



ZONING BOARD OF ADJUSTMENT

Date of Hearing: August 15, 2019
Date of Decision: October 24, 2019

Zone Case: 158 of 2019
Address: 3440 Forbes Avenue
Lot & Block: 28-F-211, 28-F-213, 28-F-215
Zoning Districts: OPR-C
Ward: 4
Neighborhood: Central Oakland

Owner: Wexford Science & Technology, LLC
Applicant: Strada Architecture, LLC

Request: New construction with ground floor retail, parking garage floors and office/lab above with green roof.

Variance	908.03.D.3(c)	From the permitted height of 128' (portion of the building where residential compatibility standards don't apply) and 60 feet (with LEED Bonus where residential compatibility standards do apply) to the requested height of 188.6'. Review of relevant height restrictions.
Special Exception	908.03.D.3(g)	6:1 FAR permitted, with Section 915.04.D LEED FAR bonus of 7.2:1 permitted, and 9:1 requested, or in the alternative, a Variance from Code Section 908.03.D.3(c) to allow for additional FAR.
Special Exception	916.09 / 916.02.B.2	Waiver of residential compatibility height up to 6 stories maximum building height not to exceed 50ft/4 stories within 51-100ft of residential zone, for building height above 6 stories, requested the building to be built to its full height at 89.7ft from the residential district

Appearances:

Applicant: Andrea Geragthy (Attorney)

In-Favor: Allison Andronic (Attorney), Georgia Petropuluos, Cindy Jampole, Michael Dembert, Clifford B. Levine, Abigail Mountain, Joseph Regan, Molly Finnell

Opposed: Elena Zaitsoff, Millie Sass, Mark Oleniacz, Andrea Boykowycz, Wanda Wilson, Marjory Lake

Observing: Jon Kamin (Attorney)

Findings of Fact:

Subject Property

1. The Subject Property is located at 3440 Forbes Avenue, at the corner with Coltart Street, in the OPR-C (Oakland Public Realm, sub-district C) District in Central Oakland. Iroquois Way is located at the rear of the Subject Property.
2. The Subject Property is comprised of three separate parcels: Lot and Block 28-F-211, 213 and 215. As a part of the proposed development, the Applicant would consolidate the three parcels into a single lot with 191' of frontage on both Forbes Avenue and Iroquois Way and 150' of frontage on Coltart Avenue.
3. The combined parcels would have a total lot area of 28,690 sf. (Ex. A-1.13).
4. A two-story building, with a pharmacy and a restaurant on the first floor, is located on the Subject Property. The building abuts an adjacent hotel building ("the Hotel") located at 3454 Forbes Avenue on the interior side property line. (Ex. A-1.4).
5. A surface parking lot is also located on the Subject Property, at the corner of Forbes Avenue and Coltart Avenue. (Ex. A-1.4).
6. The adjacent properties on all four sides of the Subject Property are also located in the OPR-C District. Residentially zoned properties are located within approximately 90' of the Subject Property, with Coltart Avenue addresses. (Ex. A-1.14).
7. The Subject Property slopes down approximately 10' from the front property line on Forbes Avenue to the rear property line on Iroquois Way, along Coltart Street. The Subject Property also slopes down approximately 10' the interior side property line to the exterior side property line on Coltart Street, along Iroquois Way. The elevation of the Subject Property is generally consistent along the front property line on Forbes Avenue. (Ex. A-3).

Adjacent Buildings

8. The hotel, a 12-story/128' building, is located on the adjacent property at 3454 Forbes Avenue. (Ex. A-1.10).
9. Although the Hotel has a Forbes Avenue street address, the Hotel's primary entrance is on Mckee Place. The hotel does not have a public entrance on Forbes Avenue.
10. The Hotel building abuts the Subject Property on the interior side property line, with windows located on the abutting façade. (Exs. A-1.3 and A-1.4).
11. A six-story/86' office building ("Office Building") is located at 230 Mckee Place, behind a portion Subject Property. The Office Building extends roughly from Mckee Place to point approximately

110' from Coltart Avenue. An alley and a surface parking lot are located between the Office Building and Coltart Avenue. (Exs. A-1.4 and A-1.14).

12. A 10-story/140' apartment building (3423 Forbes Avenue) and an eight-story/110' office building (3420 Forbes Avenue) are located in the immediate vicinity of the Subject Property. (Exs. A-1.6 and A-1.11).

Proposed Development

13. The Applicant proposed to demolish the existing building and to construct a 13-story/188'6" office building with first floor retail space on the Subject Property. The proposed offices are designed to accommodate laboratory functions. (Ex. A-1.10).

14. The proposed building would contain three-levels of integral garage parking with a total of 155 automobile parking spaces. 61 bicycle parking spaces would also be provided on-site. (Ex. A-1.10).

