, 2006, the Applicant submitted an affidavit of posting, with attached photographs showing that two zoning posters were posted on the site.

The public hearing was conducted December 12, 2006. The record remained open for the submission of additional material into the record by the Applicant and the opposition.

The Office of Planning Report. The Office of Planning submitted its report dated November 14, 2006, recommending approval of the application on the condition that the Applicant permanently seal the side windows it had already installed and permanently fill or seal the non-conforming side courts, which OP viewed as being a fire hazard. The Applicant submitted revised plans that were consistent with this recommendation (Finding of Fact No. 5). OP addressed the special exception criteria in § 223, concluding that the proposed addition complied with the criteria.

Advisory Neighborhood Commission Report. By letter dated December 13, 2006, ANC 6B advised the Board that it had voted 7-0 to oppose the application as recommended in its Executive Committee's letter to the Board dated December 11, 2006. Its opposition was based on light, air, and privacy concerns. The ANC also believed that the addition created a four-story building, which requires a variance in the R-4 zone district. The ANC claimed that the bottom floor did not meet the definition of a cellar (which does not count as a story), because its ceiling was higher than four feet above the adjacent finished grade. The ANC further stated that it opposed the granting of a variance, because there was no exceptional condition affecting the property.

Request for Party Status. Bryan Cassidy, who resides at 748 13<sup>th</sup> Street, S.E., filed a request for party status to represent himself and other neighbors in opposition on November 6, 2006. Since he could not be available for the new hearing date, he agreed to submit his opposition and that of the other neighbors in writing and withdrew his request for party status. ANC 6B was automatically a party in the case.

Persons in Support. Four neighbors signed a petition in support of the construction, including one who subsequently signed a petition and submitted a letter in opposition to

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<sup>1</sup> The case caption has been modified to reflect this change.

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the construction.

Persons in Opposition. Bryan Cassidy along with 11 other residents of 13<sup>th</sup> Street S.E., Patrick and Wendy O'Meara of 736 13<sup>th</sup> Street, Clarence J. Jackson, Sr., who resides at 738 13<sup>th</sup> Street, which is next door to the applicant, and the Capitol Hill Restoration Society ("Society") are the persons opposing the application. The Applicant did not appear before the Society to discuss his addition, and the Society voted to oppose the application. The other persons in opposition were variously concerned about the adverse impact on light and air to neighboring properties due to the proposed height, the privacy issues raised by the side window, the potentially negative effect a large addition would have on neighboring property values, the failure of the Applicant to comply with building plans, and the negative effect on the character of the neighborhood that would be created by the erection of a four story addition in an R-4 zone.

**FINDINGS OF FACT**

The Subject Property

1. The subject property is located at 740 13<sup>th</sup> Street, S.E. (Square 1045, Lot 97) on the east side of 13<sup>th</sup> Street between Pennsylvania Avenue, S.E. and Potomac Avenue, S.E. The subject lot is improved with a row dwelling.
2. Lot 97 is 18.8 feet wide and 92.5 feet deep, with a land area of 1,743 square feet (rounded).
3. The subject property is zoned R-4.

The Proposed Addition

4. The Applicant proposes to construct a three-story addition and cellar to the rear of the existing row dwelling and cellar and to add an additional dwelling unit, thereby converting the structure to a flat.
5. In response to the concerns raised by the Office of Planning as to the existence of side windows and non-conforming courts, the Applicant submitted plans on January 18, 2007 ("the revised plans") that showed no side windows, the side courts infilled with concrete, and the new addition exterior walls with stucco on six inch concrete masonry units to line up with the face of the existing building.

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6. With the proposed addition, the structure would have a lot occupancy of 63.8 percent.
7. A flat may not occupy more than 60 percent of its lot in an R-4 zone district, 11 DCMR § 403.2. The BZA is authorized to grant a special exception from that limitation, so long as the proposed lot occupancy does not exceed 70 percent, 11 DCMR § 223.3.
8. On July 13, 2006, the Applicant filed an application with the Board for a special exception pursuant to section 3104.1 of the Zoning Regulations under section 223.

