

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17919 of Richard Barnes and Janet Staihar, pursuant to 11 DCMR § 3103.2, for variances from the lot occupancy requirements under § 403 and the rear yard requirements under § 404.1 of the Zoning Regulations, to permit the construction of a rear addition to an existing one-family row dwelling in the R-4 zone district, at premises located at 3150 17th Street, N.W. (Square 2600, Lot 87).

HEARING DATE: May 12, 2009

DECISION DATE: May 12, 2009

DECISION AND ORDER

Richard Barnes and Janet Staihar (the applicant), filed this application on December 12, 2008 for area variances under § 403.2 (lot occupancy requirements) and 404.1 (rear yard requirements) of the Zoning Regulations. Following a full public hearing, the Board of Zoning Adjustment (the Board) voted to deny the requested relief. A full explanation of the factual and legal basis for this decision follows.

PRELIMINARY MATTERS

Self-Certification

The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2 (Exhibit 4). The application was self-certified by the applicant's architect, Meagan Mitchell, of Suzanne Reatig Architecture. Ms. Mitchell also appeared at the public hearing on the applicant's behalf.

Notice of Public Hearing

Notice Pursuant to 11 DCMR § 3113.13, notice of the hearing was sent by the Office of Zoning to the applicant, all owners of property within 200 feet of the subject site, Advisory Neighborhood Commission (ANC) 1D, and the District of Columbia Office of Planning (OP).

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Posting The applicant posted placards at the property regarding the application and public hearing in accordance with 11 DCMR §§ 3113.14 through 3113.20. It also submitted an affidavit to this effect in accordance with 11 DCMR §§ 3113.19 and 3113.20. (Exhibit 25).

ANC 1 D The subject site is located within the jurisdiction of ANC 1D, which is automatically a party to this application. In its report dated May 6, 2009, ANC 1D indicated that at a regularly scheduled and legally noticed meeting on April 21, 2009, with a quorum present, the ANC voted to support the application. (Exhibit 26). The report stated that it had “neither issues nor concerns with the proposed zoning variance”. Greg Edwards, the ANC vice-chair, presented the ANC report at the public hearing, and testified that “...the statement that there are neither issues nor concerns now is no longer true.” (T., p. 22). Mr. Edwards explained that the application had been discussed at a second ANC meeting, and that the ANC considered whether to change its resolution of support. (T., p. 20-22). In response to Board questioning, Mr. Edwards also acknowledged that the ANC had not reviewed the application in accordance with the variance test set forth in § 3103.2 of the Zoning Regulations. (T., p. 84-90).

Requests for Party Status There was a request for party status dated April 15, 2009 from Frank Agbro, an adjacent property owner residing at 1702 Kilbourne Place, NW. (Exhibit 22). The request was granted, with no objection from the applicant or the ANC.

Persons in Support/Opposition No persons testified in support or opposition to the application. The Board received letters in support of the application from three neighboring property owners. (Exhibits 20, 21, and 23).

Government Reports

OP Report OP reviewed the variance application and prepared a report recommending denial of the variance requests (Exhibit 24). OP’s representative, Karen Thomas, testified that there were no exceptional conditions at the property that warranted the need for zoning relief, and that the proposal would be a detriment to the zone plan.

Historic Preservation Review Office The existing structure is a contributing building in the Mount Pleasant Historic District, so that any permit to alter it would have to be reviewed by the Mayor to determine whether the proposal would be consistent with the applicable principle contained in the Historic Preservation Act. As permitted under the Act, applicant sought “conceptual design review” by the Historic Preservation Office staff before filing for a permit. The non-binding Staff Report and Recommendation concluded that the addition was consistent with the purposes of the Historic Preservation Act. (Exhibit 7).

Request for Continuance Mr. Agbro requested a continuance of the public hearing, claiming that the ANC resolution in support was unfair and that the ANC had not provided adequate notice of its intention to vote on the proposed project. The Board denied this request. Assuming that Mr. Agbro was correct, an ANC report issued without proper notice would not warrant the

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continuation of the case, but rather would result in the Board not being able to give the ANC great weight. In any event, the Board concludes that proper notice was given and notes that the resolution states as much. Ultimately, the fact that the Board gave great weight to the ANC's advice did not harm Mr. Agbro at all, because the Board found the ANC's advice to be unpersuasive.

