

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17571 of 1124 9th Street, L.L.C., pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements of § 771, a variance from the lot occupancy requirements of § 772, a variance from the residential open space requirements of § 773,¹ and a variance from the rear yard requirements of § 774, to allow a three-story residential addition to an existing building in the DD/C-2-A District at premise 1124 9th Street, N.W. (Square 369, Lot 36).

HEARING DATE: February 27, 2006
DECISION DATE: February 27, 2006

DECISION AND ORDER

This application was submitted on October 9, 2006 by 1124 9th Street, LLC (“Applicant”), the owner of the property that is the subject of this application (“subject property”). The self-certified application requested several area variances necessary to permit the Applicant to restore and enlarge a one-story vacant building located at 1124 9th Street, N.W., in a DD/C-2-A zone district.

The Board held a hearing on the application on February 27, 2006, and at the conclusion of the hearing, voted 4-0-1 to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated October 25, 2006, 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”) 2C, the ANC within which the subject property is located, the Single Member District member for 2C03, and the Council Member for Ward 2. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing in the *D.C. Register* and mailed such notice to the Applicant, ANC 2C, and all owners of property within 200 feet of the subject property.

Requests for Party Status. ANC 2C was automatically a party to this case. There were

¹On April 6, 2007, the Zoning Commission repealed all the residential recreation space provisions in the Zoning Regulations; therefore, such variance relief is neither necessary nor addressed in this Order.

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originally three party status requests in this case, two of which were withdrawn at the hearing, after an agreement was reached with the Applicant. The third, of Mr. Kwok Tom, a nearby neighbor, was granted by the Board. Mr. Tom was particularly concerned about the parking issues related to the proposed project, both during construction and after occupancy of the building.

Applicant's Case. The Applicant's representative testified in support of the project. The project architect explained how the 56-foot setback came about and what effect it had on the project and the relief requested. The Applicant's land use and zoning expert testified as to how the variance tests are met.

Government Reports. The Office of Planning filed a report with the Board dated February 13, 2007, recommending approval of all the variance relief sought. OP stated that the variances are minimal, will not have detrimental impact on nearby buildings or on the neighborhood, and will meet the intent of the Zoning Regulations.

The Historic Preservation Office ("HPO") prepared two reports on the Applicant's project. In the first report, no approval was recommended by staff because the Applicant was directed to either eliminate the third floor of the proposed addition or set the addition significantly further back on the roof of the existing building. After the Applicant revised its plans and considerably increased the setback of the addition, the HPO staff recommended concept approval to the Historic Preservation Review Board ("HPRB").

ANC Report. By a letter filed with OZ on November 13, 2006, ANC 2C stated that, at a regularly-scheduled and properly-noticed meeting, it had voted unanimously to support the application. The ANC opined that the application met the three prongs of the variance test and that "the relief is necessary due to the size and configuration of the existing building on the site."

FINDINGS OF FACT

The Subject Property and the Surrounding Neighborhood

1. The subject property is located at 1124 9th Street, N.W. (Square 369, Lot 36), in a DD/C-2-A zone district, and encompasses approximately 3,469 square feet of land area.
2. The subject property is 25 feet wide, and is bounded at the rear by a 30-foot wide public alley.
3. Square 369 is bounded by M Street, N.W. on the north, L St., N.W., on the south, 10th St., N.W. on the west and 9th St., N.W. on the east. The Square

- includes a number of vacant structures along 9th Street, a new residential development on M St., and other residential uses along M, L, and 10th Streets.
4. The subject property is in the Shaw Historic District and is improved with a vacant, one-story building built in 1920 which has been found to be a contributing building to the Historic District, effectively preventing its razing.
 5. The existing building has a unique crenellated roofline, or “stepped parapet,” as the HPO staff referred to it, which signals its current one-story nature.
 6. The adjacent building attached to the north side of the subject building is two stories, and the adjacent building attached to the south side is three stories.
 7. Prior to being vacated approximately 15 years ago, the building on the subject property was used for commercial purposes.
 8. The building on the property occupies 100% of the lot, which is permitted in the C-2-A zone for a building devoted to commercial uses.
 9. There is a loading zone on 9th Street, in front of the property, from the prior commercial use, which the Applicant will retain.

