

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18841 of Robert J. Searle pursuant to 11 DCMR § 3103.2 for a variance from the Zoning Regulations to allow an addition to an existing row dwelling not meeting requirements for lot occupancy (§ 403.2), open court (§ 406.1), or enlargement of a nonconforming structure (§ 2001.3) in the R-4 District at premises 1522 8th Street, N.W. (Square 397, Lot 828).

HEARING DATES: October 28, 2014 and December 2, 2014
DECISION DATE: December 2, 2014

DECISION AND ORDER

Robert J. Searle (the “Applicant”) submitted this self-certified application on August 29, 2014. The application requests a variance from the Zoning Regulations to allow construction of a third-story rear addition to a row dwelling that does not presently conform with lot occupancy under § 403.2 or open court under § 406.1, thereby resulting in the enlargement of a nonconforming structure as prohibited in § 2001.3. The Applicant is the owner of the property at issue, which is located at 1522 8th Street, N.W. (Square 397, Lot 828) (the “Subject Property”) and is mapped in the R-4 District. Following two public hearings, the Board voted to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated July 29, 2013, the Office of Zoning provided notice of the application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 6; Advisory Neighborhood Commission (“ANC”) 6E, the ANC for the area in which the Subject Property is located; and Single Member District/ANC 6E01. Pursuant to § 3113.13, the Office of Zoning mailed letters on August 7, 2014, providing notice of the hearing to the Applicant, ANC 6E, and the owners of all property within 200 feet of the Subject Property. Notice of the hearing was published in the *D.C. Register* on August 15, 2014. (*See* 61 DCR 8391.)

Party Status. The Applicant and ANC 6E are automatically parties to this proceeding. No other persons requested party status.

Applicant’s Case. The Applicant provided evidence and testimony describing the proposed

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project. Currently, there is a load-bearing masonry wall in the Applicant's dwelling, running parallel to street frontage. This wall is in the interior of the cellar, first, and second floors, and it serves as the exterior rear wall for the third floor, which occupies approximately three-fifths of the footprint of the lower floors. The Applicant stated that this wall, which currently carries the load of the third-floor roof, has deteriorated due to lack of maintenance and defective upgrades by previous owners, resulting in the wall being structurally unsound. The Applicant proposed to demolish the wall from the first floor up to the roof and expand the third floor to match the lower floor footprint. The expansion of the third floor was necessary to shift the roof load to the exterior rear wall.¹

OP Report. In its reports submitted to the Board (Exhibits 29, 32) and at the Board's hearings, OP opposed approval of the application, contending that it did not meet the requirements for variance relief. OP stated that the practical difficulty alleged by the Applicant arises from the proposal to remove the deteriorated wall and that it is not clear that expanding the third floor is necessary to solve the existing structural deficiency. Specifically, OP suggested that this deficiency could be solved by reconstructing the deteriorated wall rather than removing it permanently. Alternatively, OP suggested reframing the third floor within the existing footprint to redistribute the roof load to the party wall and dog-leg wall. OP concluded that the build-out of the third floor would impair the public good because it could potentially impact the light, air, and privacy of neighboring property owners. Lastly, OP asserted that the intent and purpose of the Zoning Regulations would be harmed if relief was granted because the Applicant failed to show that relief was needed.

DDOT Report. By memorandum dated October 16, 2014, DDOT indicated no objection to approval of the application. (Exhibit 27.)

ANC Report. By letter dated October 20, 2014, ANC 6E indicated that it discussed the application at its regularly scheduled, properly noticed meeting on September 2, 2014, and, with a quorum present, voted 7-0 to support the application. (Exhibit 28.)

Party in opposition. No persons requested party status nor appeared in opposition to the application.

Persons in support. No persons appeared in support of the application. The owner of the adjacent property to the south at 1520 8th Street, N.W. signed a letter in support. (Exhibit 25.)

FINDINGS OF FACT

The Subject Property

1. The Subject Property is an interior, L-shaped lot located on the west side of the street at 1522

¹ The Applicant's original plan also added a stairway penthouse and rooftop deck to the dwelling. However, the Applicant revised the plan to exclude these additions for his second hearing on December 2, 2014. (Exhibit 31.)

