

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18990 of Diana Kurnit and Jonathan Brumer, as amended¹, pursuant to 11 DCMR § 3104.1, for a special exception under § 223 to allow a replacement rear deck addition at a one-family semi-detached dwelling, not meeting the lot occupancy requirements of § 403, the side yard requirements of § 405, and the nonconforming structure requirements of § 2001.3, in the R-2 District, at premises 5330 42nd Street, NW, (Square 1664, Lot 30).

HEARING DATES: May 12, 2015 and June 16, 2015
DECISION DATE: June 16, 2015

DECISION AND ORDER

Diana Kurnit and Jonathan Brumer, the property owners of the subject premises (the “Owner” or the “Applicants”), filed an application with the Board of Zoning Adjustment (the “Board”) on February 26, 2016, for a special exception under § 223 of the Zoning Regulations to allow the construction of a deck located within the rear yard of a one-family semi-detached dwelling, wherein the completed project will not conform to the lot occupancy requirements of § 403, the side yard requirements of § 405, or the nonconforming structure requirements of § 2001.3 of the Zoning Regulations. For the reasons explained below, the Board voted to approve the application after the public hearing was completed on June 16, 2015.

PRELIMINARY MATTERS

The Zoning Administrator (“ZA”) Memorandums

This matter was referred to the Board by the ZA of the Department of Consumer and Regulatory Affairs. The ZA initially referred the matter for special exception relief encompassing only lot occupancy relief. (Exhibit 7.) However, the ZA Memorandum was revised twice, first to revise the lot occupancy calculations and add a requirement for side yard relief (Exhibit 42) and, later, to note that the ZA had granted minor flexibility under §.407 of the Zoning Regulations regarding the rear yard requirements. (Exhibit 45.) The Board reviewed this application based upon the revised determination that is reflected in Exhibit 45.

¹ The Applicant did not request relief under § 2001.3. However, the Office of Planning (“OP”) suggested that relief was needed under this provision, as the proposed deck would extend the nonconforming side yard. The Board agreed with OP and granted this technical amendment to the application on its own motion.

The Application

The Applicants provided two initial options for special exception review, an original proposal for a deck with a depth of 10 feet, and a second proposal for a slightly smaller deck with a depth of 9.6 feet. Both proposals show a stairway and landing on the south side of the deck or, when facing the rear of the dwelling from the public alley, to the right of the deck.² The Applicant ultimately chose to proceed with its original option. As a result, the Board only considered the original proposal under the §§ 223 and 3104 standards.

Notice of Public Hearing

Pursuant to 11 DCMR § 3113.13, notice of the hearing was sent to the Applicants, all owners of property within 200 feet of the subject site, Advisory neighborhood Commission (“ANC”) 3E, and the District of Columbia Office of Planning (“OP”). The Applicants posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect. (Exhibit 43.)

Request for Party Status

The Board received and granted a request for party status from Jane Waldmann (“Ms. Waldmann” or the “Opposition Party”), the owner and resident of 5332 42nd Street. (Exhibit 41.) Ms. Waldmann maintains that the proposed deck with a staircase to the south, will affect the privacy and enjoyment of her own rear porch (an enclosed deck), will reduce the amount of light in her basement, and will result in the loss of “plantable” green space on the Applicants’ property. Ms. Waldmann’s preference is for the Applicants to locate the staircase on the north side of the deck, at their shared property line, in order to create additional separation between the properties. (Exhibit 41.)

ANC Report

ANC 3E filed a report based upon the initial ZA memorandum. (Exhibit 38.) However, when the ANC received the ZA’s revised memorandum, the ANC reviewed the application based upon the new lot occupancy calculations and the additional request for special exception relief encompassing the side yard requirements. In its report submitted on April 14, 2015, the ANC indicated that, at a regularly scheduled monthly meeting with a quorum present, the ANC voted to support the amended special exception application. (Exhibit 40.) The ANC noted that the neighboring property owner to the north (Ms. Waldmann) objected to the Applicants’ proposed location for the deck staircase. However, the ANC stated that it supported the Applicants’

² The filings are somewhat confusing as they relate to directions. What the Applicant describes as to the south or to the “right” of the property from the rear, the Office of Planning describes as to the east of the property. What the Applicant describes as to the north or to the “left” of the property from the rear, the Office of Planning describes as to the west of the property. For the sake of simplicity, this Order shall reference directions from the property going north and south, rather than directions to the west and east, or to the left or right from the rear.

