Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 840

Case No. 97-2/94-6

(Text Amendments - Special Exception Provisions for Single-family Dwellings and Administrative Flexibility Provisions)

February 23, 1998

The Zoning Commission for the District of Columbia initiated this case in response to a petition from the Office of Planning based on a longstanding request from the Board of Zoning Adjustment (BZA) to explore whether certain additions to single-family dwellings could be regulated by the special exception process rather than the area variance process. The BZA request was initially recorded in Z.C. Case No. 94-6, which is incorporated in this case. The purpose of the amendments is to provide a legal basis for making reasonable additions to single-family dwellings where the strict tests associated with an area variance are unattainable. In addition, both the Zoning Commission and the BZA questioned whether the Zoning Administrator should be authorized to allow very minor, "de minimus" deviations from the area standards of the zone districts, and determined that the issue was appropriate for this case. Amendments to the Zoning Regulations are authorized pursuant to the Zoning Act {Act of June 20, 1938, 52 Stat. 797, as amended, D.C. Code Ann. Section 5-413 (1981)}.

The petition, filed on January 31, 1997 and February 3, 1997, presented background information about the proposal, and presented the proposed text with comments indicating the intent and justification for the proposal. The overall goal of the proposal is to provide a degree of flexibility regarding additions, while retaining essential controls related to effects on neighboring properties and neighborhood character.

At its public meeting on February 10, 1997, the Zoning Commission determined that the proposed text amendments presented a sound basis for consideration and authorized a public hearing. The public hearing in this case was scheduled for May 1, 1997. The May 1, 1997 hearing session was canceled. The public hearing was rescheduled for and re-advertised for July 10, 1997.

Pursuant to proper notice, the Zoning Commission held a public hearing on the proposed amendments on July 10, 1997. The public hearing was conducted in accordance with the provisions of 11 DCMR 3021. At the close of the public hearing, the Commission left the record of the case open until September 2, 1997 to receive additional public comments.

At the hearing session, the Commission heard the presentation of the Office of Planning (OP) and the testimony of one witness, Lindsley Williams. In addition to the testimony presented at the public hearing session, the Commission received the testimony of the Chairperson of the Board of Zoning Adjustment, and items of correspondence from Advisory Neighborhood Commissions 3D, 2E, 3C, 3E, 3F, 6B; the District of Columbia Building Industry Association; Lindsley Williams; and Weinstein Associates Architects.

THE REPORT AND TESTIMONY OF THE OFFICE OF PLANNING

By memorandum dated April 21, 1997 and by testimony presented at the public hearing, the Office of Planning recommended the adoption of the advertised text in this case, subject to modifications that may be justified by testimony presented at the public hearing or submissions to the record of the case. The OP noted that on several occasions, the Board of Zoning Adjustment (BZA) had requested that the Commission and the OP explore whether additions to single-family dwellings and flats could be regulated by a special exception process rather than the area variance process. The OP further noted that the reason for the request was that some applicants had presented reasonable plans for additions to their homes to the BZA which were denied because the subject properties did not provide a legal basis for area variance relief. In many cases, neighbors expressed minor or no objections, and the proposed additions were reasonably attractive, functional additions to the homes in question. However, the properties lacked uniqueness or a specific characteristic that would have provided a legal basis for approval of the requested variance relief.

In its report dated April 21, 1997, the OP provided its rationale and comments for each provision of the amendments as initially proposed and advertised. The proposed provisions and a summary of OP's rationale and comments follow:

223.1 **An addition to a single-family dwelling or flat that does not comply with all of the requirements of sections 401, 403, 404, 405 or 406 of this title shall be permitted if approved by the Board of Zoning Adjustment in accordance with the conditions specified in Section 3108 of Chapter 31 of this title, subject to the provisions of this section.**

The Office of Planning noted that the reference to Section 3108 of the Zoning Regulations in Subsection 223.1 establishes that the special exception process would govern applications under proposed Section 223. Additionally, this subsection specifies which sections of the Zoning Regulations would be affected by the proposed special exception process.

223.2 **A matter of right addition is demonstrated to be inadequate or undesirable to achieve a suitable expansion of the dwelling or flat.**

The Office of Planning stated that Subsection 223.2 is intended to require justification for deviating from the area standards of the subject zone districts. Homeowners, architects and builders should look first to a matter-of-right addition and only apply for special exception relief if their case has significant need and merit.

