

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17551-A of Mustafa Guldu, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under § 405, a variance from the side yard requirements under § 404, and a variance from the prohibition on enlarging a non conforming structure under subsection 2001.3 that will increase an existing nonconformity and which will not comply with area requirements¹, to allow the construction of a two-story addition to an existing flat (two-family dwelling) in an R-2 District at premise 4323 River Road, N.W. (Square 1653, Lot 16).

HEARING DATES December 19, 2006 and January 23, 2007
DECISION DATE: January 23, 2007

CORRECTED DECISION AND ORDER*

*Note: Pursuant to 11 DCMR § 3125.6, this order corrects the attestation page of Order No. 17551, which was inadvertently mailed without notice to the Applicant. In all other respects, the order remains the same.

This application was filed by Mehmet Ergene, an Architect, on behalf of Mustafa Guldu ("Applicant"), the owner of the property that is the subject of this application. The property, located at 4323 River Road, N.W., is improved with a nonconforming flat in an R-2 District. The Applicant self-certified his need for variance relief from the Board of Zoning Adjustment. He is seeking variances from the lot occupancy requirements under § 405, the side yard requirements under § 404, and the prohibition on enlarging a non conforming structure under § 2001.3, to construct a two-story addition to the existing flat.

For the reasons discussed below, the Board denied the application by a vote of 5-0-0.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated August 28, 2006, the District of Columbia Office of Zoning ("OZ") notified the Councilmember for Ward 3,

¹ The application was originally advertised as a request to expand a structure devoted to a nonconforming use pursuant to 11 DCMR § 2002.5. For reasons that are explained in the conclusions of law, the Board determined that it was the structure that was nonconforming, not the use.

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Advisory Neighborhood Commission ("ANC") 3E, as well as the ANC member for Single Member District 3E03, the District of Columbia Department of Transportation ("DDOT") and the District of Columbia Office of Planning ("OP"), of the filing of the application. Pursuant to 11 DCMR § 3113.13, the OZ published notice of the hearing on the application in the *District of Columbia Register* and on October 5, 2006 mailed notices to the ANC, the Applicant, and to all owners of property within 200 feet of the subject property, advising them of the December 19, 2006 hearing date. On December 15, 2006, the Applicant filed an affidavit of posting indicating that he placed a zoning poster on the subject property in plain view of the public on December 4, 2006. In fact, he did not post the notice on the property until December 8, 2006, after his agent, Mr. Ergene, was notified by the staff that the Office of Zoning had received information indicating that the property had not been posted. As a result of the late posting, the Board postponed the hearing until January 23, 2007.

Requests for Party Status. The Board granted party status to Elaine Chan, the daughter of Florence Chan, the owner of 4321 River Road, N.W. on lot 15. That property is the other half of the semi-detached building that is owned by the Applicant, and it shares the party wall to the east of the subject property. The Board also granted party status to Michael Soghomonian, who was representing his father, John Soghomonian, the owner of lot 14, which is the property that is immediately adjacent to the Applicant's property on the west side and the rear. ANC 3E was automatically a party to the proceeding.

Applicants' Case. The Applicant and his architect testified in support of his variance application. Although the Applicant's intention with respect to this building was not entirely made clear, it appears that he will be occupying one unit and renting out the other. Although the addition would contain a bedroom on each floor, the number of bedrooms would not increase since one of the existing bedrooms on each floor would be converted into a den. In addition, each unit would have a passageway leading to a new bathroom. At present, the only means of accessing the existing bathroom is through one of the bedrooms. The reconfiguration permitted by the addition would allow persons using each bedroom to directly access a bathroom. Also, the expansion and reconfiguration of the structure would allow the Applicant to increase the rent charged for the other unit so as to offset increases in his property tax.

Government Reports. On December 12, 2006, OP filed its report recommending that the application for variance relief be denied because it did not meet two of the three elements for granting variance relief.

ANC Report. In letters dated November 11 and December 15, 2006, ANC 3E informed the Board that at a properly noticed meeting on December 14, 2006, the Commissioners

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voted, 4-0, to support the application. Subsequently, in a letter dated January 12, 2007, the ANC Chairman stated that new information had come to the Commissioners' attention concerning the Applicant's failure to contact a neighbor and his failure to post notice, and, if this information had been available at the time of the initial vote, it may have resulted in the ANC recommending that the application be denied. The January 12th letter does not reflect official action by the ANC since no vote was taken by the ANC at a duly noticed meeting.

Parties and Persons in Support. There were no parties or persons in support of the application.

