



ZONING BOARD OF ADJUSTMENT

Date of Hearing: March 14, 2019
Date of Decision: May 9, 2019

Zone Case: 44 of 2019
Address: 3342 5th Avenue
Lot & Block: 28-E-19, 25, 26, 28, 29, 30
Zoning Districts: OPR-C
Ward: 4
Neighborhood: South Oakland

Owner: Walnut Capital Fifth LP
Applicant: Jonathan Kamin, Goldberg, Kamin & Garvin LLP

Request: New construction of 10 story office building with ground level retail. 100 accessory parking spaces.

Special Exception	908.03.D.3(f)	Special Exception allows height up to 120ft for building with frontage on Fifth Ave, 85ft otherwise permitted
Variance	908.03.D.3(f)	Requested height up to 185ft, above Special Exception request to 120ft <u>(Revised to 152' requested)</u>
Variance	908.03.D.3(g)	6:1 FAR permitted, 10:1 FAR requested <u>(Revised to 8:1)</u>
Variance	914.02	299 automobile parking spaces required, 100 provided

Appearances:

Applicant: Todd Reibord, Jonathon Kamin, Esq., Cindy Jampole, Gregg Perelman, Ruth Reidbord, Tom Price, David DelGreco, Esq.

In-Favor: Wanda Wilson, Kenneth J. Yardley, Andrea Boykowycz, Hannah Poland

Objecting: Mark Oleniacz, Phil Garrow, Elena Zaitsoff

Observing: Geof Becker

Findings of Fact:

1. The Subject Property is located at 3342 5th Avenue, at the corner with Halket Street, in the OPR-C (Oakland Public Realm, subdistrict C) District in South Oakland. Euler Way is located at the rear of the Subject Property.
2. The Subject Property slopes down approximately 15' from the front property line to the rear.
3. The parcel is irregularly shaped and tapers in width from 289' of frontage on Fifth Avenue to 220' of frontage on Euler Way at the rear. The Subject Property is 127.5' wide.
4. A series of one and two-story buildings are located on the Subject Property.
5. The Applicant proposes to demolish the existing structures and to construct a 152', 10-story office building with first floor retail on the Subject Property, with 100 parking spaces provided in an integral garage. (Ex. A-1.2).
6. The proposed building would have a total floor area of 267,900 sf and a Floor to Area Ratio ("FAR") of 8:1. (Ex. A-1.2).
7. The Applicant originally applied for special exceptions and variances to approve a 185', 12-story office building. The Applicant explained that the building size had been reduced as the result of discussions with the Oakland Planning and Development Corporation and other neighborhood stakeholders. (Ex. A-1.2).
8. Pursuant to Code Section 914.02, the proposed development would require 299 on-site automobile parking spaces.
9. The Applicant proposes to provide 100 automobile parking spaces in an integral parking garage with access from Euler Way. The Applicant also proposes to provide 125 bicycle parking spaces. (Ex. A-1.5).
10. The outer boundary of the Oakland Off-Street Parking Reduction Area, which reduces the Code's parking requirements by 50 percent, is located across Halket Street from the Subject Property. (Ex. A-1.2).
11. Cindy Jampole, P.E. of Trans Associates, testified and submitted a Transportation Impact Study which includes a number of proposed transportation demand management proposals which would mitigate the impact of the development on the surrounding neighborhood. (Ex. A-1.5).
12. The Applicant's site plan depicts 5,101 sf of public open space along the Fifth Avenue and Halket Street frontages. The Applicant indicated that the public space is intended to improve the pedestrian realm and was designed in conjunction with community outreach efforts. (Ex. A-1.2).
13. The Applicant testified that, because of the irregular shape and topography of the site the proposed height and FAR are necessary in order to provide the required on-site parking required by the Code and to make development financially feasible.
14. The Applicant further stated that the location of Duquesne Light utility infrastructure further limits the possibility of developing the site in strict conformity with the Code. (Ex. A-1.2).

15. The Applicant submitted a series of renderings intended to demonstrate the minimal impact of the requested height and FAR variances, as compared to a permitted building. (Ex. A-1.2).

16. The Applicant submitted a Community Benefits Agreement signed by the Applicant and the Oakland Planning and Development Corporation ("OPDC") regarding the proposed development. The agreement states that the Applicant shall: 1) provide a given amount of retail space on the first floor of the building for use by OPDC for "business and community uses;" 2) design the first floor of the building to enhance the public and pedestrian realm; 3) create a traffic demand management plan; and 4) provide a loan to OPDC to fund the Oakland Community Land Trust. (Ex. A-1.4).

17. A number of taller buildings are located in the immediately vicinity on Fifth Avenue, including the immediately adjacent SkyVue Apartments, a 10-story building located at 3333 Forbes Avenue. (Ex. A-1.2).

18. OPDC submitted a letter of support for the proposal, conditioned on the Applicant's commitment to the Community Benefits Agreement. The letter further indicates that the Oakland 2025 Master Plan "identifies the lower fifth/Forbes corridor as an opportunity for new mixed-use development...[and] also encourages integrating open space improvements into new development and fostering community serving retail and business." (Ex. O-5).

19. The Applicant submitted a series of letters in support of the development from elected officials and neighborhood stakeholders.

20. Mark Oleniacz, of 3249 Juliet Street (0.6 miles from the Subject Property), Phil Garrow, of 3219 Joe Hammer Square (0.3 miles from the Subject Property), and Elena Zaitsoff of 338 Ophelia Street (0.4 miles from the Subject Property), appeared at the hearing to oppose the requested development, citing concerns related to neighborhood character, height, massing, and loss of views, parking, and traffic. The objectors submitted a joint letter summarizing their concerns. (Ex. O-5).

21. The Applicant challenged the standing of the objectors to participate in the hearing, citing lack of sufficient proximity or relationship to the Subject Property. (Ex. O-2, 3, 6, and 7).

Conclusions of Law:

1. Code Section 908.03.D.3(c) permits buildings up to 85' in height with an FAR of 6:1, by right. Section 908.03.D.3(f) permits buildings up to 120' in height as a special exception. Section 908.03.D.3(g) permits additional FAR as a special exception. The Applicant therefore requests special exceptions pursuant to, and variances from, these provisions to permit the proposed 152'/10-story mixed-use building with an FAR of 8:1.

2. The Applicant also seeks a variance from Code Section 914.02, the Code's parking requirement of 299 on-site spaces, to permit the requested 100 on-site automobile parking spaces.

3. Under Pennsylvania law, a special exception, unlike a variance, is a form of a permitted use. By designating a use as a "special exception," the governing body has determined that the use is one that is appropriate in the zoning district and is thus presumptively consistent with the promotion of health, safety, and general welfare. See, e.g., *Bray v. Zoning Board of Adjustment*, 410 A.2d 909 (Pa. Commw. Ct. 1980); *In re Brickstone Realty Corp.*, 789 A.2d 333 (Pa. Commw. Ct. 2001).

4. The applicant for special exception approval has the initial burden to show that its proposal complies with the specific criteria delineated in the ordinance. *Bray*, 410 A.2d at 910. By showing

compliance with the specific criteria, the applicant establishes that the proposal is presumptively consistent with the promotion of public health, safety, and welfare. *Bray*, 410 A.2d at 911.

5. Objectors to a use that is permitted as a special exception must establish, with substantial and credible evidence, that the impact from the proposed use would be greater than normally expected from that type of use and would abnormally affect the public interest. See, e.g., *Manor Healthcare Corp v. Lower Moreland Twp. Zoning Hearing Bd.*, 590 A.2d 65, 71 (Pa. Commw. 1991).

6. To prove a “detrimental impact,” objectors to a proposed special exception cannot simply speculate but must raise specific issues regarding the effect of the proposed use on the public interest and they must show with “a high degree of probability” that the effect of the proposed use will be substantial. *Manor Healthcare Corp.*, 590 A.2d at 71 (quoting *Archbishop O’Hara’s Appeal*, 131 A.2d 587, 596 (Pa. 1957)). Opinions, without more substantive evidence, do not satisfy the objectors’ burden of proof. *Appeal of R.C. Maxwell Co.*, 548 A.2d 1300, 1304 (Pa. Commw. 1988); *Commonwealth of Pennsylvania Bureau of Corrections v. Pittsburgh City Council*, 532 A.2d 12, 14-15 (Pa. 1987).

7. Section 922.09.E sets forth the general conditions the Board is to consider with respect to variances. The Pennsylvania Supreme Court has summarized the criteria for determining whether to grant a variance as: 1) unique circumstances or conditions of a property would result in an unnecessary hardship; 2) no adverse effect on the public welfare; and that 3) variance proposed is the minimum variance that would afford relief with the least modification possible. *Marshall v. City of Philadelphia and Zoning Bd. of Adj.*, 97 A.3d 323, 329 (Pa. 2014); see also *Hertzberg v. Zoning Board of Adj. of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998), citing *Allegheny West Civic Council v. Zoning Bd. of Adj. of the City of Pittsburgh*, 689 A.2d 225 (Pa. 1997).

8. In *Hertzberg*, the Court recognized that a less restrictive standard is appropriate for dimensional variances, which require only for a reasonable adjustment of the zoning regulations to accommodate a use of property that is permitted. *Hertzberg*, 721 A.2d at 47-48. In determining whether unnecessary hardship has been established for a requested dimensional variance, the Board may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary for strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

9. In determining whether unnecessary hardship has been established with regard to dimensional variances, the Board may consider multiple factors, including the economic detriment to the applicant if the variance is denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

10. The Board concludes that because the proposed building would be consistent with the context of the surrounding neighborhood, including the adjacent 10-story building, and because the Applicant has made significant efforts to improve the public realm and accommodate the concerns of the surrounding neighborhood, approval of the requested variances and special exceptions will not cause negative impacts.

11. Further, the Board concludes that development consistent with the transportation demand management proposals from the Applicant’s Traffic Impact Study will not cause negative impacts on parking and traffic in the vicinity.

12. The Applicant has submitted substantial and credible evidence demonstrating that the unique conditions of the site, particularly the irregular shape, topography, and utility concerns, as well as accommodations made to the community, significantly constrain development of the site in strict conformity with the Code’s dimensional requirements.

13. Finally, the Applicant credibly demonstrated that variances requested represent the minimum relief needed to make development of the site feasible given the unique site conditions.

14. The Board acknowledges the concerns that the neighboring residents presented. However, it found those concerns to be speculative in nature and insufficient to meet the heavy burden of demonstrating that any impacts from the proposed use would somehow abnormally affect the public interest.

Procedural Standing Question

15. As to the Objectors, it is fairly questionable whether person's living more than 1,000' from the Subject Property reside in close enough proximity to confer standing and whether their testimony established a direct and immediate interest that will be harmed by the proposed building.

16. The concept of "close proximity" can be limited and Pennsylvania courts have held that an individual whose property is half a mile away from the property at issue is not in "close proximity." *Whitehall Manor, Inc. v. Planning Commission of the City of Allentown*, 79 A.3d at 728 n. 9, citing *Laughman v. Zoning Hearing Bd. of Newberry Twp.*, 964 A.2d 19 (Pa. Commw. Ct. 2009).

17. However, since both Ms. Zaitsoff and Mr. Garrow reside just under 0.5 miles from the subject property, the Board finds that they have standing, but just barely.

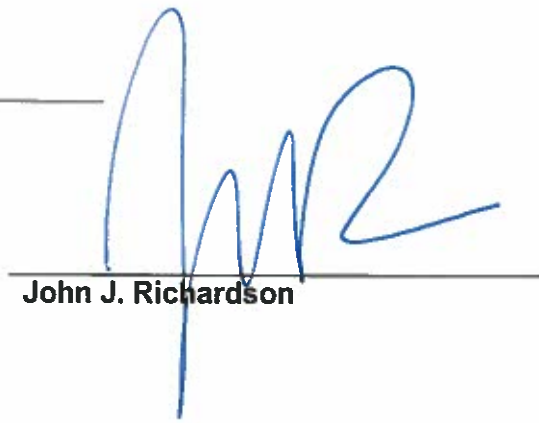
Decision: The Applicant's request for special exceptions pursuant to Code Sections 908.03.D.3(f) & (g), and variances from Code Sections 908.03.D.3 (c), (f) & (g) and 914.02 are hereby **APPROVED** subject to the condition that the Applicant shall comply with the requirements of the Community Benefits Agreement and the demand management proposals detailed in the Traffic Impact Study.



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LaShawn Burton-Faulk

RECUSED
Alice B. Mitinger, Chair



A large, stylized handwritten signature in blue ink, appearing to read 'John J. Richardson', written over a horizontal line.

John J. Richardson