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proposed staircase location, because the proposed design would preserve more green space in the northern portion of the yard, including an existing tree. The ANC asserted that, in contrast, the proposal favored by the objecting neighbor would require the removal of the tree. (Exhibit 40.)

Office of Planning (“OP”) Report

OP prepared a written report supporting the application. (Exhibit 44.) OP noted that placement of the staircase to the south, as proposed by the Applicants, will not unduly affect light and air to the adjacent property or unduly compromise the privacy of use and enjoyment of neighboring properties. (Exhibit 4.) In addition, OP’s representative, Maxine Brown-Roberts, testified at the public hearing, stating that OP considered both options presented by the Applicants (the 10-foot deck and the 9-foot, six inch deck) and found that both met the criteria of § 223. (Transcript of June 16, 2015 (“T.”), p. 83.)

Persons in Support/Opposition

The Board received 26 letters in support from nearby property owners (Exhibits 14-16, 26-27, and 36) and no letters from persons in opposition to the application other than a letter from Ms. Waldmann before she requested party status. (Exhibit 32.) No persons testified in support or in opposition to the application other than the Applicants and the Opposition Party.

FINDINGS OF FACT

The Site and Surrounding Area

1. The subject property is located at 5330 42nd Street, NW, Square 1664, Lot 30, in the R-2 zone district.
2. The rear of the lot abuts a 15-foot wide public alley.
3. Properties in the surrounding area are predominantly one-family semi-detached dwellings.
4. The lot is improved with a two story one-family semi-detached dwelling that was built sometime during the 1920s.
5. When the Applicants purchased the property in 2013, the dwelling had a rear deck that extended approximately seven feet out from the rear of the dwelling. The deck had become unsafe and could not be repaired. The Applicants therefore propose to replace it.

The Adjacent Neighbor

6. The property owned by the Opposition Party (the 5332 property) to the north of the subject property, is contiguous to the site owned by the Applicants.

7. The two dwellings (owned by the Applicants and the Opposition Party) share a party wall and are symmetrical in design. Both properties were originally designed with rear porches. In the center of the two properties, each originally had a landing onto which doors opened to the dwelling. The landings each led to staircases to the ground level at the joint property line. (Exhibit 41.)
8. During the mid-eighties, the Opposition Party enclosed the porch at her property and created a screened porch. She maintained the porch landing and staircase in the original location at the joint property line. (Exhibit 47.)
9. The Opposition Party also maintains a privacy fence at her property. (T., p. 88.)

The Proposed Deck

10. The deck proposed by the Applicants would be approximately 19 feet wide, the width of the subject dwelling, and would be 10 feet deep. (Exhibit 8, OP Report, Exhibit 44.)
11. The deck proposed by the Applicants varied from the original design of the dwelling, as the staircase was planned at the southern side of the dwelling instead of at the joint property line at the northern side of the dwelling. (Exhibit 8, OP Report, Exhibit 44.)
12. Placing the stairway to the south of the deck will preserve more green space than if the stairway were placed to the north, because the green space to the north is larger and more usable. (Exhibit 37, T., p. 77-79.)
13. Placing the stairway to the south of the deck, instead of to the north of the deck, will also preserve the mature myrtle tree which is located on the north side of the property. (Exhibit 8, T. p. 83.)

Zoning Relief

14. Section 403 of the Zoning Regulations requires that each structure in an R-2 zone allow a maximum lot occupancy of 40%. The existing lot occupancy (without a deck) is 39%. The dwelling and 10 foot deep replacement deck would have a 50% lot occupancy; and the dwelling and 9.6-foot replacement deck would have a 48% lot occupancy. (OP Report, Exhibit 44.)
15. Subsection 405.3 of the Zoning Regulations requires, in most cases, that each semi-detached dwelling in an R-2 zone provide a minimum side yard of eight feet on the resulting free-standing side.
16. Subsection 405.8 of the Zoning Regulations allows a minimum side yard of five feet in the case of a dwelling, such as this one, where the dwelling existed on or before 1958. In these cases, however, the side yard (less than eight feet), may not be decreased. (11 DCMR § 405.8.)