The Proposed Project

10. The Applicant proposes to rehabilitate the existing building for commercial use, and add a three-story addition on top of it, containing one residential unit on each floor.
11. There will be no residential unit(s) on the ground floor, but the entrance to the upper-floor residential units will be on the ground floor, as will two parking spaces serving those units.
12. Because the existing building is a contributing structure in the Shaw Historic District, the ability to remove portions of the existing building or locate new structures on the property is limited and subject to HPRB review and recommendation to the Mayor to assure that alterations of existing structures and new construction are compatible with the character of the historic district.
13. The Applicant’s original plans called for a three-story addition set back 10 feet from the building face along 9th Street, with two parking spaces open to the

- sky, and a building height of 43 feet, 7 feet less than the 50 feet permitted in the zone. *See*, 11 DCMR § 770.1.
14. The HPO staff did not recommend approval of the original plans to the HPRB, but recommended that the Applicant either remove one floor of the addition or set it much further back, in order to respect the historic nature of the existing building, particularly its “stepped parapet,” and to minimize the visual connection between the existing façade and the addition.
 15. In order to obtain HPRB’s recommendation of approval, the Applicant changed the setback of the addition to approximately 56 feet from the building face along 9th Street, resulting in the addition being above, and therefore, completely enclosing, the two parking spaces which were previously open to the sky. The building height was also increased to 49 feet.

The Requested Relief

16. Although not required to do so because the existing building has been certified as contributing to the historic district, the Applicant has chosen to provide the two parking spaces that would otherwise be required. *See*, 11 DCMR §§ 2100.5 & 2101.1.
17. Because the two parking spaces are covered by the addition, the area in which they are located is within the rear portion of the existing building, and so counts toward the floor area ratio (“FAR”) of the project, putting the FAR of the project .18 over the maximum permitted FAR of 2.5, and resulting in the request for the FAR variance. *See*, 11 DCMR §771.2.
18. If the two parking spaces were not enclosed, and therefore not counted toward FAR, no FAR relief would be needed.
19. The small size of the lot and the location of the historic building make below-grade parking infeasible, if not impossible.
20. In a C-2-A zone, a building or portion thereof which is devoted to residential use is limited to a maximum lot occupancy of 60%. *See*, 11 DCMR § 772.1.
21. Each of the stories of the addition will have a lot occupancy of only 57%, but the large setback of the addition results in the floor area of the two parking spaces being located within the building, and the two spaces are attributable to residential use. Although there are no residential units on the ground floor, if the parking spaces are considered to make the residential use begin at the

- ground floor, then the residential lot occupancy becomes 100%, over the permitted 60%, resulting in the need for the lot occupancy variance.
22. The minimum required rear yard in the C-2-A district is 15 feet, but for a building abutting an alley, the rear yard for the portion of the building below a horizontal plane 20 feet above the mean finished grade is measured from *the center line of the alley* to the rear wall of the building. For the portion of the building above a horizontal plane 20 feet above grade, the rear yard is instead measured from the *rear lot line* to the rear wall of the building immediately above the horizontal plane. *See*, 11 DCMR §§ 774.1 & 774.7.
 23. There is a rear yard of 15 feet from the center line of the rear alley to the rear wall of the existing building; therefore no rear yard variance is required for the first floor.
 24. Because of the deep setback of the addition, there is a rear yard of only one foot provided above a horizontal plane 20 feet above grade, necessitating the requested rear yard variance for the second, third, and fourth floors.
 25. But for the deep setback approved by HPRB, no rear yard relief would be needed.
 26. Compliance with the 60% lot occupancy maximum would require elimination of the two parking spaces or a significant reduction in the size of the addition, and therefore, in the number of residential units provided, thereby harming the feasibility of the project.
 27. Similarly, compliance with the rear yard requirement above the 20-foot threshold would result in a significant reduction in the size of the addition, and therefore, in the number of residential units provided, thereby harming the feasibility of the project.
 28. Even with the rear yard variance, there is still a 30-foot alley, twice as wide as the required 15-foot rear yard depth, providing open space and allowing air and light to reach the building behind the subject property.

CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the Zoning Regulations where “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary or exceptional

situation or condition” of 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 variances will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The subject property is affected by an exceptional situation due to the confluence of its narrowness, the 100% lot occupancy and historic nature of the existing structure, and the deep setback necessary to gain HPRB approval. *See, Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990). The width of the subject property is actually 5 feet less than the alley abutting it at the rear. This is an unusual condition of the property. The existing building has a unique crenellated parapet along its roofline facing 9th Street. The HPRB was concerned that this architectural embellishment not be overshadowed by the addition.

Meeting the strict letter of the applicable Zoning Regulations relating to FAR, residential lot occupancy, and rear yard would cause the Applicant exceptional practical difficulties. The HPRB-recommended setback, coupled with a 25-foot lot width circumscribed on either side by attached buildings, considerably reduces the building envelope available to the Applicant. The reduced building envelope forces the rear wall of the addition to within one foot of the rear wall of the existing building, resulting in the enclosure of the area containing the two parking spaces. The Applicant’s original plans called for only a 10-foot setback from the building face along 9th Street, with two open-air parking spaces. If these plans had been implemented, the project would likely not require any relief.

The 46-foot increase in front setback, to 56 feet, creates the need for the relief requested. The enclosure of the area where the two parking spaces are located makes it count toward the building’s FAR, raising the FAR .18 above the 2.5 FAR permitted by §771.2. With their enclosure, the parking spaces also arguably create a 100% lot occupancy for a

“portion of the building devoted to a residential use,” contrary to § 772.1, which permits a lot occupancy of 60% for such a building portion. The language of § 772.1 is not crystal clear, but the Applicant reads it as meaning that variance relief is needed if the portion of the building, *i.e.*, the floor, that includes the residential use, occupies more than 60% of the lot, rather than that the area actually devoted to the residential use must occupy more than 60% of the lot. Therefore, the Applicant requests lot occupancy relief because the first floor of the building, which houses part of the residential use (the parking spaces), occupies 100% of the lot. If the parking spaces had remained unenclosed or been eliminated, this relief would not be necessary.

The last variance, for rear yard relief, is also necessitated, at least in large part, by the extensive 56-foot setback. There is no rear yard relief needed for the building’s first floor, and without the sizable setback, the addition was designed to meet the requirement of a 15-foot rear yard measured from the rear lot line to the rear wall of the building immediately above a horizontal plane 20 feet above grade. *See*, §§ 774.1 & 774.7(b). With the setback, however, the second, third, and fourth floors end up being just one foot short of the rear wall of the existing building, creating a one-foot rear yard and the need for rear yard relief.

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.

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). When a building is subject to HPRB review, however, 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. Such is the case here. The practical difficulties in meeting the Zoning Regulations engendered by the effect of the much-greater-than-originally-contemplated setback results in the need for the variance relief.

The requested variance relief can be granted without substantial detriment to the public good or substantial impairment of the Zone Plan. The uses proposed, first-floor retail, and upper-floor residential, are matter-of-right uses in this C-2-A zone. The project will

cause no impairment of the Zone Plan. The FAR variance is minimal and results in a minimally more dense building than permitted. Such a *de minimus* variance request requires a lesser showing of practical difficulties than a more substantial variance request. See, *Gilmartin, supra*, at 1171, fn. 6. (The "BZA may consider whether the variance is *de minimus* in nature and whether for that reason a correspondingly lesser burden of proof rests on the" applicant.) The residential lot occupancy variance has no real external effect because the existing building is already at 100% lot occupancy, and any effect of the rear yard variance is ameliorated by the 30-foot alley abutting the rear of the property.

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 6-623.04 (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. Both OP and ANC 2C recommended approval of the application and the Board agrees.

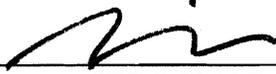
Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to variance relief from the FAR requirement of § 771, the residential lot occupancy requirement of § 772, and the rear yard requirement of § 774. It is therefore **ORDERED** that the application be **GRANTED**.

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr. and John A. Mann II, to approve. No Zoning Commission member participating or voting.)

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

FINAL DATE OF ORDER: AUG 03 2007

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.

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As Director of the Office of Zoning, I hereby certify and attest that on **AUGUST 3, 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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