Parties and Persons in Opposition. Elaine Chan, representing her mother, the owner of the other half of the duplex, testified as a party in opposition. She testified that there was frequent flooding in the basement of her mother's property as a result of water flowing off of the Applicant's property on to her mother's property at 4321 River Road, N.W., and that condition would be exacerbated by the proposed addition. According to Ms. Chan, the increased lot coverage would result in increasing the runoff and reducing the permeable surface area and vegetation available for the absorption of water from rain and snow. Ms. Chan was also concerned that there could potentially be three bedrooms in each unit, which could result in an increase in the number of residents in the subject property. She feared that additional residents would lead to more noise, increased demands on parking, and greater competition for open space for recreation, leisure and solid waste disposal containers. Ms. Chan felt that these factors would have an adverse impact on the rental value of her mother's property.

Michael Soghomonian, whose father owns the property to the rear and west of the subject property, was concerned that the addition would be too close to his father's property, be too large, and adversely affect light and air. He also opposed the proposed construction because of the possibility that the addition on the property could later be used as two three bedroom housing units.

Gustavo Vasquez, of 4907 44th Street, N.W., filed a statement in opposition to the application, claiming that the subject property would be a four unit apartment building, too large for its lot, and out of character with the neighborhood.

FINDINGS OF FACT

1. The subject property is located at 4323 River Road, N.W., Square 1653, Lot 16, in an R-2 zone district.

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2. The purpose of the R-2 district is to protect one-family, semi-detached dwellings from the invasion by denser types of residential development, such as flats and row dwellings, 11 DCMR § 300.1.
3. A flat is a two-family dwelling, 11 DCMR 199.1 definition of “flat”), which is first permitted in an R-4 zone district, 11 DCMR § 330.5 (b).
4. The property is an irregularly shaped lot that is a trapezium, which is nearly triangular shaped.
5. The subject property is bounded on the east by lot 15, on which is located 4321 River Road, N.W. That lot is improved by a semi-detached flat dwelling that shares a common divisional wall with the subject property.
6. To the west of the subject property is a ten-foot wide green space that is an extension of lot 14. Lot 14 also abuts the rear of the subject property to the north and has a residence on it that fronts on Ellicott Street.
7. The subject property is improved with a flat with one unit on the first floor and another unit on the second floor. Each unit has two bedrooms with a bathroom located between the two bedrooms.
8. The bathrooms do not open on to a common area, but may only be accessed through one of the bedrooms.
9. The subject structure is also nonconforming in two respects. First, it is a flat, which is not among the matter-of-right uses permitted in the R-2 district pursuant to 11 DCMR § 300.3, and second, it occupies 41.9% of its lot, which exceeds the 40% maximum lot occupancy allowed for “all other structures” in an R-2 zone by 11 DCMR § 403.2.
10. The proposed addition would be attached to west side of the existing semi-detached dwelling. The addition would consist of a bedroom, a bathroom, and a walk-in closet being added to each unit. One of the existing bedrooms in each of the units would become a den.
11. The proposed addition would be nearly triangular in shape with its new building walls parallel to the property lines.
12. Applicant proposes to increase the already nonconforming lot occupancy to 55.9%.

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13. The side yard to the west of the addition will be 5 feet wide, rather than the 8 feet that is the minimum width required for a side yard in an R-2 district. (*See* 11 DCMR § 405.9)
14. Without the addition, the Applicant could still provide common access to each bathroom by constructing a door to the bathroom from the living room/dining room area (*See* Exhibit 9)
15. The Applicant provided no evidence that the property is not currently economically viable other than an undocumented assertion that the property is smaller than others in the neighborhood and that property taxes were increasing. (Transcript, January 23, 2007, 338-339)
16. In the past, the property has been a viable rental property for the Applicant.
17. The Applicant testified that, if the addition is not approved, he could make less extensive renovations to the building. (Transcript, January 23, 2007, 389)
18. The proposed addition would eliminate green space on the west side of the property, come within eight feet of its rear neighbor's property line, and be 20 feet from that neighbor's home.

CONCLUSIONS OF LAW

The Board is authorized to grant a variance from the strict application of the zoning regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. Relief can be granted only "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." *Id.* In this context, the Board must consider the effect of the variance relief on the "public good," including the surrounding properties, and the size and massing of a building which would result from the granting of such relief.