FINDINGS OF FACT

The Site and Surrounding Area

1. The subject property is located at 3150 17th Street, NW, Square 2600, Lot 87.
2. Lot 87 is a rectangular shaped lot measuring 18 feet in width and 67.5 feet in length.
3. Lot 87 is a corner lot, situated at the corner of 17th Street and Kilbourne Place, NW. It abuts a 15 foot wide alley at the rear.
4. The lot is located in the R-4 zone district and in the Mount Pleasant Historic District.
5. The lot is improved with a three-story brick row dwelling, with a basement and one parking space.
6. The rear of the property is paved from the alley to the rear wall of the house. Part of the paved area is in the public space, is in poor condition, and is used by others as an unauthorized parking area.

The Proposed Project

7. The applicant proposes to construct a 16 x 16 foot sun room which would be located at the second level of the dwelling. The sun room would be supported on brick piers, with parking below.
8. The sun room would be one story in height and would be fully enclosed by walls, with casement windows on three sides.
9. The applicant also proposes to remove the existing concrete parking area and replace it with a new landscaped area.

The Zoning Relief

10. Although the Zoning Regulations require a minimum lot area of 1,800 square feet, the lot area is only 1,275 square feet. However, because the lot predates the adoption of the Zoning Regulations in 1958, it is a legally non-conforming lot. See, 11 DCMR § 2000.4. However,

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no expansion of a building located on such a lot may not be enlarged or replaced by a new building unless it complies with all other provisions of [Title 11].” 11 DCMR § 401.1.

11. The lot was improved with the existing row house, in excess of the maximum lot occupancy (67.7%), prior to the adoption of the Zoning Regulations in 1958. Because the structure predates the adoption of the Zoning Regulations, it is a legally non-conforming structure. 11 DCMR § 2000.4. However, a structure that is nonconforming as to lot size may not be expanded, 11 DCMR § 2001.3(a) and the enlargement cannot “increase or extend any existing, nonconforming aspect of the structure; nor create any new nonconformity of structure and addition combined. 11 DCMR § 2001.3(b)(2).
12. The R-4 district permits a maximum lot occupancy of 60 percent for row dwellings. *See*, 11 DCMR § 403.2. Because the proposed addition will result in a lot occupancy of 88.7%, the applicant requires variance relief under § 403.2.¹ The request, if granted, would increase the lot occupancy by 20%.
13. The R-4 district requires a minimum rear yard of 20 feet for any structure located in the district. *See*, 11 DCMR § 404.1. Because the proposed addition will reduce the 20-foot rear yard and result in a rear yard of only 4 feet, the applicant requires variance relief under § 404.1.

Exceptional Topography, Shape, and Condition

14. There is nothing exceptional about the shape of Lot 87, which has a typical rectangular shape.
15. There is nothing exceptional about Lot 87’s location at a corner. The Board agrees with OP that a corner lot, in and of itself, is not exceptional because there are many corner lots. (T. p. 71).
16. Although Lot 87 is smaller than other lots in the Square (Square 2600), it is similar to nearby lots in the opposite square. The lots opposite it in Square 2602, though a bit wider, are even smaller than Lot 87. (Exhibit 6, Plat).
17. The Board agrees with OP that, when compared to other lots in the District, or the Mount Pleasant Historic District, the size of Lot 87 is not unusual. (T., p. 58).
18. When compared to other lots in the same row (Lots 83, 84, 85 and 86), the depth of Lot 87 is not unusual. (Exhibit 6, Plat). The lots all have about the same depth.

¹ The proposal does not qualify for special exception relief under § 223, because that provision limits the increase in lot occupancy to a maximum of 70 percent.

Practical Difficulty

19. The applicant claims that the footprint of the existing house is too small to accommodate a space that could be utilized as a dining room, or a meeting area for business purposes. (Statement, Exhibit 3). However, the Board agrees with OP that the dwelling is not so small as to preclude a reasonably sized dwelling. (Exhibit 24). In addition, the business use contemplated is not a matter of right in this zone district, except as an accessory use permitted as a home occupation.