#### The Withdrawal of the Variance Request

9. The maximum height of any building in an R-4 District may not exceed 40 feet or three stories, 11 DCMR § 400.1.
10. Based upon a memorandum from the Zoning Administrator indicating that the addition would increase the building stories to four (Exh. 3), the Applicant also sought a variance from this provision.
11. Subsequently, the Zoning Administrator filed a second and third memorandum indicating that variance relief was not necessary (Exhs. 30 and 35).
12. Subsection 199.1 of the Zoning Regulations defines a story as the space between the surfaces of two successive floors in a building. The number of stories is counted at the point from which the height of the building is measured. The definition provides that a cellar is not counted as a story.
13. Subsection 199.1 defines a cellar as that portion of a story, the ceiling of which is less than four feet above the adjacent finished grade, which would be the center and the adjacent grade at the front of the subject property.
14. The Applicant initially claimed that the height of the bottom-most ceiling of the building was 3'8" above the adjacent finished grade, but did not offer drawings showing the location of the existing ceiling.
15. The ANC contended that the Applicant used the ceiling of the crawl space beneath the porch, but if the porch were removed, the actual basement ceiling would be over 6 feet above the finished grade.

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16. The Applicant's revised plans showed the actual location of the ceiling in the existing portion of the building. The drawing shows that the ceiling for the lowest portion of the building remains level from the front to the back of the structure and that this ceiling's height is 3'8" above the adjacent finished grade. (Exh. 45)

Findings Relevant to the Special Exception

17. The properties on the subject block consist of two-story row dwellings. The other properties in the subject block have rear yards and detached garages in the rear. These homes extend into the yards at varying lengths.
18. On the east side of the north-south alley at the rear of the subject property, a planned unit development, consisting of five-story condominium buildings called Jenkins Row, is being constructed. The alley is approximately 20 feet wide, and there is no rear yard to Jenkins Row.
19. The revised plans showed the line of sight for the property that illustrates that the addition would not be visible from the sidewalk directly across 13<sup>th</sup> Street in front of the subject property, but can only be seen if viewed from a position north or south on 13th Street. (Exh. 45)
20. The subject property is oriented east and west so the addition will cast minor shadows on the property immediately to the north of it for a portion of the day.
21. The addition will have no side windows, and therefore will not reduce the level of privacy currently enjoyed by the adjacent properties.

**CONCLUSIONS OF LAW**

The Applicant seeks a special exception under Section 223 pursuant to 11 DCMR § 3104.1 to allow construction of a three-story-plus-cellar addition on the rear of a row dwelling in the R-4 District. The Board is authorized to grant special exceptions where, in the Board's judgment, a special exception would be in harmony with the general purpose and intent of the Zoning Regulations and Map and would not tend to adversely affect the use of neighboring property. Pursuant to § 223, the Board may permit an addition to a one-family dwelling or a flat that does not comply with normal requirements pertaining to minimum lot dimensions, lot occupancy, rear and side yards, courts and nonconforming structures, subject to the conditions enumerated in Section 223. In this case, Applicant seeks to construct an addition that would exceed the maximum lot

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occupancy permitted for a flat, but which would be less than the 70% lot occupancy limitation set forth in § 223.3.

The Board finds that the application meets the general requirements of § 3104.1 and the specific criteria of § 223.

In accordance with § 223.2, the addition will not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property. The neighboring building that will be most affected in terms of its light and air is the abutting row dwelling on the immediate north at 738 13<sup>th</sup> Street S.E. Although there will be shadows from the subject property during the morning, there will be ample sunlight available to the property during most of the day. Additionally, the elimination of the side windows will assure that the addition will not reduce the present privacy level of the adjacent properties.

The addition also meets the requirement of § 223.2 (c) in that it will not create a visual intrusion on the character, scale and pattern of houses along the east frontage of 13<sup>th</sup> Street, S.E. in this vicinity, as viewed from the street, alley, and other public way. The addition will not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage. It can not be viewed easily from 13<sup>th</sup> Street and to the extent it is visible, it will have little visual impact. Although the addition is visible from the alley in the rear, it will not be out of context with other intrusions into neighboring back yards and will have no greater impact than the construction of the five story condominiums Jenkins Row.

