

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18787-A on the Motions for Reconsideration and Rehearing of the Application of 143 Rear W Street LLC, pursuant to 11 DCMR § 3103.2, for a use variance from § 2507.2 to allow construction of five one-family row dwellings on alley lots where the alleys are less than 30 feet wide in the R-4 District at premises 143 Rear W Street, N.W. (Square 3121, Lots 73 and 74).

HEARING DATE: July 29, 2014
LIMITED HEARING DATE: September 9, 2014
DECISION DATE: October 7, 2014
**RECONSIDERATION
DECISION DATE:** June 9, 2015

ORDER DENYING RECONSIDERATION AND REHEARING

By order dated April 14, 2015, (“Order”) the Board granted an application submitted by 143 Rear W Street LLC (“Applicant”) for a use variance to construct five one-family row dwellings on alley lots where the alleys are less than 30 feet wide. (Exhibit 81.) The parties to the proceeding were the Applicant, Advisory Neighborhood Commission (“ANC”) 5E, and several individuals – Alicia Hunt, Joe Gersen, Victoria Leonard, Pia Brown, and Jonathan Carron – whose party status requests the Board combined into a single party (the “Party in Opposition”).

On April 24, 2015, the Party in Opposition filed a motion for reconsideration of the Board’s decision and for rehearing of the application.¹ (Exhibit 84.) In the motion, the Party in Opposition alleges the following errors in the Board’s Order: (1) that the Order erroneously places the burden of proof on the Party in Opposition rather than the Applicant, particularly as to the “undue hardship” requirement of the variance test; (2) that the Order fails to give “great weight” to ANC 5E’s vote opposing the application; (3) that the Order erroneously injects a

¹ The Party in Opposition also submitted a request for review by the Zoning Commission. (Exhibit 83.) Subsection 3128.1 of the Zoning Regulations provides that, “[w]ithin the ten (10) day period set forth in § 3125.9, the Zoning Commission may, *sua sponte*, determine to review any final decision or order of the Board.” However, nothing in the Zoning Regulations grants a party the right to request such review. Rather, as § 3128.1 states, such review is *sua sponte*, i.e., “[w]ithout prompting or suggestion; on [the Zoning Commission’s] own motion.” *Black’s Law Dictionary* 1650 (10th ed. 2014). Accordingly, the Board need not address this request.

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policy determination into the analysis of the variance standard; and (4) that the record does not support Finding of Fact Nos. 19–21, which relate to the financial feasibility of alternative uses for the property. The Party in Opposition also requested that the Board reopen the record to consider additional evidence regarding whether it would be financially feasible for the Applicant to build four units instead of five.

On April 24, 2015, ANC 5E also submitted a motion for reconsideration. (Exhibit 86.) Prior to the Board’s decision, ANC 5E submitted a report indicating that it had voted not to support the Applicant’s original proposal to construct four flats. In its motion, the ANC “clarify[ies] that it reviewed [the Applicant’s amended] 5 unit plan and voted to oppose that version of the development plan.” ANC 5E asks the Board to reconsider its ruling based on this clarification.

The Applicant filed an opposition to the motions for reconsideration dated April 30, 2015, (Exhibit 87), contending the following: that the Board’s Order properly places the burden of proof on the Applicant; that, although ANC 5E’s report references only the initial four-flat plan for the project, the Order specifically addresses the issues and concerns the ANC raised; that the statement in the Order that the project compliments the character of the surrounding area is a proper consideration under the third prong of the variance test; and that Finding of Fact Nos. 19–21 are all supported by the record.

At a public meeting on June 9, 2015, the Board voted to deny the motions for reconsideration and rehearing.

CONCLUSIONS OF LAW

Pursuant to 11 DCMR § 3126.2, any party may file a motion for reconsideration or rehearing of any decision of the Board within ten days after a final written order is issued. A motion for reconsideration must state specifically all respects in which the final decision is claimed erroneous, the grounds of the motion, and the relief sought. (11 DCMR § 3126.4.) The Board shall only consider a request for rehearing when new evidence is submitted that could not reasonably have been presented at the original hearing. (11 DCMR § 3126.6.)

The Board finds that the instant motions do not provide a sufficient basis to reconsider its decision to grant the application in this case or to reopen the record. Contrary to the Party in Opposition’s contention, the Board properly placed the burden of proof on the Applicant to demonstrate that the project satisfied the standard for a use variance. (*See* Order at 9 (“Therefore, the Applicant must demonstrate an exceptional situation or condition of the property and that such exceptional condition results in an ‘undue hardship’ to the Applicant.”).)

With respect to ANC 5E’s report, as the Order states, the Board must give “great weight” to the issues and concerns that the affected ANC raises in its written report, as required by § 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)). (Order at 11–12.) Here, the ANC’s report makes

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reference only to the Applicant's original plans for four flats, not the revised proposal for five one-family units. (*Id.* at 12.) Nonetheless, the Order includes a detailed discussion of the concerns and issues the ANC raised in its report, concluding that the ANC's recommendations were unpersuasive. (*Id.* at 12–13.) The ANC's subsequent "clarification" of its report does not alter the Board's conclusion.

Further, the Order does not improperly inject a policy determination into the variance standard, as the Party in Opposition claims. The Order states that "[t]he proposed development compliments the established character of the area while turning an eyesore into a productive housing use, which is desperately needed in the city." (*Id.* at 11.) As the Applicant notes, this statement is appropriately included in the Board's discussion of the third prong of the variance test, which requires the Applicant to demonstrate that the requested relief can be granted without substantial detriment to the public good. *E.g.*, *Oakland Condominium v. District of Columbia Bd. of Zoning Adjustment*, 22 A.3d 748, 752 (D.C. 2011) (quoting *Wash. Canoe Club v. District of Columbia Zoning Comm'n*, 889 A.2d 995, 1000 (D.C. 2005)). The Board need not reconsider its ruling on this issue.

Additionally, the Board is not persuaded that its findings regarding the financial feasibility of alternative uses for the property were unsupported by the record. Sufficient evidence supports the Board's findings, specifically, the financial analysis prepared by the Applicant's expert witness. (*See* Exhibit 72.)

Lastly, the Party in Opposition had ample opportunity to present evidence on the issue of alternative uses, and, thus, the Board denies the request to reopen the record for additional evidence.

For all of these reasons, the Board hereby **ORDERS** that the **MOTION for RECONSIDERATION and REHEARING** is **DENIED**.

VOTE: **4-0-1** (Marnique Y. Heath, Robert E. Miller, Lloyd J. Jordan, and Jeffrey L. Hinkle to DENY; one Board seat vacant.)

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: September 14, 2015

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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.