The Impact of the Proposed Project

20. Because the property is a corner lot, the proposed rear addition would be viewed along 17th Street as a side addition. The Board finds that the design of the addition would be compatible with other additions in the Mount Pleasant Historic District. (HPRB Report, Exhibit 7).
21. The proposed addition would be taller than other existing additions in the neighborhood. There is an existing deck at the adjacent property located at 1702 Kilbourne Place, which is owned by the party in opposition, Frank Agbro. There are also decks located at other nearby properties. However, the other decks are fairly low transparent structures which are located at the first floor level. (See, photos, Exhibits 5 and 8, and OP Report Aerial, Exhibit 24).
22. The Board agrees with the party in opposition that a tall enclosed structure at the second story level would have a “towering” effect and would result in Mr. Agbro’s property being “boxed in”.
23. The Board agrees with the party in opposition that the proposed addition would compromise the visibility in the alley, and could lead to potential safety problems.
24. The Board finds that the severity of the variance relief sought – a 20% increase to an existing non-conformity – is significant.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799), as amended; D.C. Official Code § 6-641.07(g)(3)(2001), to grant variances from the strict application of the Zoning Regulations. As stated above, the applicant here seeks relief from the lot occupancy requirements and the rear yard requirements.

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Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property has an exceptional size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant\owner will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. See *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). In order to prove “practical difficulties,” an applicant must demonstrate first, that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. *Id.* at 1170.

As to the first prong, the Board finds that there is no exceptional condition at the property. Neither the size, shape, nor location of the lot is exceptional. (See, Findings of Fact 14 – 18). While the lot is a small, substandard lot, there are other similar lots in the nearby vicinity and in the Mount Pleasant Historic District, some of which have a shorter depth than Lot 87. The grandfathering provision of § 401.1 recognized the large number of nonconforming lots that would be created by virtue of adoption of the 1958 regulations and permitted the expansion of existing structures provided that all other area requirements were met. This prerequisite further indicates the Commission’s assumption that a substandard lot would not render zoning compliance impracticable.

Since this application fails because it does not satisfy the first prong of the variance test, the application must be denied. However, even were the Board to find that the small size of the lot was exceptional, as explained below, the application would not satisfy the second or third prong of the test.

As to practical difficulty, the applicant has not met its burden in showing that the size of the lot constrains his ability to design an interior dining room space. As noted in the Findings of Fact, the Board agrees with OP and recognizes that, while the dwelling is small, it is still possible to design a reasonable home. (Finding of Fact 19) Simply put, an increase in lot occupancy and expansion of the footprint into the rear yard may be desirable, but it is unnecessary.

Turning to the third prong of the variance test, the Board concludes that the addition would result in a substantial detriment to the public good and to the zone plan. The addition at the second floor level would undoubtedly affect Mr. Agbro’s enjoyment of his property. However, any “towering” would affect the public as well, and could also compromise visibility in the alley, leading to potential safety problems in the community. (Findings of Fact 22 and 23). Finally, the Board agrees with OP, that a lot occupancy of almost 89%, would impair the intent of the zone plan. The Court of Appeals has held that the severity of the variance requested is a factor to be considered when assessing a variance application. *Gilmartin, Id.*, at 1171. As stated previously, the applicant seeks to increase the lot occupancy from 67% to over 88%. The Board considers the severity of the relief to be significant, and a factor which mitigates against approval.

ANC Issues and Concerns

Section 13(b) (d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10 (d)(3)(A)) requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. Specifically:

The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

In this case, there were no specific issues and concerns raised by the ANC to give great weight to. A simple recommendation of approval does not suffice. For this same reason, the assertion of ANC Vice-Chair of a purported change in the ANC's position is irrelevant. In addition, the great weight requirement relates only to the ANC's written report, and not to its oral comments. *Neighbors United For a Safer Community v. Bd. of Zoning Adjustment*, 647 A.2d. 793 (D.C. 1994).

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application is hereby **DENIED**.

VOTE: **3-0-2** (Marc D. Loud, Shane L. Dettman, and Michael G. Turnbull
to DENY; two Board members not participating (vacancies))

Vote taken on May 12, 2009

ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: DEC 01 2009

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

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As Director of the Office of Zoning, I hereby certify and attest that on **DECEMBER 1, 2009**, 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 who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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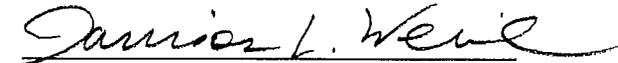
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