

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18101 on behalf of Nabeel Audeh, pursuant to 11 DCMR § 3103.2, for a variance from the non-residential floor area ratio (“FAR”) requirements under § 771 and the nonconforming structure requirements under § 2001.3 to expand an existing restaurant to the second and third floors, in a building in the C-2-A Zone District, at premises 1440 Wisconsin Avenue, N.W. (Square 1244, Lot 163).

HEARING DATES: September 21, 2010 and October 19, 2010
DECISION DATE: October 26, 2010

DECISION AND ORDER

Nabeel Audeh (the “Applicant” or the “Owner”), filed this application for variance relief on May 21, 2010, on behalf of Wisey’s Restaurant to expand the existing ground floor restaurant to the second and third floors. Following a public hearing, the Board of Zoning Adjustment (the “Board”) voted to approve the requested relief. A full explanation of the facts and law that support the Board’s decision follows.

PRELIMINARY MATTERS

Applicant’s Agent. The Applicant authorized his architect, Stephen DuPont, Jr., to act as his agent during the Board proceedings. (Exhibits 1 and 4.)

Self-Certification. The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2. (Exhibit 4.)

The Application. The application is to eliminate an existing duplex apartment at the second and third floors of the building and expand the existing ground floor restaurant to occupy those floors. The second floor will be used as a customer seating and lounge area and the third floor will be used for office and storage space. (Exhibit 1.)

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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”) 2E, and the District of Columbia Office of Planning (“OP”).

Posting. The Applicant posted placards at the property regarding the application and public hearing in accordance with 11 DCMR § 3113.14 through 3113.20. He also submitted an affidavit to this effect in accordance with 11 DCMR § 3113.19¹ and 3113.20. (Exhibit 25.)

ANC 2E. The subject site is located within the area served by ANC 2E, which is automatically a party to this application. The ANC filed a report indicating that at a public meeting on October 4, 2010, with a quorum present, the ANC voted to oppose the application, due to the “adverse impacts on the adjacent neighbors, specifically regarding sound transmission and trash and waste removal.” (Exhibit 31.) The ANC did not participate in the public hearing.²

Requests for Party Status. There were no requests for party status.

Persons in Support/Opposition. The Applicant submitted over 50 letters in support from neighbors and/or customers of Wisey’s Restaurant. (Exhibit 39.)

No letters were received from persons in opposition. However, three neighboring property owners testified in opposition at the public hearing on September 21, 2010.

Government Reports

OP Report. OP reviewed the variance application and prepared a report recommending approval of the variance request. (Exhibit 24.) OP’s representative, Paul Goldstein, also testified during the public hearing, explaining how the application satisfied the variance test, and suggesting that the Board consider conditions to address the concerns of the ANC and neighboring property owners. (Hearing Transcript of September 21, 2010, p. 151 – 159; Hearing Transcript of October 19, 2010, p. 133.)

¹ Subsection 3113.19 provides that the affidavit is to be filed at least five days prior to the public hearing, and in this case the Applicant filed the affidavit three days late. However, the Board waived the filing requirement, finding that the Applicant had demonstrated the requisite good cause shown, and lack of prejudice to the rights of any party. (See, 11 DCMR § 3100.5.)

² The ANC requested a postponement of the September 21, 2010 hearing until a date after October 11, 2010. (Exhibit 26.) The Board denied the ANC’s request and began the hearing on September 21, 2010. However, the Board scheduled a continued hearing date on October 19, 2010, in part, to explore the ANC’s issues and concerns. The Board addressed the ANC issues and concerns at the continued hearing. However, the ANC did not participate in the public hearing on either the initial hearing date or the continued hearing date.

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The Public Hearing. The case was first heard on September 21, 2010, but was continued to October 19, 2010 so that the ANC would have additional time to weigh in and so that the Applicant could address the issues and concerns raised by the ANC and the neighboring property owners who testified in opposition.

The Applicant's Case. The Applicant's case was presented by his architect, Stephen DuPont, Jr., who testified during the two days of public hearing. Among other things, Mr. DuPont submitted revised drawings indicating trash and sound control measures that were proffered by the Applicant in response to concerns raised by the ANC and the neighbors in opposition. (Exhibits 32, 33, 34, and 35.)

