

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18943 of Myrtle Avenue LLC, pursuant to § 3103.2 for a variance from the lot area requirements under § 401.3, to allow the construction of a detached one-family dwelling in the R-1-B District, at premises 2608 Myrtle Avenue, N.E. (Square 4315, Tax Lot 834).¹

HEARING DATES: March 17, 2015 and April 28, 2015
DECISION DATE: April 28, 2015

DECISION AND ORDER

On December 12, 2014, Myrtle Avenue LLC, (the “Applicant”) filed an application with the Board of Zoning Adjustment (the “Board”) requesting an area variance from the lot width requirements of § 401.3 of the Zoning Regulations, to allow the construction of a one-family dwelling on a substandard lot in the R-1-B zone district. Following a public hearing spanning two dates, the Board voted to grant the application.

PRELIMINARY MATTERS

Authorization

The Applicant in this case is Myrtle Avenue LLC, owner of the subject property. The Applicant was represented by Gabriel Nathaniel, from the firm of I.S. Enterprises Inc.

The Application

The application was filed by Mr. Nathaniel on December 12, 2014, seeking a variance from the lot width requirements under § 401.3 of the Zoning Regulations to allow the construction of a one-family dwelling on a “newly created lot with the proposed address of 2610 Myrtle Avenue, NE”. (Exhibit 1.)

¹ As will be explained further, the caption describes the property location as “2608 Myrtle Avenue” at “Square 4315, Tax Lot 834”. During the course of the proceedings, the Applicant stated that the address for the newly proposed dwelling would actually be “2610 Myrtle Avenue”, and that the dwelling would be located within an existing “record” lot that is part of “Tax Lot 834”. However, since the Board does not possess a survey or deed referencing a “record” lot, the Board will identify the property with the tax lot description and the 2608 Myrtle Avenue location.

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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”) 5C, 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. (Exhibit 25.)

ANC 5C Report and Testimony

The subject site is located within the jurisdiction of ANC 5C, which is automatically a party to this application. The full ANC submitted a report to the Board. The ANC indicated that, at a properly noticed meeting on March 11, 2015, with a quorum present, the ANC voted 5-1-1 to recommend denial of the variance. (Exhibit 30.) In its report, the ANC noted concerns regarding water drainage, reduced street parking, the disturbance and destruction of vegetation, and crowding, all of which would allegedly result from the proposed project. Ms. Gail Brevard testified on behalf of the ANC, reiterating the concerns that were raised in the ANC’s report. (Hearing Transcript of March 17, 2015, (“Tr.”) p. 8-10.)

Ms. Brevard also stated that although the Applicant attended an ANC meeting, he never presented plans to the ANC regarding the proposed project. The Applicant maintained, on the other hand, that he had attempted to present plans, but was prevented from doing so by the ANC. (Tr., March 17, 2015, p. 14-15). The Board continued the public hearing to April 28, 2015 to allow the Applicant an opportunity to present its plans at an additional ANC meeting. (Tr., March 17, 2015, p.15.)

SMD ANC 5C01 Report

The Board received nothing further from the ANC 5C. However, prior to the continued hearing, the Single Member District (“SMD”) ANC 5C01 submitted a report to the Board dated April 13, 2015. (Exhibit 34.) In its report, the SMD stated that a meeting was held on April 2, 2015 with the Applicant, the SMD ANC 5C01 and SMD 5C02 Commissioners, and 19 neighbors. The SMD report reiterated the concerns expressed in the report by the full ANC. It also proposed that the Applicant take various measures to protect the neighborhood, such as: conducting an environmental study to determine “water displacement,” preserving vegetation and landscaping of the abutting property owner, or compensating the abutting property owner for his losses, and insuring against losses to neighboring property owners due to damage from excavation. (Exhibit 34.) At the continued hearing on April 28, the Applicant indicated he would comply with these requests. (Hearing Transcript of April 28, 2015, (“Tr.”) p. 11.)