223.3 **The addition shall not adversely impact the use or enjoyment of any abutting or adjacent dwelling or property; in particular:**

(a) **The light and air available to neighboring properties shall not be unduly affected;**

(b) **The privacy of use and enjoyment of neighboring properties is not adversely affected; and**

(c) **The addition, together with the original building, as viewed from the street, is not out of character with the scale and pattern of houses along the subject street frontage.**

The Office of Planning indicated that the specific impact standards in Subsection 223.3 are intended to guide the impact review regarding adjacent properties with a degree of detail, ensure a satisfactory addition or provide for denial of the application when appropriate. The inclusion of specific standards assures the community that the applicant must make a strong case by presenting a plan for an addition that respects neighboring properties and public design character in the immediate vicinity.

223.4 **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. (Fifty-five percent in the former category and 75 percent in the latter category are advertised in the alternative to the main text provisions.)**

The Office of Planning indicated that the proposed standards would allow the lot occupancy to be 10-15 percent higher than matter-of-right standards in the respective zone districts. OP recommended an overall limit on lot occupancy because lot occupancy is a reasonable approximation of a general density in those residential zone districts where no floor area ratio (FAR) is specified. Specifically, in the R-1 and R-2 zone districts, the maximum lot occupancy of 40 percent times the maximum height of three stories is equivalent to a 1.2 FAR. In the R-3 and R-4 zone districts, the maximum lot occupancy of 60 percent, together with the maximum height limit of three stories, equals a maximum density of 1.8 FAR. Beginning in the R-5-A zone district, FAR limits are provided in the Zoning Regulations. Therefore, in the R-5 zone districts, the FAR standards in the Regulations would govern the density of the original building and the proposed addition. The greater flexibility in lot occupancy, if granted, would allow that density to be spread over a larger portion of the lot. OP emphasized that the

advertised special exception would only apply to properties zoned R-5 where there is an existing single-family dwelling or flat.

The Office of Planning again noted that the general lot occupancy limit provides a general density maximum within which the other standards of the subject zone districts are eligible for flexibility according to the proposed special exception process. OP further indicated that some of the other standards, especially side yard requirements, do not lend themselves to a percentage formula so readily. For example, in an R-1 zone district with an eight-foot side yard requirement, a deviation may have a sound basis at zero side yard, depending on the character of the abutting lot. A formula limiting the deviation to some percent of the standard might simply introduce an arbitrary, complicating factor. OP believes the standards in proposed Subsection 223.3 can address privacy, light, air and design factors on a case-by-case basis.

223.5 **The Board may require special treatment in the way of design, screening, exterior or interior lighting, building materials or other features for the protection of adjacent and nearby properties.**

The Office of Planning stated that the Board's authority to require special treatment is a critical ingredient regarding additions to dwellings and flats. Some mention of "design" seems appropriate without making it such a prominent issue that the Board must attempt to evaluate architectural design per se.

The Office of Planning commented on the issue of whether decks more than four feet above grade should be afforded greater flexibility in the proposed provisions than other additions. OP indicated that the flexibility provided by the proposed regulations would also apply to decks that are greater than four feet in height and therefore count toward the lot occupancy and maximum gross floor area (FAR) limits. OP noted that because of the height of such decks and the potential visual and privacy effects on neighbors, they probably should not be excluded from FAR or lot occupancy limits as a matter-of-right. The impact standards of proposed Subsection 223.3 would guide review of this issue.

Regarding the Commission's request for testimony on whether it should adopt a flexibility rule that would authorize the Zoning Administrator to allow "de minimus" deviations from the area standards of the residential zone districts, OP suggested that such flexibility might be specified as one or two percent, whether a yard, court, lot occupancy, FAR or other standard. OP indicated that the purpose of such a rule would be to eliminate a few variance cases that now go to the BZA for public hearing on a deviation that is extremely minor. Finally, OP noted its support for such a regulation and reminded the Commission that the planned unit development (PUD) provisions of the Zoning Regulations have a similar provision.

In testimony presented at the public hearing, the Office of Planning acknowledged issues and comments submitted to the record of the case and stated that many actually improved the text of the proposed amendments. OP referred to comments submitted by Lindsley Williams

related to the standards from which deviations would be eligible under the proposed rules, and agreed with his statement that substandard lots should be excluded from this process and should be required to meet the variance tests because these lots tend to be already more dense than the zone would normally allow and have an arguable case for a variance.

