

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18205 of Mohammed Sikder, pursuant to 11 DCMR § 3103.2, for a variance from the lot area and lot width requirements of § 401, a variance from the lot occupancy requirements of § 403, and a variance from the side yard requirements of § 405, to allow construction of a new one-family detached dwelling in the R-2 Zone District at 4209 Grant Street, N.E. (Square 5092, Lot 31).

HEARING DATES: May 10, 2011 and June 21, 2011

DECISION DATE: July 12, 2011

DECISION AND ORDER

On February 10, 2011, Mohammed Sikder (the “Applicant”) submitted a self-certified application requesting variances from the lot area and lot width requirements of § 401, the lot occupancy requirement of § 403, and side yard requirement of § 405, to construct a one-family detached dwelling in the R-2 Zone District at 4209 Grant Street, N.E. (Square 5092, Lot 31) (the “Subject Property”). Following two public hearings, the Board of Zoning Adjustment (the “Board”) voted 4-0-1 to deny the application for the reasons discussed below.

PRELIMINARY MATTERS

Notice of Application and Public Hearing

By memoranda dated February 14, 2011, the Office of Zoning provided notice of the filing of the application to the Office of Planning (“OP”) (Exhibit 12); the affected Advisory Neighborhood Commission (“ANC”) 7D (Exhibit 13); the affected ANC Single-Member District - ANC 7F06 (Exhibit 14) the Councilmember for Ward 7 (Exhibit 15); and the District Department of Transportation (“DDOT”). (Exhibit 16.)

A public hearing was scheduled for May 10, 2011. Pursuant to 11 DCMR § 3113.13, notice of the hearing was mailed to the Applicant, ANC 7D, and owners of all property within 200 feet of the Subject Property on March 17, 2011. (Exhibits 17, 18, and 19.) In accordance with 11 DCMR § 3113.4, the Applicant provided an affidavit of posting certifying that on April 27, 2011 notice was posted on the Subject Property, in plain view of the public. (Exhibit 25.) Notice of the hearing was published in the *D.C. Register* on March 18, 2011 at 58 DCR 2398. The hearing was continued to June 21, 2011 to receive additional testimony.

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Parties

The Applicant and ANC 7D were automatic parties in this proceeding. There were no requests for party status.

Applicant's case

The Applicant requested the area variance relief necessary to construct a one-family detached dwelling on the Subject Property. The Applicant asserted his application satisfied the variance test because the Subject Property is nonconforming in that it is smaller than the minimum lot area and width permitted in the R-2 Zone District, and cannot be improved without zoning relief. The Applicant believes the property is exceptional because the lot cannot be enlarged because the lot on the left hand side is already developed and in separate ownership, and there is an alley at the right hand side of the Subject Property. The Applicant stated that the requested variances would not cause substantial detriment to the public good because his proposal would not limit light and air to neighboring properties and it included parking on-site. The Applicant stated that the requested variances would not be inconsistent with the intent and purpose of the Zoning Regulations and Map because strict application of the Regulations would prohibit development of the lot with a residential use, the proposed development replicates the historical development pattern of the neighborhood, and construction on the property will improve the appearance of the neighborhood.

Office of Planning reports and testimony

By report dated May 3, 2011, the District of Columbia Office of Planning ("OP") recommended approval of the application with conditions.

The report stated that the application met the first prong of the variance test because of its small, nonconforming size and unusual shape. The report stated that the application met the second prong of the variance test because the small dimensions of the lot created practical difficulties, that the lot was undevelopable without relief, and that in order to construct a home of sufficient size to attract prospective homeowners, the Applicant must construct something with a footprint that exceeds the maximum allowed lot occupancy. The report stated that the application met the third prong of the variance test because the Applicant would not be able to construct a conforming structure on the existing lot, that this development, would replicate a historical development pattern in the neighborhood that includes detached and semi-detached homes on relatively narrow lots, and that the Zoning Regulations were not intended to prohibit a usable footprint when the design does not impede light and air and privacy rights available to neighboring properties. (Exhibit 24.)

At the request of the Board, OP submitted a supplemental report dated June 17, 2011 that provided additional information requested by the Board concerning the ownership of the Subject

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Property, ownership of the lot directly to the south of the Subject Property, and the height of other buildings in the neighborhood. (Exhibit 34.)

OP testified at the June 21, 2011 hearing that the Applicant could construct a semi-detached dwelling (*i.e.* a dwelling with a single eight-foot-wide side yard) immediately adjacent to the alley along the west lot line, which would have less of an impact on the neighboring property to the east. (Hearing Transcript of June 21, 2011, p. 197-98.) However, the OP representative noted that because of the alley there was no opportunity to attach such a dwelling to an adjacent wall and so it would have to be a stand-alone structure. Because the other neighborhood semi-detached dwellings tend to be the two units together, a stand-alone semi-detached might be “somewhat uncharacteristic.” (*Id.*)

ANC Report

By letter dated June 16, 2011, ANC 7D indicated that at a regularly scheduled, properly noticed meeting with a quorum present on June 14, 2011, the ANC voted unanimously to oppose the application. (Exhibit 35.) The report listed the following issues and concerns: (1) that the Applicant had not sustained its burden of proof in this case, (2) that the proposed project would not benefit the community, and was out of character for the surrounding neighborhood, and (3) the Applicant caused removal of several trees on the lot.