15. The Applicant testified that bedrock is located only 15' below the surface of the Subject Property and that this condition precludes the provision of parking below grade. (Tr. 26).

16. Pursuant to an agreement with the owners of the Hotel, the proposed building would be setback 18' from the interior side property line and the abutting Hotel façade. (Ex. A-1.10).

17. The Applicant's site plan depicts a 22' wide sidewalk on Forbes Avenue and a 10' wide sidewalk on Coltart Avenue. A 10' wide setback is currently located in front of the existing building on the Subject Property on Forbes Avenue. (Ex. A-1.3).

18. The Applicant asserted that the proposed additional front and side setbacks result in loss of 35,000 sf of rentable floor area for the building. (Tr. 30; Ex. A-1.10).

19. The Applicant also stated that the proposed laboratory office use requires a height of 15' between floors, unlike the 13' required for more typical offices, which resulted in an increased proposed height for the building. (Tr. 10-11, 30; Ex. A-1.11).

20. The proposed building would have a gross floor area of 258,555 sf. With the 28,690 sf lot area, the building would have a Floor to Area Ratio ("FAR") of 9:1).

21. The Applicant submitted a sun/shady study for the proposed building that demonstrates that the structure would not cast shadows on nearby residential properties. (Tr. 34-35; Ex. 12).

22. Cindy Jampole a registered traffic engineer with Trans Associates testified and submitted a technical memorandum which asserts that the proposed additional density would not cause detrimental traffic impacts. (Tr. 48-55; Ex. A-1.17).

Neighborhood Testimony

23. Councilperson Bruce Kraus testified at the hearing in opposition to the Applicant's requests, citing general concerns about neighborhood impacts and the lack of community support.

24. Wanda Wilson, of the Oakland Planning and Development Corporation submitted a letter and testified in opposition to the Applicant's request, asserting that the proposed building lacked

community support, would have a negative impact on the neighborhood, and the Applicant has not met the approval criteria for a variance. (Ex. O-1).

25. Marjorie Lake, representing the Coltart Area Residents Association, submitted a letter and testified in opposition to the Applicant's request, citing concerns related to parking, traffic, building height, density, and neighborhood character. (Ex. O-6).

26. Elena Zaitsoff, representing the Oakliff Community Organization, submitted a letter and testified in opposition to the Applicant's requests, citing concerns related to parking in the surrounding neighborhood, and the assertion that the Applicant has not met the criteria for approval. (Ex. O-4).

27. Mark Oleniacz, representing the South Oakland Neighborhood Group, submitted a letter and testified in opposition to the Applicant's request, citing concerns related to neighborhood compatibility, parking, traffic, and the assertion that the Applicant has not met the criteria for approval. (Ex. O-6).

28. The Applicant challenged the standing Ms. Zaitsoff and Mr. Oleniacz to participate in the hearing, based on the distance of their residences and neighborhoods from the Subject Property.

29. Ms. Zaitsoff owns 338 Ophelia Street, 1,780' from the Subject Property. (Ex. O-4). Mr. Oleniacz owns 3249 Juliette Street, 2,426' from the Subject Property. (Ex. O-5).

Post-Hearing Procedure

30. Following the hearing the Board provided the parties with the opportunity to submit Proposed Findings of Fact and Conclusions of Law. The parties made their submissions and the record closed on September 29, 2019.

Conclusions of Law:

General Approval Standards

1. 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).

2. 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.

3. 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.

Relevant Height Provisions

Contextual Height:

4. Code Section 925.07.D states that permits the use of a contextual height limit, to permit a higher by-right maximum than otherwise permitted in the base zoning district. The permitted contextual height “may fall at any point between the (zoning district) maximum height limit and the average height of the buildings that exist **on adjoining lots that are oriented on the same side of the street as the subject lot**. If the subject lot is a corner lot, the contextual height may fall at any point between the (zoning district) maximum height limit and the building height that exists on the adjoining lot that is oriented on the same side of the street as the subject lot” [Emphasis added].

5. The Code further states the contextual height provisions “shall not be interpreted as allowing buildings heights that would conflict with Residential Compatibility Standard (“RCS”) height limits of Chapter 916.”

6. Objectors to the proposed development assert the contextual height provisions should not apply because the Hotel, the building that would establish a 128’ contextual height allowance, has its primary entrance on McKee Place and not Forbes Avenue.

7. The Applicant asserts that the contextual height provisions should apply because the Hotel lot is oriented toward Forbes Avenue, though the building itself is not.

8. The Applicant argues further that the meaning of “oriented” in the Code is ambiguous and should be interpreted in a light most favorable to the Applicant. While the Code does not specifically define “oriented,” the Board does not agree that the term is ambiguous in this context.