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Requests for Party Status

The Board received no requests for party status.

Persons in Support

No persons appeared at the hearing to testify in support of the application. Nor were any letters received from persons in support of the application.

Persons in Opposition

The Board received letters in opposition attached to a submission from the SMD, i.e., letters from: (1) Ms. Greata Grene Hicks, residing at 2618 Myrtle Avenue, Kevin and Karri Meldorf (address not disclosed), and an unidentified neighbor who wrote that she wished to keep her identity confidential. (Exhibit 32.) The Board received additional letters in opposition from Carolyn Wilson, residing at 2619 Myrtle Avenue, and Corrine and John Pressley, residing at 2634 Myrtle Avenue. (Exhibit 33.)

The Board also heard testimony from two neighbors in opposition. Mr. Steven Clay, residing at 2606 Myrtle Avenue, testified of his concerns relating to parking and crowding, stating the proposed dwelling would be larger than other homes on the block and would result in less available parking. (Tr., April 28, 2015, p. 13-14.) Ms. Janice Adams, residing at 2616 Myrtle Avenue, testified of her concerns relating to parking and environmental impacts of the proposed construction. (Tr., April 28, 2015, p. 15-17.)

Government Reports

Office of Planning (OP) Report

OP reviewed the application and initially prepared a report recommending denial of the application. (Exhibit 26.) In its report, OP explained that the proposed relief would allow for the subdivision of a lot with significant land area that is already developable without relief. As a result, it reasoned, there is no exceptional situation resulting in a practical difficulty that impedes development of the lot.

However, OP later changed its position and submitted a supplemental report recommending that the application be granted. (Exhibit 29.) In its supplemental report, OP explained that the subject property was not one large lot, as it had previously thought. Rather, the large lot had been subdivided long ago, and consisted of two lots of record, each having a nonconforming width. OP reasoned that because the relief would allow the Applicant to develop an existing nonconforming lot which could not otherwise be developed, OP supported the application. (Exhibit 29). OP's representative, Brandice Elliott, explained OP's position during testimony at the public hearing.

District of Columbia Department of Transportation (DDOT) Report

DDOT submitted a report stating that it had no objection to the variance sought by the Applicant. (Exhibit 27.)

FINDINGS OF FACT

The Subject Property

1. The application concerns a tax lot, Tax Lot 834, of approximately 10,326 square feet in area, with frontage along Myrtle Avenue.
2. Tax Lot 834 is located within Square 4315.
3. The survey plat in this record shows Tax Lot 834 and a “proposed” new property line dividing Lot 834 into two lots. (Exhibit 3.) According to this plat, the proposed eastern lot would have a lot width of 42.5 feet along Myrtle Avenue, and a lot width of 41.23 feet at the rear of the lot. (*See, also*, Self-Certification calculations, Exhibit 28.)
4. According to OP, the Applicant provided a survey plat showing that two record lots were created in 1911. (Exhibit 29.)² Although the plat was not provided to the Board and is not part of this record, the Board finds that there are two record lots within the Tax Lot, based upon OP’s representation that it reviewed the plat.
5. According to the Applicant, the western lot (Lot 28) has a one-family dwelling on it, that was recently renovated. The eastern lot (Lot 26 or 27) is a substandard lot upon which the Applicant proposes to construct a new one-family dwelling. (Tr., April 28, 2015, p. 8.)
6. The Applicant testified that the two lots have been separate lots under single ownership since the early 1900s. (Tr., April 28, 2014, p. 6.)
7. No deeds were provided to the Board showing ownership of either of the lots at any point in time.
8. It is undisputed by the ANC or any of the witnesses in this proceeding that the western lot is currently improved with a one-family dwelling and that the eastern lot is currently vacant.

The Area

9. The average lot width of properties in Square 4315 is 47.6 feet, which is less than the 50 feet required in the zone. (Exhibit 26.)

² This assertion contradicts the original filings which state that a single family dwelling is proposed for the “newly created lot”. (Application, Exhibit 1.)