Persons in Opposition

At the public hearing on May 10, 2011, the Board heard testimony from persons in opposition to the Application who generally expressed opposition based on the small size of the lot, the significant amount of variance relief requested and the removal of trees. Letters in opposition were also received, expressing the same concerns. (Exhibits 21 and 28.)

Person in support

The Board received a letter from a person in support of the application, which expressed support based on a belief that infill development on this lot would help revitalize the neighborhood. (Exhibit 22.)

FINDINGS OF FACT

Ownership

1. The application indicated that the Applicant is the owner of the Subject Property. The Subject Property is actually owned by RUPSHA 2008, LLC. The Applicant is the sole member of this business entity.

The Subject Property and Surrounding Area

2. The Subject Property is an undeveloped, flat lot located on Grant Street, N.E, between 42nd and 44th Street.
3. The lot is located in the R-2 Zone District. The only residential uses permitted in the zone are one-family detached and semi-detached dwellings.
4. The lot pre-dates the establishment of the 1958 Zoning Regulations, and is nonconforming as to lot area and lot width.
5. The lot area of the Subject Property is 1,765 square feet. The required minimum lot area for a one-family detached dwelling in the R-2 Zone District is 4,000 square feet. (11 DCMR § 401.3.) The required minimum lot area for a one-family semi-detached dwelling in the R-2 Zone District is 3,000 square feet. (*Id.*) A detached dwelling must have two eight-foot side yards while a semi-detached dwelling may have one eight-foot side yard. *See* definitions of terms at § 199.1 and side-yard requirement at §§ 405.1, 405.2 and 405.9.
6. The lot is 25 feet wide. The minimum lot width for one-family detached dwellings in the R-2 Zone District is 40 feet. (11 DCMR § 401.3.)
7. Subsection 401.2 provides an exemption from the minimum lot size requirements if a property was unimproved as of November 1, 1957 and did not adjoin another unimproved property under common ownership, but only if both the lot area and width of the lot are at least 80% of the lot area and width specified under § 401.3. The Subject Property does not meet this last requirement.
8. The surrounding neighborhood is characterized by a mix of detached, semi-detached, row houses and small apartment buildings.

The Applicant's Proposed Project

9. The Applicant proposed construction of a three-story, detached one-family dwelling. The building would face Grant Street to the north, sharing the same north-south orientation as the neighboring dwellings.
10. The proposed dwelling would be 17 feet wide and 43 feet long.
11. The proposed dwelling would have side yards of three feet to the west and five feet to the east. The required minimum side yard for a detached dwelling in the R-2 Zone District is eight feet on both sides. (11 DCMR § 405.3, 405.9.)

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12. The proposed dwelling would occupy 50.2% of the lot. The maximum permitted lot occupancy for a dwelling in the R-2 Zone District is 40%. (11 DCMR § 403.2.)

The Variance Test

Extraordinary situation or condition

13. With a width of 25 five feet the lot is extremely narrow.
14. The lot to the south has an irregular triangular shape that causes the rear lot line of the Subject Property to form an angle.
15. The irregularly shaped lot to the south of the Subject Property is not owned by the Applicant.

Practical difficulty

16. As a result of its irregular shape and narrow width nothing can be built on this lot without some zoning relief being granted.

The Public Good and the Zone Plan

17. The proposed three-story dwelling would be located five feet from the east property line, three feet from the west property line, and would unacceptably diminish the light and air available to its neighbors, particularly the adjacent property to the east.
18. Construction of a one-family semi-detached building on the each lot line would allow for a conforming eight-foot side yard between the west side wall of this property and the property on the west.

CONCLUSIONS OF LAW

Pursuant to § 8 of the Zoning Act, the Board may grant a variance from the strict application of the Zoning Regulations 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 a specific piece of property, the strict application of any 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); 11 DCMR § 3103.2.) Variance 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.*)

Applications for area variances must satisfy the less stringent standard of “practical difficulties,” as compared to the more difficult showing of “undue hardship” that is required for use variances.

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Palmer v. Bd. of Zoning Adjustment, 287 A.2d 535, 541 (D.C. 1972). Therefore the Applicant in this case must show: (1) the Property is subject to an exceptional or extraordinary situation or condition; (2) such situation or condition will result in practical difficulties to the Applicant; and (3) the granting of the variance will not be detrimental to the public good and will not substantially impair the intent, purpose, and integrity of the zone plan. The “fact that the owner knew or should have known of the area restrictions before he purchased the property does not alter the lesser standard.” *A.L.W., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 338 A.2d 428, 431 (D.C. 1975).

Exceptional condition

The Applicant has shown that the Subject Property is subject to an exceptional conditional. The lot is extremely narrow and irregular in shape. (Findings of Fact Nos. 13 and 14.) *See, e.g. Application No. 17949 of Mohammad Sikder* (2009) (exceptional condition found where the “lot was created as an irregularly shaped parcel, very narrow and generally triangular at one end, and situated at an angle from surrounding properties”).