FINDINGS OF FACT

The Site and Surrounding Area

1. The subject property is located at 1440 Wisconsin Avenue, N.W., Square 1244, Lot 0163 in the Old Georgetown Historic District in the C-2-A Zone.
2. The subject lot is only about 624 square feet in size, and is irregularly shaped. The lot fronts Wisconsin Avenue to the east but is otherwise landlocked. There is an alley behind the lot, and the back of the lot is about 24 to 36 inches below the alley grade.
3. The property is developed with a three-story building with a cellar that is more than a century old. The cellar and first floor comprise an existing restaurant known as Wisey's. The upper two floors (second and third floors) are configured as a two-story apartment, with the stair serving as the interior stair of the apartment. The existing non-residential floor area ratio ("FAR") is .85. The existing residential FAR is 1.84. Both conform to the maximum FAR allowed in the zone.
4. The building is non-conforming as to residential lot occupancy and rear yard standards.
5. To the south of the property, at 1448 Wisconsin Avenue, is a matching but slightly larger three-story building, with a ground floor commercial use known as Cappuccino Food, and residential uses on the second and third floors. To the north, at 1442 Wisconsin Avenue, is a taller and substantially larger three-story L-shaped building which occupies the southwest corner of Wisconsin and P Streets, and contains a commercial use on the ground floor known as L'Enfant Gallery. This building wraps behind the subject property, causing it to be landlocked.
6. Square 1244, where the property is located, is characterized by one- to three-story row dwellings, with ground floor retail use along Wisconsin Avenue. Behind the subject property, on the other side of the alley is an R-3 Zone characterized by row dwellings.

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The Proposed Project

7. The Applicant proposes to expand the commercial use to occupy the entire building. The second floor would be used for tables and customer space for Wisey's, and the third floor would provide office and storage space for Wisey's. No physical expansion of the building is proposed. However, there will be an intensification of the commercial use.
8. The revised plans are depicted and described at Exhibits 32, 33, 34, and 35.

The Zoning Relief

9. Buildings in the C-2-A Zone District are allowed to have a maximum non-residential FAR of 1.5 under § 771.2 of the Zoning Regulations. Because the expansion of the restaurant will result in a non-residential FAR of 2.7, the Applicant requires variance relief under § 771.2.
10. Under § 2001.3 of the Zoning Regulations, nonconforming structures may not be enlarged or extended where the nonconforming aspect of the structure is increased or extended, or where any new "nonconformity of structure" is created. Here, the expansion of the restaurant creates a new nonconformity of structure, a nonconforming amount of non-residential FAR. Thus, relief is also required under § 2001.3.³

Exceptional Condition

11. At 624 square feet, the property is one of the smallest in the Square. By comparison, the average commercial property size in the Square (excluding surface parking spaces), is 1,684 square feet. In addition, the property is in the smallest five percent of all C-2-A-zoned lots in the District of Columbia. The building footprint is even smaller, at 547 square feet, and is landlocked with a small depressed rear yard space.
12. The small building footprint and more than century-old design of the building also produces a constrained interior layout. Most of the ground floor is occupied by the restaurant's kitchen and customer service areas. While the stairway leading from the ground floor to the second floor is located along the building's south wall, the stairway between the upper two floors is located in the center of the floor plan. As a result of the stairway location, only one room can fit on either side of the stairwell on the second and third floors and there is limited room for circulation on these floors aside from the stairwell.

³ OP takes the position that relief is unnecessary under this section, reasoning that no physical expansion of the building is proposed. The Board agrees with OP that the increase in non-residential FAR will not increase or extend an existing non conformity. However, the Board finds that the proposal will create a "new nonconformity", to wit: the non-conforming non-residential FAR.

Practical Difficulty

13. The Board accepts the Applicant's assertion that it is necessary to expand the seating of the ground floor restaurant to the second floor. There is not enough room on one floor in this tiny building's footprint to facilitate even the informal range of services currently provided. While Wisey's is able to seat 14 or so customers now, it often happens that customers cannot get in the door, because there is standing room only inside. The Applicant would like to expand to the second floor to provide additional seating and to alleviate crowding at the counter area. (Appliant's Revised Statement, Exhibit 23.)
14. The building is so small that, on the upper floors, only one room can fit on either side of the stairwell that bisects the building across the middle of its depth. Even the restrooms on the upper floors are in the stairwell, because there is no room for circulation space except at the stair landings. In addition, there is insufficient space in the building to construct a newly dedicated stairway or to locate a second stair to the street.
15. Because the building is so small and inflexible, any commercial expansion to the second floor alone would also result in blocking access to the third floor for a tenant. Due to the constrained floor layout of the upper floors, a commercial expansion to 1.5 FAR (allowed as a matter-of-right) would restrict a tenant's access to the third floor by forcing the tenant to pass through the second floor commercial space.

The Impact of the Proposed Project

16. The Board finds that the proposed project will be compatible with the neighborhood and the zone plan. The 1400 block of Wisconsin Avenue is a busy mixed-use corridor, and the building already contains an existing restaurant use which can expand, as a matter of right into a portion of the second floor. While it is the intent of the C-2-A Zone to encourage mixed-use development by limiting non-residential use, here the proposed commercial expansion will result in the loss of only one residential unit.
17. The Board finds that the proposed expansion, as conditioned in this Order, will not adversely affect neighboring property owners.
18. The Applicant has submitted a plan for trash removal, a contract for trash removal services, and a contract for pest management services. The trash management plan is also incorporated into this Order as a condition.
19. The Board credits the Applicant's architect and his expert opinion that the sound abatement system proffered by the Applicant will militate against any potential adverse noise impacts.
20. There is no evidence that the proposed expansion will lead to increased problems with rodent infestation. According to Robert Bell, an architect who was located at nearby

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properties for many years, the problem with rats in the alley is a longstanding problem that was not caused by Wisey's.