The Office of Planning disagreed with comments in the record which state that the criteria for review make the proposed rules tantamount to a variance, and indicated that such is not the case because the criteria refers to the addition and a variance would be related to proof regarding the property as a whole. OP also indicated that Amy Weinstein in her comments to the Commission made a good point about graphic representations about why a matter-of-right addition is undesirable.

In discussing the adverse impact criteria, OP suggested that the Commission add language that would clearly require an applicant to show in a graphic form the dimensionally correct adjacencies. Finally, OP generally discussed the comments from the ANCs and noted that many were opposed based on the specific character of their areas and their misunderstandings about the proposal. At least one ANC strongly opposed any increase in lot occupancy and referred to older, pre-zoning structures that were rendered nonconforming by the 1958 Regulations. OP opined that a lot occupancy lower than that proposed might be appropriate. Finally, OP discussed with the Commission whether nonconforming structures should be eligible to seek relief under the proposed regulations.

At the close of the public hearing, the Commission left the record of the case open until September 2, 1997, for additional comments. By memorandum dated July 25, 1997, the OP submitted a post-hearing report containing changes and additions to the proposed amendments that reflected the Commission's preliminary discussion of the case based on information submitted to the record and testimony presented at the public hearing. OP's report revised Subsection 223.1 to include language indicating that any reference to a flat was to be considered in those zone districts where a flat is permitted. The advertised text of Subsection 223.2 was deleted, and Subsection 223.3 became 223.2 with a modification to Paragraph c to add consideration of views from an "alley, and other public way" and the addition of a new Paragraph (d) to require graphical representations to represent the relationship of the proposed addition to adjacent buildings and views from public ways. Advertised Subsection 223.4 became 223.3 and added the option of no change from the lot occupancy limits currently allowed by the Zoning Regulations. Advertised Subsection 223.5 became 223.4 and remained as initially advertised.

The report provided proposed text for effectuating the Commission's request for a flexibility rule for the Zoning Administrator. The amendment would be placed in Chapter 4 of the Zoning Regulations and would allow the Zoning Administrator two percent flexibility in deviating from the area requirements of Sections 401, 403, 404, 405 and 406; provided that deviations were allowed for no more than two of the sections and the deviations were determined to be minor and consistent with the purpose of the applicable regulations.

THE TESTIMONY OF THE BOARD OF ZONING ADJUSTMENT

The Board of Zoning Adjustment, by testimony of its Chairperson submitted on July 10, 1997, supported the proposed amendments and stated that many applications that come before the Board are requests for modest additions to single-family residences. While the additions seem reasonable and attractive, there is often no legal basis for granting variance relief. In most cases, the construction of these additions would cause no harm to the neighborhood, and would afford an improved living environment for the residents. The Board believes that the residents of the District could better be served by a change to the Zoning Regulations that would provide a little flexibility in the area of minor residential additions.

THE REPORTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

Advisory Neighborhood Commission (ANC) 3E, by letter dated June 9, 1997, stated that it voted unanimously to support the proposed text amendments.

Advisory Neighborhood Commission 3F commented on the proposed amendments but took no formal position on the proposal and urged further study. Advisory Neighborhood Commissions 2E, 3C, 3D, and 6B submitted reports in opposition to the proposed amendments. The issues and concerns raised by the ANCs and the Commission's disposition of them are summarized as follows:

1. The proposed language is vague. The proposed amendments rely on subjective criteria, are unclear in their application and provide no rational guidance for decisionmakers. The Commission believes that its proposed rules, as revised by the Commission during discussions both at the public hearing and the decision meeting, address the issue of vagueness, subjectivity and provide adequate guidance for the BZA in its special exception proceedings.

2. The proposed amendments provide a loophole to evade government review and effectively deny citizen-participation in the decisionmaking process. The Commission notes that the proposed amendments, as revised, provide for a special exception process which requires a public hearing on any application filed. Additionally, the Commission notes that the flexibility standard for the Zoning Administrator is so low that it would only allow for deviations that are extremely minor.

3. The proposed increase in lot occupancy may result in unfair crowding, and would impact on those areas in ANC 3C where there are large single-family houses on small lots which generate applications from owners to expand or exacerbate nonconformities. The increase in lot coverage would be detrimental to the historic district of Georgetown and the communities of Foxhall, Hillandale and Burleith. ANC 6B is unsure what impact an increase in lot coverage would have on the

Capitol Hill area. The Commission believes that its proposed amendments, as revised, provide criteria for the BZA's review which will allow for consideration of each case based on the specific circumstances of the particular case, and will therefore consider the impacts associated with the surrounding area on a case-by-case basis.