As noted, a flat is not permitted in an R-2 zone. If a flat were considered a nonconforming use, 11 DCMR 2100.5 disallows the expansion of the structure in which

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it is located, “except if the enlargement is to be devoted to a conforming use.” Although the application was advertised as a variance from this prohibition, the Board found that because residential uses are permitted in an R-2 zone, the fact the structure had two dwelling units, rather than the single unit permitted, did not make that use nonconforming.

Instead, the Board concluded that the application involved an expansion of a nonconforming structure. As such, the provisions of 11 DCMR § 2001.3 applied. That subsection allows additions to a nonconforming structure if the structure will comply with lot occupancy requirements, the addition will conform to use and structure requirements, and the addition does not increase an existing nonconformity or create a new one. As noted in the findings of facts, the proposed addition will increase the nonconforming lot occupancy and will not comply with the side yard requirements. Therefore, a variance from 11 DCMR § 2001.3 is also required.

Because all of the variances required in this case are area variances, the Applicant must make the lesser showing of "practical difficulties," and not 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). The Applicant in this case, therefore, had to make three showings: uniqueness of the property, that such uniqueness results in “practical difficulties” to the Applicant, and that the granting of the variance will not be detrimental to the public good or impair the intent and integrity of the zone plan and regulations.

Since the subject property is irregularly shaped, the Applicant has met the first prong of the three part test for an area variance by establishing that the property has an “extraordinary or exceptional situation or condition.” However, the Applicant has failed to show how that unusual shape has resulted in peculiar or exceptional practical difficulties for him in complying with the Zoning Regulations. Without any supporting documentation, the Applicant claimed that he needed the variances to make the property economically viable. He noted that the property was smaller than other properties in the neighborhood and the taxes were constantly increasing. In the past, the property has been a viable rental property for the Applicant. There is no reason to believe it will not continue to be so. The Applicant has admitted that even without the addition, he could make less extensive renovations. Since the Applicant has failed to submit any evidence that the property is not economically viable, the Board does not consider this to be a basis for a finding that there are practical difficulties.

The Applicant also testified that he wants to construct the addition to enable house guests to use the bathrooms without going through his bedroom. However, that objective can be

achieved without constructing an addition, by adding a door to the bathroom from the living room/dining room area. Accordingly, the strict application of the Zoning Regulations does not result in a peculiar or exceptional practical difficulty for the Applicant.

The Applicant also fails to meet the third prong of the variance test, which requires that the Applicant show that the requested variance will not result in substantial detriment to the public good and that it will not impair the intent and purpose of the zone plan as embodied in the zoning regulations. The addition would increase the already nonconforming lot occupancy from 41.9 % to 55.9 %, which would be a significantly higher lot occupancy than the surrounding properties. It will likely have a negative effect on the privacy of the neighbor to the rear and its increased lot occupancy will be out of character with the other properties in the neighborhood. Consequently, variance relief cannot be granted without substantial detriment to the public good. The Board also concludes that the Applicant's proposed addition will impair the integrity of the R-2 zone plan by substantially impinging on the green space to the west of the existing building and increasing the lot occupancy significantly beyond the 40% limit to 55.9%. Such construction would be contrary to the purpose of the R-2 district, which is to protect one-family, semi-detached dwellings from the invasion by denser types of residential development and to preserve a significant amount of green space around them by limiting the lot occupancy to 40%.

The ANC and OP Recommendations

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 (2001). The ANC stated that it did not oppose the application. Subsequently, in a letter that was not the result of action taken during an official meeting, the ANC Commissioners expressed reservations about the application. However, the Board cannot rely on assertions that were not made in accordance with the requirements of section 13(d) of the Advisory Neighborhood Councils Act of 1975, effective October 10, 1975, D.C. Law 1-21, D.C. Official Code § 1-309.10(d) (2001). Furthermore, because the ANC report did not express any issues or concerns, there is nothing for which the Board can give great weight to.

The Board agrees with OP's recommendation that variance relief should be denied because the Applicant failed to meet the second and third prongs of the variance test for any of the variances sought. Since the Board reached this conclusion based upon the more lenient practical difficulty standard than the more severe undue hardship standard deemed applicable by OP, the difference in views is of no consequence.

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Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to his application for variance relief. It is therefore **ORDERED** that the application is **DENIED**.

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., Gregory N. Jeffries and John A. Mann II to deny)

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

Each voting Board member (other than former members Griffis and Mann) has approved the issuance of this Order denying this application.

ATTESTED BY:


JERRILY R. KRESS, FAIA
DIRECTOR, Office of Zoning

FINAL DATE OF ORDER: JAN 29 2008

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.

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 **JANUARY 29, 2008**, 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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