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 §§ 771.2 and 2001.3 of the Zoning Regulations.

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 property owner will encounter a 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 the combination of the diminutive size and unusual building design results in a constrained interior layout, and these characteristics constitute an exceptional condition at the property. (Findings of Fact 11 – 12.)

As to the second prong, practical difficulty, the Applicant is constrained by its size and design, in particular its inability to relocate the stairway to the second and third floors. (Findings of Fact 13 – 15.) As explained above, a commercial expansion to the second floor alone would result in restricting access to the third floor. Were the Applicant to stay within the matter-of-right 1.5 non-residential FAR cap and expand only to the second floor, a portion of the second floor and the entire third floor would have limited utility, and could reasonably remain vacant.

Turning to the third prong of the variance test, the Board concludes that the expansion will not result in substantial detriment to the public good. As explained in Findings of Fact 18 - 20, the Board concludes that, as conditioned, the expansion will not result in adverse impacts relating to trash removal or noise/sound abatement, the primary concerns raised by neighboring property owners and echoed by the ANC.

Nor will the expansion result in impairing the zone plan. The Board agrees with OP in this regard. Because of the exceptional features of the subject property, the limited impact of a single lost residential unit, the site specific challenges to strictly complying with the Zoning Regulations while providing a competitive commercial use, and the absence of any increase in

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gross floor area or FAR, the intent and integrity of the C-2-A Zone will not be significantly impaired.

ANC Issues and Concerns

Section 13(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)(B)) 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.

As noted, the ANC opposed the application. Its concerns mirror those of the opposition witnesses, i.e., the potential adverse impact on adjacent neighbors, in particular the impacts relating to sound transmission and trash and waste removal. These issues and concerns were addressed during the two days of public hearing and are discussed in detail above. Suffice it to say that the Board has considered the ANC's issues and concerns, and agrees that the issues and concerns are valid. Because of this, the Board is imposing conditions in this Order to mitigate the potential adverse impacts that were discussed, and is also setting a term of five years for the approval of this relief for the reasons to be explained below.

Great Weight to OP

The Board is required under D.C. Official Code § 6-623.04 to give "great weight" to OP recommendations. As set forth above, the Board found OP's findings to be persuasive.

Five Year Term for Approval

Because the restaurant use will be intensified and because the Board has identified potential adverse impacts to be mitigated, the Board limits this approval for a term of five years. As aptly expressed by a New Jersey court when ruling on the validity of a five-year term on a special use permit for a new⁴ use, the term "would provide an escape-hatch if the board concluded that continuance of the [use] thereafter was not consistent with the public good." *Houdaille Construction Materials, Inc. v. Bd. of Adjustment of Tewksbury Township*, 223 A.2d 210 (N.J. Super. App.Div. 1966). The Board believes that potential adverse impacts will be successfully addressed by the conditions imposed by this Order. The reason for the five-year term limit is to

⁴ Although the restaurant use at the building here will not be "new," its expansion to the second and third floors will result from this approval.

allow the Board to review the operations of the expanded use to ensure that the conditions imposed succeeded in mitigating the potential adverse impacts identified.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application for zoning relief from the requirements under § 771.2 and § 2001.3, is hereby **GRANTED** (pursuant to Plans, Exhibit 9, as revised by Exhibit 32 (sheets A2.0 and A3.0)), **SUBJECT** to the following **CONDITIONS**:

1. Approval shall be for a term of **FIVE YEARS** beginning on the date upon which this order became final.
2. The hours of operation shall be from 8:00 a.m. to 11:00 p.m., Monday through Sunday.
3. The Applicant shall provide four 95-gallon trash receptacles as shown on Exhibit 32, sheets A2.0 and A3.0.
4. The Applicant shall provide trash removal services seven days per week and shall not leave trash on the street.
5. The Applicant shall provide a sound abatement system on both the north and south sides of the street, as partially detailed in submissions contained in Exhibit 32. Exhibit 32 shows a sound abatement system only on the south side of the Street. However, the Applicant proffered to include a system on the north side as well, and abatement on the north side is so ordered by this Board.
6. Any music sound system that is installed shall be located away from the north and south walls of the property.

VOTE: 3-0-2 (Meridith H. Moldenhauer, Michael G. Turnbull, and Jeffrey L. Hinkle to Approve; Nicole C. Sorg not participating; No other Board member (vacant) participating)

ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of Board members approved the issuance of this order.

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

FINAL DATE OF ORDER: APR 07 2011

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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 PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

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. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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

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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 APR 07 2011, 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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