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10. Only 10 of the existing 45 lots in Square 4315 conform to the lot width requirements. (Exhibit 26.)

The Proposal and the Relief Required

11. The Applicant plans to construct a one family dwelling on the vacant eastern lot.
12. According to OP's supplemental report, the eastern and western lot width dimension will be 46.34 feet each. (Exhibit 29.)³
13. Subsection 403.1 requires a minimum lot width of 50 feet in the R-1-B zone district. Thus, an area variance is needed from the requirements of § 403.1.

Exceptional Condition

14. The survey plat in evidence reflecting one oversized tax lot, and the representations of two undersized record lots, are in conflict.
15. A photograph submitted by the Applicant depicts the vacant eastern portion of the tax lot as appearing akin to a "missing tooth" along Myrtle Avenue. (Exhibit 6.)
16. Assuming this portion of the tax lot is actually a record lot, it is a vacant lot that is only a few feet shy of the required lot width in the R-1-B zone.

Practical Difficulty

17. The Board credits OP's finding that there do not appear to be opportunities to re-subdivide the eastern lot and the adjacent western lot to make this lot conforming. (Exhibit 29.)
18. The eastern lot is not otherwise buildable without zoning relief.

The Impact of the Proposed Dwelling

19. The Board credits OP's finding that the proposed dwelling will conform to all of the bulk and setback requirements and that the lot will exhibit characteristics that are typical of the surrounding neighborhood. (Exhibit 26.)
20. The proposed dwelling will have a footprint that is consistent with other dwellings on the block. (Tr., April 28, p. 15.)

³ This figure is slightly more than the width calculation that was initially submitted of 42.25 feet.

CONCLUSIONS OF LAW

Zoning Relief is Required

The threshold question raised in this matter is whether zoning relief is required, or whether the development of the lot is allowed as a matter of right under § 401.2 of the Regulations. Subsection 401.2 states:

Except as provided in § 401.3, in the case of an unimproved lot in single ownership on November 1, 1957, that has a lot area or width of lot less than specified in § 401.3 for the district in which it is located and that does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the lot area and width of lot are at least eighty percent (80%) of the lot area and width of lot specified under § 401.3; provided, that the structure shall comply with all other provisions of this title.

(11 DCMR § 401.2.)

The Board has examined the meaning of this provision before. In *Appeal No. 17034 of Advisory Neighborhood Commission 2E* (2004), the Board explained that § 401.2 was an exception to the minimum lot requirements contained in § 401.3. In order for this exception to apply, however, **all** of the criteria of § 401.2 must be met. Interpreting the language of § 401.2, the Board explained that, in addition to meeting 80% of the width and area requirements and not **currently** being improved or in common ownership with an adjoining unimproved lot, the subject property **must have been both unimproved and in single ownership on November 1, 1957**, in order to get the benefit of the exception. (*Id.*, at 5 (emphasis supplied).)

In this case, the record is devoid of several material facts that might establish eligibility for the exception. For instance, proof of ownership was not submitted for either the western lot or the eastern lot, for either the current time period or the period of time prior to 1957. Nor was any evidence submitted that reflects the history of improvements at the two adjacent lots. While it appears that the current lot width may meet the 80% ceiling that is prescribed in § 401.2, that calculation was not proffered by the Applicant. In sum, the Board lacks sufficient information to determine whether the Applicant is eligible to apply the exception allowed under § 401.2. As a result, the Board cannot conclude that the property may be developed as a matter of right, and relief from the lot width requirements is necessary.

The Requested Variance

The Board is authorized under § 8 of the Zoning Act of 1938, D.C. Official Code §6-631.07(g) (3) (2008) to grant variance relief from the strict application of the Zoning Regulations. As noted by the Court of Appeals, the Applicant must meet a three-prong test for the Board to grant relief:

An applicant must show, first, that the property is unique because of some physical aspect or “other extraordinary or exceptional situation or condition”

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inherent in the property; second, that strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant; and third, that granting the variance will do no harm to the public good or to the zone plan.