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8th Street, N.W. between P Street and Q Street N.W. (Square 397, Lot 397).

2. The Subject Property is improved with a three-story row dwelling and a detached garage. The garage occupies the rear yard and abuts an alley to the west.
3. The Subject Property is zoned R-4, is located in the Shaw Historic District, and is listed on the District of Columbia Inventory of Historic Sites.
4. The adjacent properties to the north and south are both two-story row dwellings.
5. The Subject Property is nonconforming as to lot occupancy. The existing lot occupancy of the Subject Property is 77%. Under § 403.2, the maximum lot occupancy allowed as a matter of right for a row dwelling in the R-4 District is 60%, and up to 70% may be granted by special exception under § 223.3. The row dwelling constitutes 53% of the Subject Property's lot occupancy; the rear garage constitutes the remaining lot occupancy. The footprint of the existing third floor constitutes 32% lot occupancy.
6. The Subject Property is nonconforming as to open court. The Subject Property has an open court with a width of five feet ten inches. Subsection 406.1 requires that open courts in the R-4 District have a minimum width of four inches per foot of height, but not less than six feet.

The Applicant's Project

7. The Applicant proposes to add an addition to the existing structure that would extend the existing third floor to the rear so as to match the footprint of the lower floors. The proposal would not increase the nonconforming lot occupancy but would increase the height and therefore extend the nonconforming court.

The Zoning Relief Required

8. Subsection 2001.3(a) disallows the expansion of any structure that does not conform to lot occupancy even if the nonconforming lot occupancy is not increased. Because the existing lot occupancy of the Subject Property exceeds that which may be permitted by right or granted by special exception, any expansion of the structure requires a variance pursuant to § 2001.3(a).
9. Subsection 2001.3(b)(2) disallows the expansion of any structure that increases or extends any existing, nonconforming aspect of the structure. In this case the extension of the third floor will extend the height of the nonconforming court.

The Exceptional Condition and Practical Difficulty

10. There is a load-bearing masonry wall in the Applicant's dwelling, running parallel to street frontage.
11. This wall is in the interior of the cellar, first, and second floors, and it serves as the exterior rear wall for the third floor, which occupies approximately three-fifths of the footprint of the lower floors.
12. The wall carries the load of the third-floor roof.
13. The wall is structurally unsound and inadequate to carry the load of the third-floor roof.
14. The wall has deteriorated due to lack of maintenance and defective upgrades by previous owners. This deterioration includes cracks, mortar damage, and bowing.
15. Pursuant to a request made by the Applicant's architect, Mr. Roger Chebib, a structural engineer, visited the Subject Property on November 5, 2014, to examine the wall at issue. Mr. Chebib in a letter dated November 8, 2014, indicated his visual observation and examination "revealed that the wall is in very bad condition." (Exhibit 31C.) Specifically, the letter states that there are eroded mortar joints along the entire wall, as well as out of plane and horizontal movement in several locations throughout the wall.
16. The letter stated Mr. Chebib's strong belief that the wall must be demolished because it "would be extremely difficult to stabilize during construction and may simply collapse during the process."
17. The Applicant therefore proposes to demolish the load-bearing masonry wall from the first floor up and transferring the weight to the exterior load bearing walls by extending the rear of the third floor towards the rear to match the footprint of the floors below.
18. Extending the third floor would shift the roof load to the rear exterior wall of the dwelling and is necessary to account for the lack of support resulting from removal of the deteriorated wall.
19. Demolishing the wall on the ground floor and above would also take the load off of the cellar portion of the wall, thus preventing further deterioration and eliminating the need to conduct demolition in the cellar floor.

The Zone Plan and the Public Good

20. The R-4 District is designed to include areas developed primarily with row dwellings, but within which there have been a substantial number of conversions into dwellings for two or

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more families. (11 DCMR § 330.1.) The primary purpose of the R-4 District is the stabilization of remaining one-family dwellings. (11 DCMR § 330.2.)

21. The owner of the adjacent property to the south at 1520 8th Street, N.W. indicated in writing the proposed project would not have a substantially adverse effect the owner's use or enjoyment of her home, nor would it affect the owner's light, air, or privacy. (Exhibit 25A.)
22. The owner of the property to the north made a similar verbal representation to the Applicant.