17. The only side yard at the property is 5.3 feet. With the proposed deck and staircase construction, the side yard would be only 1.3 feet. Because the nonconforming side yard would be extended by the deck addition, relief is also required under § 2001.3(b)(2).
18. Section 404 of the Zoning Regulations requires a 20-foot minimum rear yard for structures in the R-2 zone. While the proposed deck will result in a rear yard that is slightly less than 20 feet, the ZA has granted minor flexibility for the rear yard setback pursuant to § 407 of the Regulations. (Exhibit 45.) Thus, no request is made to this Board to grant rear yard relief.

The Impact of the Proposed Deck

Visual Intrusion

19. The elevation plans, photographs, and site plan show the relationship of the proposed deck to adjacent buildings, and also show views from the public alley at the rear of the property.
20. The proposed deck will not be visible from 42nd Street but will be visible from the public alley at the rear of the property.
21. Many dwellings along the alley have rear additions, enclosed decks, and open decks that are similar to the deck proposed by the Applicants. The Board credits OP's finding that the proposed deck would not visually intrude upon the character, scale, and pattern of houses along the adjacent alley. (OP Report, Exhibit 44, p. 4.)

Light and Air

22. The Board credits OP's finding that the proposed height and area of the deck and the stairway location would not affect the light and air to adjacent residences or rear yards along the alley. (OP Report, Exhibit 44, p. 3.)
23. The Board credits OP's finding that the Opposition Party's own porch and stairway, which is above and in front of the basement entrance, limits the light and air that is available to the basement of the property. (OP Report, Exhibit 44, p. 3.)
24. The Board credits OP's finding that the proposed deck and stairway will not be covered and would not block light and air to the neighboring property to the south. (OP Report, Exhibit 44, p. 3.)

Privacy

25. The Board credits OP's finding that the proposed deck will be set back 19.76 feet from the 10-foot alley and will not impact the privacy of properties across the alley. (OP Report, Exhibit 44, p. 44.)

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26. The Board credits OP's finding that the placement of the stairway to the south, as proposed by the Applicant, will help to reduce movements between the deck and the northern yard (near the 5332 property), and will reduce any noise generated by the use of the proposed deck. (OP Report, Exhibit 44, p. 4.)
27. The Board credits OP's finding that the Opposition Party's fence will help to lessen views from the proposed deck onto the enclosed porch at the 5332 property. (OP Report, Exhibit 44, p. 4.)

CONCLUSIONS OF LAW

The Applicant is seeking a special exception pursuant to 11 DCMR §§ 223 and 3104.1 to construct an addition to a one-family dwelling in an R-2 District, where the proposal will not comply with the lot occupancy requirements of § 403, the side yard requirements of § 405 and the nonconforming structure requirements of § 2001.3. As stated in § 3104.1 of the Zoning Regulations (Title 11 DCMR), the Board "is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) ... to grant special exceptions, as provided in this title, where, in the judgment of the Board, the special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions specified in this title." In this case, the "special conditions" are those specified in §§ 223.2 through 223.5.

As noted by the Court of Appeals:

In evaluating requests for special exceptions, the BZA is limited to a determination of whether the applicant meets the requirements of the exception sought. "The applicant has the burden of showing that the proposal complies with the regulation; but once that showing has been made, the Board ordinarily must grant the application." *National Cathedral Neighborhood Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 753 A.2d 984, 986 n. 1 (D.C.2000) (quoting *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1032-33 (D.C.1995)).

Georgetown Residents Alliance v. District of Columbia Bd. of Zoning Adjustment, 802 A.2d 359, 363 (D.C. 2002).

In this case, the Board concludes that the Applicant has satisfied the two general tests stated in § 3104.1 and the specific conditions contained in § 223.

