

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18002 of Gould Property Company, through Square 374 LLC, pursuant to 11 DCMR § 3104.1 and 3103.1 for: (1) a special exception under subsections 777.1 and 411.11 for relief from the requirements of subsections 411.3, 411.4, and 411.5, to allow two separate rooftop enclosures of varying heights, (2) a special exception under subsection 2202.2 for relief from the requirements of subsections 2204.9 and 2201.5, to allow a non-dedicated service and delivery space, and (3) a variance from the requirements of subsections 777.1, 411.2, and 400.7(c), to allow elevator penthouses with a maximum height of 22 feet 6 inches, to allow the construction of a new office building with ground floor retail in the DD/C-3-C District (and Downtown Urban Renewal Area) at premises 900 New York Avenue, N.W. (Square 374, Lot 45).¹

HEARING DATE: December 1, 2009
DECISION DATE: December 8, 2009

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case is self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 2F and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 2F, which is automatically a party to this application. ANC 2F submitted a report in support of the application. The Office of Planning (OP) also submitted a report in support of the application.

Variance Relief:

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of

¹ The applicant amended its application at the public hearing to include additional sections of the Zoning Regulations. However, the three areas of relief reflected in the above caption are identical to the relief which was identified in the original application and filings.

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proving the elements that are necessary pursuant to § 3103.2, for a variance from §§ 771.1, 411.2, and 400.7(c). No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and OP reports filed in this case, the Board concludes that in seeking variances from §§ 777.1, 411.2, and 400.7(c), the Applicant has met the burden of proof under 11 DCMR § 3103.2, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner if the Zoning Regulations were strictly applied, and that the relief can be granted without causing 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.

Special Exception Relief:

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary pursuant to § 3104.1, for special exception relief under §§ 777.1, 411.11, 2202.2, from the requirements of §§ 411.3, 411.4, 411.5, 2201.5, and 2204.9. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and the OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR § 3104.1 and §§ 777.1, 411.11, 411.3, 411.4, 411.5, 2202.2, 2201.5, and 2204.9, that the requested relief can be granted, as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Height Issue

The plans for this project show an atrium and a roof canapé that exceed both the maximum height permitted for this building under § 770.1 of the Zoning Regulations (Title 11 DCMR) and Section 5 of the Height Act,² D.C. Official Code § 6-601.05 (2001). In its report to the Board, OP noted that the Applicant considered the roof canapé to be an architectural embellishment, and the atrium to be a tower.

According to Section 5 of the Height Act, “spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts,³ ventilation shafts, chimneys, smokestacks, and fire sprinkler

² An Act To regulate the height of buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 458)

³ An Opinion of the Corporation Counsel, dated July 27, 1953, “concluded that the phrase ... ‘penthouses over elevator shafts’, may be construed to include penthouses over stairways leading to the roof and penthouses over

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tanks may be erected to a greater height than any limit prescribed” if approved by the Mayor.⁴ These same structures are also allowed to exceed the applicable zoning height limit per 11 DCMR § 770.3. Notwithstanding the texts of these two provisions, Zoning Administrators have historically interpreted Section 5 of the Height Act, and § 770.3 of the Zoning Regulations, as extending to *any* architectural embellishment. The Board has not had the occasion to rule upon the validity of this interpretation, and makes no determination now.

In any event, the Applicant considers the roof canapé to be an architectural embellishment and the atrium to be a tower. This contention seemed novel to the Board and so, as part of its deliberations, the Board discussed whether it should rule upon the validity of this view and deny the application if it was determined that either of the two structures could not lawfully be built.

The Board decided not to do so. While the Board would be reluctant to approve plans that could not be built because the height of the building is not achievable as a matter of law, the Board believes that the issue is best decided in the first instance by DCRA as part of its review of the Applicant’s requests for a building permit. DCRA should not view the Board’s approval of this application as obviating the need for a careful review of the approved plans for compliance with the Height Act and the Zoning Regulations.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is appropriate in this case. It is therefore **ORDERED** that this application, pursuant to the plans, marked as Exhibit No. 11, is hereby **GRANTED**.

VOTE: 3-0-2 (Shane L. Dettman, Michael G. Turnbull and Meridith H. Moldenhauer to APPROVE; Marc D. Loud not present, not voting; one Mayoral appointee (vacant) not participating)

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

Each concurring member has approved the issuance of this summary order.

other utilities necessary in connection with the operation of a building, but not to include penthouses to be used for residential, office or business purposes.”

⁴ The Height Act actually refers to the District of Columbia Commissioners. However, Reorganization Plan No. 3 of 1967 divided the duties of the Commissioners between a single Commissioner, who essentially constituted the executive branch, and an appointed Council, with the former receiving Height Act waiver authority. The Commissioner delegated this authority to the Director of the former Department of Licenses and Inspections through Commissioner Order No. 68-431. That agency eventually became DCRA.

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

FINAL DATE OF ORDER: JAN 19 2010

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.

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 JAN 19 2010, 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:

Paul A. Tummonds, Esq.
Christine A. Roddy, Esq.
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128

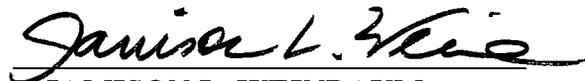
Chairperson
Advisory Neighborhood Commission 2F
5 Thomas Circle, N.W.
Washington, D.C. 20005

Single Member District Commissioner 2F06
Advisory Neighborhood Commission 2F
5 Thomas Circle, N.W.
Washington, D.C. 20005

Jack Evans, Councilmember
Ward Two
1350 Pennsylvania Avenue, N.W., Suite 106
Washington, D.C. 20004

Melinda Bolling, Esquire
Acting General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

ATTESTED BY:


JAMISON L. WEINBAUM
Director, Office of Zoning

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov