

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17556 of Murillo/Malnati Group, pursuant to 11 DCMR § 3103.2 for a variance from the rear yard requirements under section 404 to allow the renovation of four existing row dwellings and the construction of a new addition at the rear of the property in the R-5-D Zone District at premises 2816-2822 Connecticut Avenue, N.W. (Square 2107, Lots 56, 57, 75, and 76).

HEARING DATE: January 16, 2007
DECISION DATE: January 16, 2007 (Bench Decision)

DECISION AND ORDER

The Applicant filed an application with the Board of Zoning Adjustment on September 16, 2006, for a variance from the rear yard requirements, pursuant to 11 DCMR § 3103.2, of Section 404 to allow the renovation of four existing row dwellings and the construction of a new addition at the rear of the property in the R-5-D Zone District at premises 2816-2822 Connecticut Avenue, N.W. (Square 2107, Lots 56, 57, 75, and 76), (the “Property”). Following a public hearing, the Board voted 5-0-0 on January 16, 2007 to grant the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated September 15, 2006, the Office of Zoning advised the Applicant, the Office of Planning, the Department of Transportation, ANC 3C02 (the ANC for the area in which the Property is located), and the Councilmember for Ward 3, of the application.

The Board scheduled a public hearing on the application for January 16, 2007. Pursuant to 11 DCMR §3113.13, on October 25, 2006, the Office of Zoning mailed the Applicant, the owners of all property within 200 feet of the subject property, ANC 3C, the Office of Planning, and the Department of Transportation letters providing notice of hearing.

The Applicant’s affidavit of posting noted that the Property was properly posted on December 29, 2006.

Request for Expert Witness Status. The Applicant requested that the project architect, Bill Bonstra, of Bonstra Haresign Architects LLP, be admitted as an expert witness. The Board granted this request and Mr. Bonstra was admitted as an expert witness in architecture.

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Requests for Party Status. Advisory Neighborhood Commission (“ANC”) 3C was automatically a party in this proceeding. Requests for Party Status were filed by: (i) Rikke Davis (Garner) and Patrick Kevin Garner (owners of the property located at 2815 27th Street, N.W.); (ii) Deborah J. Freis and James H. Freis, Jr. (owners of the property located at 2635 Garfield Street, N.W.); and (iii) a group of concerned neighbors (“Concerned Neighbors”) who lived within 200 feet of the Property and included Mrs. Davis/Mr. Garner and Mr. and Mrs. Freis. The request for party status from the Concerned Neighbors was not filed in a timely manner. By a vote of 4-1-0, the Board granted party status to the Concerned Neighbors, with the understanding that Mrs. Davis/Mr. Garner and Mr. and Mrs. Freis would be represented by the Concerned Neighbors.

Applicant’s Case. Paul Tummonds, Esq., of Pillsbury Winthrop Shaw Pittman LLP represented the Applicant.¹ Testimony was presented by Julio Murillo, representative of the Applicant, and Bill Bonstra, project architect, regarding the project’s satisfaction of the area variance standards.

Government Reports. By a report dated January 9, 2007 (Exhibit 25) and in testimony at the public hearing, the Office of Planning (OP) recommended approval of the application. No other government reports were received.

ANC 3C: The ANC voted, at a regularly scheduled meeting on November 20, 2006 with a quorum present, by a vote of 8-0 to recommend approval of the variance application.

Parties and Persons in Support of the Application. There were no parties or persons in support of the application that appeared at the public hearing.

Parties and Persons in Opposition to the Application. Five persons (Stephen Eadland, Harriet Kelman, Hugh Henry May, Margaret O’Brien, and John Dunford) testified in opposition to the application at the public hearing.

FINDINGS OF FACT

The Property and the Surrounding Area

1. The Property is located along Connecticut Avenue, approximately two blocks north of the Adams Morgan/Woodley Park/National Zoo Metro Station in the Old Woodley Park Historic District.
2. The Property is bordered by a nine story apartment building to the north, an alley to the west, a row dwelling and a four story apartment building to the south.
3. To the west of the alley at the rear of the Property, in the interior of Square 2107, is a large surface parking lot that provides parking spaces for the apartment building to the north of the Property.

¹ The Applicant is the contract purchaser of 2822 Connecticut Avenue. On January 23, 2007, the Board received a letter from Irma S. Lann, Trustee of the Irma S. Lann Revocable Trust, which evidenced the Applicant’s authority to pursue this application.

4. The properties immediately to the west of the Property are located in the R-3 Zone District. The properties along Connecticut Avenue approximately two blocks to the south are located in the WP/C-2-A and WP/C-2-B Zone Districts.

Proposed Development of the Project

5. The Applicant proposes to renovate four existing townhouses that are currently occupied on the Property and construct a new addition at the rear of the Property. The exteriors of the existing row dwellings along Connecticut Avenue will be maintained, as will the building heights of approximately 45 feet.

6. The proposed addition will have a building height of approximately 74 feet. The addition will not have a mechanical penthouse on the roof. The proposed addition will include approximately 21 residential units and the total project will include approximately 33 residential units.

7. The project will have a floor area ratio (“**FAR**”) of 3.5 and will include 16 full-sized parking spaces. The addition will include full architectural treatment of all sides of the building. The rear of the addition will include bay windows that extend from the rear facade of the building, suspended above the rear parking.

8. The proposed addition will provide a rear yard of 19 feet - 6 inches to the face of the rear wall of the addition and 15 feet - 6 inches to the face of the suspended bay windows on the rear of the addition. Based on the height of the proposed addition, the Zoning Regulations require a minimum rear yard of 21 feet - 8 inches.

Satisfaction of the Area Variance Relief Standards

9. The Property includes existing buildings that the Historic Preservation Review Board (HPRB) has deemed to be contributing to the Old Woodley Park Historic District. Therefore, the ability to remove portions of the existing buildings or locate new structures on the property is limited and subject to HPRB review and recommendation to the Mayor to assure that alterations of existing structures and new construction are compatible with the character of the historic district.

10. The project has received conceptual design approval from the HPRB. In order to obtain a positive recommendation from that Board the Applicant was required to locate the addition towards the rear of the Property so it would appear as a separate structure when viewed from Connecticut Avenue.

11. The Property also includes a grade change of approximately nine feet.

12. The requirement to push the new addition to the rear of the property and the nine foot change in the topography of the Property limits the location for the drive lane providing access to the parking spaces, and the location of the building core (required stairwells, elevators, mechanical equipment, etc.).

13. As a result, the Applicant was forced to locate the addition on the Property in a manner that creates the need for rear yard variance relief. The degree of rear yard relief requested: 2 feet - 2 inches to the face of the building; and 6 feet - 2 inches to the face of the bay windows is not significant.

14. Strict compliance with the rear yard setback requirements would result in sub-standard residential units. The Board accepts the conclusion of the project architect that a residential unit with a depth of 55 feet is ideal for a residential unit and that the proposed project will provide units that have a depth of only 47 feet, 5 inches. A residential unit with a depth of only 41 feet, 3 inches (the depth that would occur with no rear yard relief) would be seriously deficient.

15. The addition, with the proposed rear yard setbacks of 19 feet – 6 inches to the face of the rear wall of the addition and 15 feet – 6 inches to the face of the suspended bay windows, will not cause any detriment to the public good. Garages are currently located right on, or very close to, the Property's boundary with the adjacent alley. The proposed development will create more distance between structures on the Property and the alley than currently exists.

16. The proposed height of the addition is consistent with other buildings in the area and is shorter than the apartment building immediately to the north of the Property. The addition will not include a mechanical penthouse on the roof, which will minimize any loss of light and air to the neighboring properties. The inclusion of the bay windows on the rear of the building, which creates the majority of the requested variance relief, will have no adverse impact on neighboring property, but to the contrary, will provide a more attractive and differentiated façade for surrounding residents that will see the rear of the addition.

17. The Property is located approximately two blocks from a Metrorail station in the high density residential land use category as shown on the Comprehensive Plan's Generalized Land Use Map. The proposed project, 33 residential units along Connecticut Avenue with building heights of approximately 45 and 74 feet, is entirely consistent with the Comprehensive Plan and planning goals for the District. Except for the rear yard requirements, development on the Property will satisfy all matter-of-right zoning requirements in the R-5-D Zone District.

Government Reports

18. The Office of Planning (“OP”) submitted a report, dated January 9, 2007 that supported the variance application. The OP Report noted the application’s satisfaction of the three parts of the area variance standard. In particular, the OP Report noted that “The character of Connecticut Avenue, which has taller apartment buildings interspersed with smaller row dwellings, the 60-foot setback from the row dwellings which give the impression of the addition as a separate building, and the limited visibility of the addition makes the proposal compatible with the area. As such, the requested relief should not pose substantial detriment to the public good or impair the intent, purpose or integrity of the Zone Plan.”

Advisory Neighborhood Commission Report

19. ANC 3C submitted a letter dated January 8, 2006, and presented testimony in support of the application. In testimony before the Board, the ANC representative noted the opportunities that the ANC had provided to residents of the surrounding community to comment on the proposed project.

CONCLUSIONS OF LAW

The Board is authorized to grant area variance relief pursuant to D.C. Code § 6-641.07(g)(3) (2001 Ed.), 11 DCMR §3103.2. In order to grant such relief the Board must determine that the Applicant has satisfied the following three part test: (i) the property must be subject to an extraordinary or exceptional situation or condition; (ii) a practical difficulty will result if the applicant is required to satisfy the strict application of the Zoning Regulations; and (iii) no harm to the public or to the zone plan will occur as a result of the approval of the variance application. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990).

The D.C. Court of Appeals held in *Clerics of St. Viator v. D.C. Board of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974) that the exceptional situation or condition standard goes to the “property”, not just the “land”; and that “...property generally includes the permanent structures existing on the land [footnote omitted].” *Id.* at 293-294. The Court held that the exceptional situation standard of the variance test may be met where the required hardship inheres in the land, or the property (i.e., the building on the land).

In reviewing the standard for practical difficulty, the D.C. Court of Appeals stated in *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A. 2d 535, 542 (D.C. 1972) that, “[g]enerally it must be shown that compliance with the area restriction would be unnecessarily burdensome. [Footnote omitted.] 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.” In area variances, applicants are not required to show “undue hardship” but must satisfy only “the lower ‘practical difficulty’ standards.” *Tyler v. D.C. Bd. of Zoning Adjustment*, 606 A.2d 1362, 1365 (D.C. 1992), citing *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990). Finally, it is

well settled that the BZA may consider "... a wide range of factors in determining whether there is an 'unnecessary burden' or 'practical difficulty'...." *Gilmartin*, 579 A.2d at 1171, citing *Barbour v. D.C. Bd. of Zoning Adjustment*, 358 A. 2d 326, 327 (D.C. 1976). See also, *Tyler v. D.C. Bd. of Zoning Adjustment*, 606 A.2d 1362, 1367 (D.C. 1992). Thus, to demonstrate practical difficulty, the Applicant must show that strict compliance with the regulations is burdensome, not impossible.

Based upon the Findings of Fact and having given great weight to the OP and ANC recommendations, the Board concludes that the Applicant has satisfied the area variance relief standards. The Board determines that the Property is subject to an exceptional situation or condition as a result of the specific constraints that have been put upon it by HPRB to locate the addition in such a way that necessitated the variance relief. No other property in this neighborhood has this specific requirement put upon it.

The Board finds that this exceptional condition results in a practical difficulty in satisfying the rear yard requirements of the Zoning Regulations. The request of HPRB that the new addition be pushed to the rear of the Property in combination with the need to have an appropriate width for the residential units, the location of the building's core elements, the topographical constraints of the property, and the need to provide an appropriately sized internal courtyard are all factors that create a practical difficulty to the Applicant. Although HPRB's views are advisory, a negative recommendation would require the Applicant to seek relief before the Mayor's Agent based upon a standard even more stringent than the variance test.

The Board finds that granting the requested relief from the rear yard requirement will not cause substantial detriment to the public good and the variance can be granted without impairing the intent, purpose, and integrity of the Zone Plan. The Board notes that the proposed height, density and parking spaces provided in this project satisfy the matter-of-right requirements in the R-5-D Zone District. In fact, the project provides more space in the rear of the Property than currently exists. The Board also notes that this Property is located in a high density residential land use area as determined by the Comprehensive Plan's Generalized Land Use Map. The Board concludes that granting the requested area variance relief is in harmony with the Zoning Regulations and Map and the use is not inconsistent with the Comprehensive Plan of the District of Columbia.

The Board notes the written statement and testimony presented by the Concerned Neighbors. As stated above, the Board finds that the Property is subject to an extraordinary situation or condition and that as a result of that condition, the Applicant has a practical difficulty in strictly complying with the regulations. The Board also concludes that the Concerned Neighbors' interpretation of the Court of Appeals' decision in *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972), with regard to the practical difficulty standard, is incorrect. The Court has clarified in later opinions that the statement in *Palmer* upon which Concerned Citizens rely ("[A] variance cannot be granted where property conforming to the regulations will produce a reasonable income **but, if put to another use**, will yield a greater income" (emphasis added.)) *Palmer* at 542 refers to use variances, not area variances. See, *Gilmartin v District of Columbia*, 579 A2d 1164 (1990) at 1170 ("Although this statement was within the section of the opinion

discussing area variances, it appears that it refers to the particular use of a property and *thus the economic discussion is more appropriately confined to use variances.*") (Emphasis added.) Accordingly, the Applicant is not required to address economic factors with regard to the potential use of the Property in order to satisfy the practical difficulty standard of the area variance. Finally, the Board finds that the concerns raised by the Concerned Neighbors and persons in opposition – building height, traffic and parking impacts, noise – are not relevant to the Board's analysis of whether the Applicant has satisfied the variance test for rear yard relief because they are not a result of the minor rear yard relief and would be the same if the building were built as a matter of right.

For the reasons stated above, the Board concludes that the Applicant has met its burden of proof. It is hereby **ORDERED** that the application for area variance relief from the rear yard requirements for the Property that is known as Square 2107, Lots 56, 57, 75, and 76) is **GRANTED**.

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Michael G. Turnbull to grant)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: **MAY 22 2007**

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

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 PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE

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CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

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.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment**



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As Director of the Office of Zoning, I hereby certify and attest that on May 22, 2007, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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TWR