4. Current regulations protect air and light, while the proposed amendments would have a detrimental impact on open space, privacy, light and air of adjacent properties. As indicated in No. 3 above, the Commission believes that the criteria for the special exception relief in the proposed amendments, as revised, adequately provide for protection of open space, privacy, light and air of adjacent properties.

5. Decks more than four feet above grade should continue to be counted toward lot occupancy. The Commission agrees with the ANCs and others that the current deck provisions are appropriate.

6. The proposed amendments would allow nonconforming additions to single-family dwellings in the most restrictive (R-1) zone districts by special exception rather than by variance. The Commission notes that the purpose of the proposed amendments is to more easily allow single-family homeowners to make minor additions to their homes in the residential zones. The special exception process is the mechanism chosen. Any resulting nonconformities will continue to be minor as in variance cases.

7. The proposed amendments while making additions easier for some, may reduce the protections of others. The Commission believes that the amendments, as revised, afford adequate protection to properties neighboring.

8. Special treatment of proposed construction, required as a condition, is no defense to neighboring properties in an era of lax zoning enforcement. The Commission notes that in special exception cases, special treatment provisions are important in allowing for the BZA to condition applications in such a manner as to mitigate or eliminate adverse impact.

The Commission received a letter dated July 29, 1997 from Charles R. Braun in opposition to the amendments. Mr. Braun's post-hearing submission agreed with the points of opposition made by ANC 3C in its report to the Commission. Additionally, Mr. Braun stated that the amendments would add to the responsibilities of the BZA at a time when the BZA is unable to complete its current workload. Mr. Braun indicated that the proposed amendments are constitutionally and legally questionable because they would substitute broad Board discretion to alter area standards using vague criteria on a case-by-case basis for area standards that are uniform through the same zone districts. The Commission noted that it is not modifying the area standards, but is adding a special exception. The Commission believes that it has

responded to Mr. Braun other issues satisfactorily within its discussion of the ANCs' issues and concerns.

Lindsley Williams by correspondence dated May 1, 1997 and by testimony at the public hearing supported the proposed regulations with modifications. The District of Columbia Building Industry Association and Weinstein Associates Architects submitted letters in support of the proposed amendments with modifications. The salient issues raised by the above-referenced correspondence and testimony and the Commission's disposition of those issues are summarized below:

1. References to single-family dwelling(s) should be changed to one-family dwelling(s) to conform to the current terminology used in the Zoning Regulations. The Commission agrees with the recommendation and noted that the term "dwelling, one-family" is defined in the Zoning Regulations and used throughout the Regulations whereas single-family dwelling is not officially used in the Regulations. The Commission, however, noted that the term single-family dwelling has been used by the Commission and others for many years.

2. Subsection 223.2 of the advertised text should require graphic demonstration of matter-of-right inadequacy. Subsection 223.2 should be eliminated, it requires the applicant to argue two cases. The Commission determined that the language in the advertised text of Subsection 223.2 created a burden on the applicant that was unintended. The Commission deleted this Subsection.

3. Subsection 223.3 of the advertised text should be more specific by adding language to require the applicant to put forth in graphic form the dimensionally correct adjacencies. The Commission agrees with this recommendation and has included appropriate language in its revised regulations.

4. Paragraph 223.4 (c) should be modified to require views from the street, alley and other public ways … . The Commission agrees with this recommendation and has made the modification in its revised regulations.

5. The flexibility for the Zoning Administrator in percentage form works for floor area and lot occupancy but not linear requirements like rear yard or side yard. One percent to two percent would be insignificant and therefore specific dimensional variations should be provided for linear requirements. Such variations should apply only to additions and not new buildings. The Commission believes that the proposed two percent flexibility is appropriate for the categories that are area standards, but that a larger percentage may be more appropriate for flexibility involving linear standards. The Commission noted that the flexibility granted to the Zoning Administrator is intended to be general and would apply to new buildings and additions.

6. Limit the flexibility to projects on lots that are conforming as to area requirements in Subsection 401.3 because substandard lots have a difficulty inherently arising in the land and can be reasonably considered as variance cases. The Commission believes that some owners of substandard lots may want to make reasonable additions that have minor or no adverse impacts on surrounding properties and otherwise meet the criteria for the proposed special exception process.