9. Given that it is the adjacent building, and not the metes and bounds of the adjacent underlying property, which establishes the contextual height, the Board concludes that the only reasonable interpretation of Code Section 925.07.D is that the term “oriented” is intended to refer to the orientation of the adjacent building in establishing the contextual height.

10. The Board concludes that the concept of a “lot” being “oriented” in any direction, without reference to the orientation of a building on that lot, is nonsensical and cannot reasonably be interpreted as the intent of City Planning and City Council when Code Section 925.07.D was drafted and approved.

11. As the Hotel’s primary public entrance faces McKee Place, the Board finds that the Hotel is oriented to McKee Place. Therefore, because the Hotel is not oriented to the same street as the proposed building (i.e. Forbes Avenue), the Board concludes that the contextual height provisions are not applicable in this case.

12. Regardless of any permitted contextual height, portions of the proposed building that would be subject to the Residential Compatibility Standard’s would still be subject to the height limitations of that Section.

LEED Height and FAR Bonus:

13. Code Section 915.04.D permits a 20% by-right height bonus for LEED certified buildings.

14. As the building is proposed to meet LEED Silver standards for sustainable building design, it would be permitted a height of 102' and an FAR of 7.2:1, with a gross floor area of 206, 568 sf, pursuant to the sustainability bonus provisions in Code Section 915/4.D. (Tr. 36-37, Ex. A-1.13).

15. Code Section 915.04.B states that the "bonuses may not be applied in addition to any additional height or FAR variances or special exceptions granted by the Zoning Board of Adjustment."

16. Because the Applicant seeks additional height variances and special exceptions, the Code clearly does not permit the application of the LEED height or FAR bonus on top of those. The Applicant can utilize the bonuses, or it can seek variances and special exceptions, but it cannot do both.

Waiver of Residential Compatibility Height Standard:

17. Code Section 916.02.B, a part of the Code's Residential Compatibility Requirement ("RCS"), imposes a 50'³/₄-story height limitation for buildings within 51' to 100' from a residentially zoned property.

18. Code Section 916.09 permits the waiver of the Code's RCSs as a special exception subject to certain requirements.

19. The approval criteria for the special exception state that "Building height restrictions found in this chapter may be waived only if there is a taller intervening structure between the proposed structure and the adjacent residential zoning district, in which case the height shall be limited to the height of the intervening structure" [Emphasis Added].

20. A 10' wide sliver of the Subject Property along Iroquois Way to a line 10' is located within 100' of residentially zoned properties. (Ex. A-14).

21. The 86' tall Office Building located at 230 Mckee Place intervenes between a portion of the proposed building and the residentially zoned properties, but not the entirety.

22. Although specific measurements were not provided to the Board, the exhibits make it plain that only a surface parking lot would intervene between the majority of proposed building and the residentially zoned properties.

23. Therefore, the minimal portion of the proposed building that is subject to the RCSs would only be eligible for the waiver of the height standards to the extent that the Office Building actually intervenes between that portion of the building and a residentially-zoned property. The remainder of the proposed building would require a variance to exceed the Residential Compatibility Standards maximum height requirement for the applicable portion of the building.

24. Further, for the minimal portion of the building that is eligible for the waiver, the Special Exception would only approve height up to 86', the height of the Office Building at 230 Mckee Place. Therefore, a variance would be required to approve any additional height beyond 86'.

Procedural Standing Question

1. 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.

2. 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).

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

Approvals Requested

4. The Applicant seeks various special exceptions and variances to construct a 188.6' / 13-story building on the Subject Property with an FAR of 9:1.

5. The Applicant has made a number of creative arguments related to contextual height, the RCS, and LEED bonuses, to increase the permitted height and density permitted on-site and minimize the scope of the variances requested.

6. While the Board does not agree with the Applicant's arguments regarding the applicable height and FAR standards for the reasons set forth above, it is not even necessary for the Board to reach those conclusions to issue a denial of this application because the Applicant has failed to demonstrate any unique condition or hardship associated with Subject Property which would justify the relief requested here.

7. Regardless of whether the permitted by-right height of the Subject Property is 85' or 128', the Applicant has not submitted adequate evidence of hardship or unique condition to justify a variance that would permit a height up 188'6", more than 100' taller than the Code's base height allowance.

8. Furthermore, the Board concludes that the Applicant has failed to demonstrate that the proposed building, more than 100' taller than the permitted base height in the OPR-C, would not impose negative impacts on the surrounding neighborhood.

9. Consistent with the evidence and testimony presented and the applicable legal standards governing dimensional variances and special exceptions, the Board concludes that approval of the requested variances and special exceptions must be denied.

Decision: The Applicant's request for variances from Section 908.03.D.3 and special exception pursuant to Code Section 908.03.D.3 and 916.09 is hereby DENIED.

RECUSED

Alice B. Mitinger, Chair


LaShawn Burton-Faulk


John J. Richardson