CONCLUSIONS OF LAW AND OPINION

The Applicant proposes to construct a third-story addition to a row dwelling in the R-4 District. The Subject Property does not meet the zoning requirements for lot occupancy under § 403.2 or open court under § 406.1. Because the structure is nonconforming as to lot occupancy, any enlargement of the structure requires zoning relief. (11 DCMR § 2001.3(a).) In addition, the extension of the nonconforming court separately triggers the need for zoning relief pursuant to § 2001.3(b)(2). Although this is an addition to a one-family dwelling, special exception relief from § 2001.3 is unavailable because the existing lot occupancy exceeds the 70% maximum permitted by § 223.3.

The Board is authorized to grant variances from the strict application of the Zoning Regulations by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(3) (2012 Repl.). The Zoning Regulations provide that the Board may grant such variances in the following circumstances:

where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, 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 [zoning] regulation . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property . . . provided [variance] relief can be granted 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

(11 DCMR § 3103.2; *see also* D.C. Official Code § 6-641.07(g)(3).)

Variances are classified as area variances or use variances. (11 DCMR § 3103.3.) An area variance is a request to deviate from an area requirement applicable to the zone district in which the property is located. (11 DCMR § 3103.4.) The Applicant seeks an area variance, because it requests a deviation from the "prohibition against certain enlargements and additions to nonconforming structures as stated at § 2001.3." (11 DCMR § 3103.3.)

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The Court of Appeals has interpreted the Zoning Act and Regulations as imposing a three-part test for granting an area variance. The Applicant “must show that (1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.” *Fleischman v. D.C. Bd. of Zoning Adjustment*, 27 A.3d 554, 560 (D.C. 2011) (quoting *Wash. Canoe Club v. D.C. Zoning Comm’n*, 779 A.2d 995, 1000 (D.C. 2005)).

To demonstrate an exceptional situation or condition, a property owner must demonstrate that there are unique circumstances peculiar to the owners’s property and that these circumstances are not merely the general conditions of the neighborhood. *Application of Richard and Janet Barnes*, 61 DCR 9101, 9104, BZA App. No. 18679 (August 2014) (quoting *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972)). The exceptional condition may arise out of the structures existing on the property and need not derive from the condition of the land those structures occupy. *Id.*; see also *Clerics of St. Viator, Inc. v. D.C. Bd. of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974) (“It makes no practical difference whether the [zoning nonconformity] stems from topographical conditions of the land itself or from the existence of a structure on the land.”).

In order to prove practical difficulties an applicant must demonstrate both that compliance with the area restriction would be unnecessarily burdensome and that the practical difficulties he would face absent zoning relief are unique to the Subject Property. See *Gilmartin*, 579 A.2d at 1170. There is no rote rule regarding how significant a burden must be in order to qualify as a “practical difficulty.” Rather “the nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case.” *Id.* (citing *Wolf v. D.C. Bd. of Zoning Adjustment*, 397 A.2d 936, 942 (D.C. 1979)).

For the reasons stated below, the Board concludes that the Applicant has met all three prongs of the variance test.

Exceptional Situation or Condition.

The existence of an unsound interior load bearing masonry wall and the need to replace it constitute the exceptional condition on the property. The wall carries the load of the third-floor roof and has deteriorated due to lack of maintenance and defective upgrades by previous owners. This deterioration includes cracks, mortar damage, and bowing resulting in the wall being structurally unsound and inadequate to carry the load of the third-floor roof. The wall must be replaced in order to preserve the structural integrity of the subject property. The unsound condition of the wall and the need to replace it constitutes an exceptional condition.

Practical Difficulties.

Strict compliance with the Zoning Regulations would preclude the Applicant from taking the

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actions needed to accommodate the shift in load that would result from the demolition of the load bearing wall.

The masonry wall carries the weight of the third-floor roof. In order to compensate for the loss of this support, the Applicant has no choice but to extend the rear of the third floor towards the rear to match the footprint of the floors below. This will shift the roof load to the rear exterior wall of the dwelling. Strict compliance with the Zoning Regulations would prohibit the expansion of the nonconforming structure and therefore rendered the structure unsafe and unusable.