The Board concludes that the project is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to adversely affect the use of neighboring property in accordance with the Zoning Regulations and Maps.

**Great Weight to Office of Planning and ANC 6B**

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 6-623.04. Great weight means an 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.

The Office of Planning recommended approval of the application, and the Board agrees with OP’s analysis and recommendation.

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ANC 6B voted unanimously to oppose the addition. The ANC's opposition was based upon its belief that the addition would adversely affect the light, air, and privacy of neighboring property owners and that the addition would "create an enclosed court yard effect" in light of another residential development under construction to the rear of the property. The Office of Planning, to which the Board also gives great weight, determined that the addition would not unduly affect the light and air of neighboring properties. Based on the evidence in the record, including photos submitted by the Applicant showing the property in the context of its neighboring properties, including the property under construction, the Board is persuaded, as set forth above, that this particular addition will not have a substantial adverse impact on the light and air of any adjacent dwelling or property.

The ANC also contended that the Board should have heard the case as a request for a variance. The District of Columbia Court of Appeals has held that "the 'great weight' requirement extends only to 'issues and concerns that are 'legally relevant.' *Bakers Local 118, supra, 437 A.2d at 179* (citation omitted)", *Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241(DC 1993). The question of whether an applicant should be requesting variance relief is not germane to the question of whether a special exception should be granted. As the Board previously stated in *Application No 16974 of Tudor Place Foundation, Inc*, 51 DCR 8885 (2004),

Assuming that the opposition is correct ... the most that can be said is that the applicant will need variance relief. That fact alone does not require the Board to deny a special exception. ... Our inquiry is limited to the narrow question of whether the Applicant met its burden under the general and specific special exception criteria that apply to the requested use. Having concluded that it has done so, the Board must grant the application.

While not required to address this concern, the Board notes that the ANC's argument that a variance is required is not supported by the facts in this case. The ANC contended that the ceiling height should be measured from the top of the porch over the crawl space nearest the front door with 8 inches allowed for joists to determine the ceiling height. The Applicant's revised plans show the actual location of the cellar ceiling, which turns out to be level throughout and shows its height is 3' 8" measured in accordance with the regulations. Since this ceiling was less than 4 feet in height above the adjacent finished grade to the underside of the cellar ceiling, that portion of the building was a cellar, and therefore not counted as a story (11 DCMR § 199.1 (definitions of "cellar" and "story")).

Based on the above 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 the

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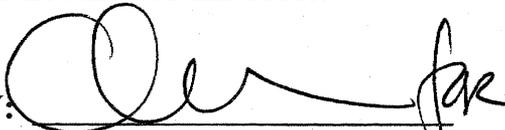
application for approval of an addition as a special exception under Section 223 in the R-4 District.

It is therefore **ORDERED** that the Application is **GRANTED**.

**VOTE:** 4-1-0 (Ruthanne G. Miller, John A. Mann II, Curtis L. Etherly, Jr. and Gregory N. Jeffries to grant the application; Geoffrey H. Griffis to deny)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**  
Each concurring Board member approved the issuance of this order.

ATTESTED BY:



**JERRILY R. KRESS, FAIA**  
Director, Office of Zoning

**JUL 27 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

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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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on **JULY 27, 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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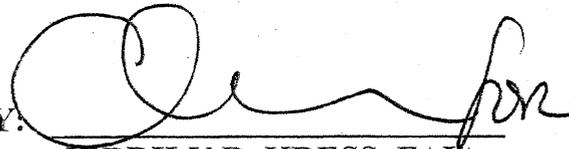
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ATTESTED BY:

A handwritten signature in black ink, appearing to read "Jerrily R. Kress", written over a horizontal line.

**JERRILY R. KRESS, FAIA**  
**Director, Office of Zoning**

TWR