Practical difficulties

The Applicant also proved that as a result of the exceptional conditions he cannot make productive use of the Subject Property without zoning relief. Even with the construction of a semi-detached dwelling, which would allow for an aggregate eight foot side yard, some relief from lot occupancy would be required for a habitable dwelling to be constructed.

Detriment to the public good and integrity of the zone plan

The Board, however, concludes that the Applicant did not meet his burden of showing that granting the proposed variances will not be detrimental to the public good and will not substantially impair the intent, purpose, and integrity of the zone plan.

The proposed structure would be three stories in height and located within five feet of the east property line. When combined with the proposed structure’s height and proximity to adjacent properties, the requested variances, if granted, would cause substantial detriment to the public good because the proposed dwelling would limit the light and air to neighboring properties. The privacy of the adjacent property owners would also be impaired. The Board cannot help but conclude that the Applicant was seeking to maximum its profit at the expense of neighboring properties.

And, as noted by OP, the Applicant could have developed the site with a semi-detached one-family dwelling with its side wall on the eastern lot line. This not only would have eliminated the need for side yard relief, but would have increased the distance between the structure and the property on the west. Although OP also noted a stand-alone semi-detached might be “somewhat uncharacteristic” with the other neighborhood semi-detached dwellings, the Board did not

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understand OP to suggest that such a dwelling, if designed appropriately, would substantially impair the zone plan. The Board notes that it granted the Applicant a variance to construct a semi-detached dwelling on another R-2 zoned property in *Application No. 17949 of Mohammad Sikder* (2009), but that the Applicant had no similar option when he requested and was granted a variance to construct a one-family detached dwelling on an R-1 zoned property in *Application No. 18090 of M. Sikder* (2011).

ANC Great Weight

The Board is required under § 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)) to give great weight to issues and concerns raised in the affected ANC's written recommendation. Great weight requires the acknowledgement of the ANC as the source of the recommendations and explicit reference to each of the ANC's concerns. The written rationale for the decision must articulate with precision why the ANC does or does not offer persuasive evidence under the circumstances. In doing so, the Board must articulate specific findings and conclusions with respect to each issue and concern raised by the ANC. (D.C. Official Code § 1-309.10(d)(3)(A) and (B).)

The ANC report listed the following issues and concerns: (1) that the Applicant had not sustained its burden of proof in this case, (2) that the proposed project would not benefit the community, and was out of character for the surrounding neighborhood, and (3) the Applicant caused removal of several trees on the lot.

As stated above, the Board concurs with the ANC that the Applicant had not sustained its burden of proof in this case. With respect to the ANC's comments that the proposed project would not benefit the community and was out of character for the surrounding neighborhood, the Board also concurs to the extent that it believes that the proposed project would be detrimental to the public good and would impair the integrity of the Zone Plan. With respect to the ANC's comment that the Applicant caused removal of several trees on the lot, the Board notes that the property is not in a Tree Protection Overlay District and therefore no Zoning Regulation was violated. The Board further notes that District law requires a permit to remove certain types of trees. *See* D.C. Official Code § 8-651.04. Even if that law were violated, the Board may not deny a special exception on that ground. In any event, there is nothing in the record to suggest that the removed trees resulted in a loss of privacy or any other cognizable adverse impact.

OP Great Weight

The Board is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Official Code §6-623.04) to give great weight to OP recommendations.

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Although the Board agrees with OP that the Applicant met the first two prongs of the variance test, the Board disagrees that the third prong was met. OP stated several reasons for this conclusion: (1) the Applicant would not be able to construct a conforming structure on the lot; (2) the proposed project would replicate the historical development pattern in the neighborhood; and (3) the Zoning Regulations were not intended to prohibit a usable building footprint when the design does not impede the light and air and privacy rights available to neighboring properties.

The Board agrees with the first conclusion, but the fact that no conforming structure can be erected only goes to the second prong of practical difficulty. Nor was the Board convinced that OP's argument that this development would replicate a historical development pattern in the neighborhood given the large number of semi-detached dwellings in the immediate vicinity. However even were that true, the Board disagrees with OP that the proposed building would not impede light and air and privacy rights available to neighboring properties. To the contrary, it will have a negative impact on the property on both adjacent properties, particularly the property to the east. The fact that the development might replicate a historical development pattern cannot mitigate the adverse impacts of the structure on adjacent properties.

Based on the record before the Board, and for the reasons stated above, and having given great weight to the recommendations of ANC 7D and OP, the Board concludes the Applicant has failed to satisfy the burden of proof with respect to the application, pursuant to 11 DCMR § 3101.2, for variances from the lot area and lot width requirements of § 401, the lot occupancy requirement of § 403, and the side yard requirements under § 405.

It is therefore **ORDERED** that the application is **DENIED**.

VOTE: **4-0-1** (Nicole C. Sorg, Jeffrey L. Hinkle, Lloyd J. Jordan, and Gregory M. Selfridge (by absentee vote) to Deny; Meridith H. Moldenhauer not present, not voting.)

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

A majority of the Board members approved the issuance of this Order.

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: October 24, 2012

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.