Impairment to the Public Good and Detriment to the Zoning Plan.

Granting the variances will have no substantial detrimental effect on the public good, nor will it substantially impair the intent, purpose, and integrity of the zone plan.

As to the first issue, the record includes a letter from the owner of the adjacent property to the south stating that the proposed project would not adversely affect the use or enjoyment of her home. Further, the neighbor to the north was consulted and expressed no opposition to the proposed project. The record evidence further supports a finding of no adverse impact on the light, air, or privacy of adjacent properties.

With respect to impairment of the zone plan, the stated purpose for the R-4 District will be unaffected by the proposed project. Pursuant to § 330.2, the primary purpose of that District is the stabilization of remaining one-family dwellings. Here, the structure will remain a row-dwelling after the addition. Further, the relief sought is slight. Indeed, had it not been for the existence of the garage, the Applicant could have applied for court width relief as a special exception pursuant to 11 DCMR § 223.²

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) (2102 Repl.)) to give “great weight” to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 6E. To satisfy the great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. As noted, the ANC voted to express its support of the application and, for the reasons stated above, the Board finds this advice to be persuasive.

The Board is also 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. OP recommended denial of the application based on its belief that no practical difficulty had been shown and that granting the variance would cause substantial

² The Board rejects as wasteful any suggestion that the Applicant should have demolished the existing garage.

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detriment to the public good and substantially impair the purpose, intent, and integrity of the zone plan.

As to the absence of a practical difficulty, OP believed that alternatives existed to the removal of the masonry wall.

First, OP suggested that the load of the roof could be redistributed to the party walls and dog-leg wall by reframing the third floor within its existing footprint. However, the Applicant provided ample evidence, through the testimony of the project's architect and the letter of a structural engineer who inspected the Subject Property, that the wall at issue had deteriorated such that it is structurally unsound and, thus, needs to be demolished.

Second, OP suggested that the Applicant could rebuild the deteriorated wall in lieu of expanding the third floor. However, OP acknowledged at the Board's December 2, 2014, hearing that doing so would require conducting demolition in the newly renovated cellar floor. By contrast, cellar-level demolition could be avoided by removing the wall on the ground floor and above, which would remove the load from the cellar portion of the wall, thus preventing further deterioration.

Thus, the Board concludes that the Applicant has "no feasible alternative method" to resolve the property's structural deficiencies other than to demolish the load bearing walls above the cellar level and expand the third floor to shift the load to the rear. *See Ass'n For Pres. of 1700 Block of N St., N.W., & Vicinity v. D.C. Bd. of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978) (affirming the Board's ruling that a YMCA had no alternatives that would permit parking compliance and still have a full sized pool).

As to the third prong of the variance test, OP expressed concern that the build-out of the third floor could potentially impact the light, air, and privacy of neighboring property owners. This concern is purely speculative and is refuted by the written and verbal statements made respectively by the adjacent property owners to the south and north.

Finally, the OP report asserted that granting the variance would substantially impair the intent, purpose, and integrity of the Zoning Regulations "because the Applicant has not provided sufficient justification as to why the nonconforming structure should be expanded," thus repeating its argument, discussed above, as to the absence of practical difficulty. For the reasons explained above, the Board already found OP's practical difficulty argument unpersuasive. OP presented no independent basis for its conclusion that the zone plan would be substantially impaired by the grant of the relief, and as stated above, the Board concludes that no such basis exists.

Based on these findings of fact and conclusions of law, the Board concludes that the Applicant has satisfied his burden to meet the requirements for the grant of variance relief under § 3103 to allow construction of a third-floor rear addition to a row dwelling not meeting zoning requirements for lot occupancy under § 403.2, open court under § 406.1, and enlargement of a

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nonconforming structure under § 2001.3 in the R-4 District at 1522 8th Street, N.W. (Square 397, Lot 828). Accordingly, it is **ORDERED** that the application is **GRANTED, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 11, AS REVISED BY EXHIBIT 31.**

VOTE: **3-1-1** (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle to Approve;
Peter G. May to Deny; Marnique Y. Heath 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: June 2, 2015

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.

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.