As to the general test, the Board concludes that the requested special exception will "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps." (11 DCMR § 3104.1.) The proposed deck will not change the residential use of the dwelling and

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will be in harmony with the existing residential neighborhood. With respect to whether the special exception will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, the Board concludes that this standard is satisfied if the specific conditions of § 223 are met. These will be discussed in the section below entitled “The ‘special conditions’ for an addition under § 223.1”.

The “special conditions” for an addition under § 223.1.

Under § 223.1 of the Zoning Regulations, an addition to a one-family dwelling shall be permitted even though it does not comply with applicable area requirements if approved by the Board as a special exception, subject to its not having a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, in particular:

223.2(a) The light and air available to neighboring properties shall not be unduly affected. While the proposed deck will be slightly larger than the previous deck, there is no evidence of negative impacts to the light and air that is available to neighboring properties. The Opposition Party maintained that her light and air would be adversely impacted by the proposed deck; however, OP found that the Opposition Party’s own porch prevented light and air from coming into the basement level of her dwelling. (Findings of Fact 22-24.) Furthermore, when questioned by the Chairman, the Opposition Party conceded as much. (T., p. 90.) Thus, it is reasonable for the Board to conclude that the proposed deck would have only a minimal effect (at best) on the light and air available to the Opposition Party, and would not “unduly” affect her property.

223.2(b). The privacy of use and enjoyment of neighboring properties shall not be unduly compromised. The Board also concludes that the proposed deck will not affect the privacy of use and enjoyment of neighboring properties. (Findings of Fact 25-27.) The Opposition Party insists that a stairway on the Applicants’ property which mirrors her own stairway is necessary to create an additional buffer, and is the only means by which her privacy can be protected. The Board does not agree. First, the fact that the stairway will be located farther away from the 5332 property may, in fact, provide more privacy than if the stairway were closer to the property. Second, there is no dispute that the Opposition Party’s own stairway (approximately four feet wide) can remain as an effective buffer to the Applicants’ property. Finally, the Opposition Party’s privacy will also be protected by the enclosure of her own porch and by the wooden privacy fence on her property.

223.2(c). The addition, together with the original building, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage. As explained in the Findings of Fact, the proposed deck will only be visible from the public alley at the rear, and not from 42nd Street. The size and design of the proposed deck is similar to many

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other additions and decks that may be viewed from the rear and will not be incompatible with surrounding dwellings in any way. (Findings of Fact 19-21.)

223.3 The lot occupancy of the dwelling or flat, together with the addition, shall not exceed fifty percent (50%) in the R-1 and R-2 Districts or seventy percent (70%) in the R-3, R-4, and R-5 Districts. The subject property is in the R-2 zone (Finding of Fact 1.) With the proposed deck, the lot occupancy will be no more than 50%. (Finding of Fact 16.) Therefore, this condition will be met.

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21), as amended; D.C. Official Code § 1-9.10(d)(3)(A)), to give “great weight” to the issues and concerns raised in the affected ANC’s recommendations. As noted, the ANC voted to support the special exception application. The Board found the ANC’s advice to be persuasive. In particular, the ANC supported the Applicants’ proposal to place the deck staircase at the southern end of the deck instead of the northern end, reasoning that more green space would be preserved in the Applicants’ rear yard, including a mature tree. As explained previously, this is a plausible reason for the Applicants’ design preference. The Board supports this preference where it has been shown, as here, that the design has no adverse effects on neighboring property owners.

In reviewing a special exception application, the Board is also required under D.C. Official Code § 6-623.04(2001) to give “great weight” to OP recommendations. OP also supported the application. The Board found the advice in OP’s written report to be persuasive, and has credited OP with various findings in this Order.

For the reasons stated above, the Board concludes that the applicant has satisfied the burden of proof with respect to the application for a special exception under § 223 to allow the issuance of a building permit authorizing the construction of a rear deck in the R-2 zone.

Therefore, for the reasons stated above, the application for a special exception is hereby **GRANTED, SUBJECT TO APPROVED PLANS AT EXHIBIT 5.**

VOTE: 4-0-1 (Lloyd J. Jordan, Marnique Y. Heath, Jeffrey Hinkle, and Marcie I. Cohen 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: November 9, 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.