Capitol Hill Restoration Society v. District of Columbia Bd. of Zoning Adjustment, 534 A.2d 939, 941 (D.C. 1987).

An applicant for a use variance must show that strict compliance with the applicable regulation will result in an undue hardship while an applicant for an area variance must meet the less stringent standard that compliance will result in exceptional practical difficulties. (11 DCMR § 3103.7.)

As noted, the Applicant is seeking an area variance from the lot width requirement under § 401.3. Therefore, the “practical difficult[y]” standard will be applied.

The Board finds that the peculiar subdivision history regarding the single oversized tax lot and the two undersized record lots constitutes an exceptional condition, especially when the result is a “missing tooth” like appearance along the block. (See, Findings of Fact 14-16.)

This exceptional condition leads to a practical difficulty in that the vacant lot is not buildable without zoning relief. As stated by the Court of Appeals, when evaluating practical difficulty, the Board may assess the “weight of the burden of compliance” with the Zoning Regulations. *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164 (D.C. 1990). In this case, the burden is weighty indeed. In contrast to an application for setback relief -- where the project could potentially be scaled down -- the burden of having to comply with the lot width requirements means no development at all.

Turning to the third prong of the variance test, the Board concludes that the proposed project will not impair the public good or the zone plan. As discussed by the Applicant and by OP, the requested relief would allow for the construction on a lot that is only a few feet shy of the width that is required, and is also consistent with the width of other properties in the Square. (Exhibit 26, Findings of Fact 9 & 10.) Moreover, as noted by OP, the footprint of the proposed dwelling will be consistent with other dwellings on the block. (Tr. April 28, 2015, p. 14-15.) (Photographs of nearby properties tend to confirm this fact. Exhibits 5, 11 & 12.)

Finally, the construction of the proposed dwelling will fill in the “missing tooth” (Finding of Fact 15) and create a more pleasing appearance on the block.

Advisory Neighborhood Commission

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

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orders give “great weight” to the issues and concerns raised in the recommendations of the affected ANC.

In this case ANC 5C recommended denial of the application. However, most of the issues and concerns raised by the ANC are outside of this Board’s purview. Issues cited by the ANC, such as environmental impacts and construction issues, are not within the Board’s purview as they do not relate to the Zoning Regulations. *See, Appeal No. 17769 of Advisory Neighborhood Commission 6A (2008)*; (Zoning Regulations do not require environmental compliance). *Appeal No. 17468 of Advisory Neighborhood Commission 6A (2006)* (Issues relating to Building Code are not within Board’s jurisdiction). As such, the portion of the ANC report which speaks to these issues is not “legally relevant” and, thus, will not be afforded great weight. *See, Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment (D.C. 1993)*. Nor will the Board address the conditions proposed by the SMD, as they relate to the same issues and concerns which have no relevance to this application.

On the other hand, the concern raised by the ANC relating to potential “crowding” is legally relevant, as this concern relates to the third prong of the variance test; i.e., whether the proposal will result in a substantial detriment to the public good. While the Board acknowledges this concern, the Board does not agree with the ANC’s position. As explained above, the Board concludes that the dwelling will comply with all height, bulk, and setback provisions, and the proposed dwelling will be in keeping with development patterns on the street.

Office of Planning

The Board is also required under D.C. Official Code § 6-623.04(2001) to give “great weight” to OP recommendations. For reasons stated in this Decision and Order, the Board finds OP’s advice, as revised, to be persuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application, as amended, is hereby **GRANTED**, to allow an area variance from the lot area requirements, **SUBJECT TO THE APPROVED PLANS AT EXHIBIT 7.**

VOTE: 4-0-1 (Marnique Y. Heath, Jeffrey L. Hinkle, Lloyd J. Jordan, and Robert E. Miller to Approve; 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

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FINAL DATE OF ORDER: October 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.