7. Retain current lot occupancy limits. Current minimum lot sizes with maximum lot occupancy and two floors in R-1-A through R-4 already permit sizable dwellings. The Commission believes that lot occupancy flexibility is important in the context of the proposed amendments.

Having discussed, considered and resolved the issues and concerns of the ANCs, the Commission determined that it has accorded the ANCs the "great weight" to which they are entitled.

A notice of proposed rulemaking was published in the D.C. Register on December 12, 1997. As a result of the publication of the proposed rules, the Commission received comments from Arcadia Residential and Commercial Design Services, the law firm of Jackson and Campbell, Lindsley Williams, and ANC-3C. After reviewing and discussing the comments received and the testimony presented during the public hearing, the Commission determined that the term "single-family dwelling" should be changed to "one-family dwelling" to conform to the Zoning Regulations. Additionally, the Commission determined that the flexibility given to the Zoning Administrator for standards in sections 401, 403, 404, 405 and 406 of chapter 4 of the Zoning Regulations should be higher for linear standards than for area standards and revised the percentages accordingly.

The proposed decision to approve the text amendments was referred to the National Capital Planning Commission (NCPC) under the terms of the District of Columbia Home Rule Act of 1973, as amended, 87 Stat. 790, Pub. L. No. 93-198, D.C. Code Subsection 1-201 et seq. The NCPC, by delegated action of the Executive Director dated December 19, 1997, determined that no federal interests would be affected by the proposed amendments.

The Zoning Commission believes that its decision to approve the text amendments set forth in this order is in the best interest of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act and is not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth in this order, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the following amendments to the Zoning Regulations:

1. Add a new Section 223 as follows:

223 ADDITIONS TO ONE-FAMILY DWELLINGS OR FLATS (R-1)

223.1 An addition to a one-family dwelling or flat, in those residential districts where a flat is permitted, that does not comply with all of the requirements of sections 401, 403, 404, 405 or 406 of this title shall be permitted if approved by the Board of Zoning Adjustment in accordance with the conditions specified in Section 3108 of Chapter 31 of this title, subject to the provisions of this section.

223.2 The addition shall not have a substantially adverse affect on the use or enjoyment of any abutting or adjacent dwelling or property; in particular:

(a) The light and air available to neighboring properties shall not be unduly affected;

(b) The privacy of use and enjoyment of neighboring properties shall not be unduly compromised;

(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; and

(d) In demonstrating compliance with paragraphs (a), (b) and (c) of this subsection, the applicant shall use graphical representations such as plans, photographs or elevation and section drawings sufficient to represent the relationship of the proposed addition to adjacent buildings and views from public ways.

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.

223.4 The Board may require special treatment in the way of design, screening, exterior or interior lighting, building materials or other features for the protection of adjacent and nearby properties.

2. Add a new Section 407 as follows:

407 MINOR FLEXIBILITY BY ZONING ADMINISTRATOR'S RULING

407.1 The Zoning Administrator is authorized to permit a deviation not to exceed two percent (2%) of the area requirements of sections 401 and

403 of this chapter; a deviation not to exceed ten percent (10%) of the linear requirements of sections 404 and 405 of this chapter; and a deviation of the requirements of section 406 of this chapter, not to exceed **either** two percent (2%) of the area standard **or** ten percent (10%) of the width standard; Provided, that:

(a) A building shall be allowed to deviate from the requirements of no more than two (2) of the sections identified in this subsection; and

(b) The deviation or deviations shall be deemed by the Zoning Administrator not to impair the purpose of the otherwise applicable regulations.

Vote of the Zoning Commission taken at its regular meeting on September 15, 1997: 4-0 (John G. Parsons, Herbert M. Franklin and Maybelle Taylor Bennett to approve; Jerrily R. Kress to approve by absentee vote).

This order was adopted by the Zoning Commission at its special public meeting on February 23, 1998 by a vote of 3-0 (John G. Parsons, Herbert M. Franklin and Maybelle Taylor Bennett to approve; Jerrily R. Kress not present, not voting).

In accordance with 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register, that is on MAR 13 1998.

MAYBELLE TAYLOR BENNETT
Chairperson
Zoning Commission

MADELIENE H. DOBBINS
Director
Office of Zoning

zco840/MHD