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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 13-AA-701

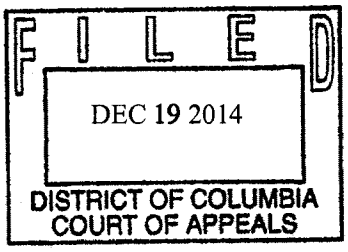
RICHARD KLUGMAN, PETITIONER,

v.

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT, RESPONDENT,

and

3579 WARDER STREET, LLC, INTERVENOR.



On Petition for Review of the Decision
and Order of the District of Columbia Board of
Zoning Adjustment
(BZA-18448)

(Submitted October 14, 2014 Decided December 19, 2014)

Before THOMPSON and BECKWITH, *Associate Judges*, and NEBEKER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Richard Klugman challenges a January 15, 2013, Decision and Order of the District of Columbia Board of Zoning Adjustment (the "BZA" or the "Board") that granted the application by applicant/intervenor 3579 Warder Street, LLC (the "applicant") for variances from the lot area requirement, lot occupancy requirement, and nonconforming structure requirements of the District of Columbia zoning regulations. The variances allow the applicant to add a floor to a former rooming house located at 1221 Otis Place, N.W. ("the property" or "the building") in an R-4 District and to convert the row house into a four-unit condominium apartment building. Petitioner argues that the BZA's determination that the applicant satisfied the legal requirements for the variances was not supported by substantial evidence. We disagree and therefore affirm.

I.

The BZA's authorizing statute provides that the Board has the power to authorize "a variance from . . . strict application" of the zoning regulations

> Where, by reason of . . . [an] extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under this subchapter would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, . . . so as to relieve such difficulties or hardship, provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map[.]

D.C. Code § 6-641.07 (g)(3) (2012 Repl.); *see also* 11 D.C.M.R. § 3103.2 (g)(3) (2013) (reiterating the statutory language). Thus, to obtain relief, an applicant for a variance must show that "(1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan[.]" *Fleischman v. District of Columbia Bd. of Zoning Adjustment*, 27 A.3d 554, 560 (D.C. 2011).

"When reviewing BZA decisions, we will generally defer to the Board's findings and will not second-guess the Board's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *N St. Follies Ltd. P'ship v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584, 588 (D.C. 2008) (internal quotation marks omitted). In particular, "[d]eterminations of whether 'practical difficulties' exist . . . must be judicially reviewed under a rule of deference to administrative expertise." *Wolf v. District of Columbia Bd. of Zoning Adjustment*, 397 A.2d 936, 942 (D.C. 1979). "Where the BZA's factual findings on the existence or not of 'practical difficulties' are neither arbitrary nor capricious, they will be upheld on review." *Id.* at 942-43. We will uphold the BZA's decision if it "rationally flow[s] from findings of fact supported

by substantial evidence in the record as a whole." *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1032 (D.C. 1995) (internal quotation marks omitted).

II.

Petitioner argues that the Board did not have substantial evidence before it to satisfy any of the prongs of the "three-part test, each part of which the applicant for the variance has the burden of satisfying before BZA may grant a variance[.]" *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). With respect to the "extraordinary or exceptional condition" prong, he asserts that a necessary predicate for the granting of a variance is that "the circumstances which create the hardship [or the practical difficulties] uniquely affect the [applicant's] property[.]" *Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230, 234 (D.C. 1973); *see also Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972) ("To support a variance it is fundamental that the difficulties or hardships be due to unique circumstances peculiar to the applicant's property and not to general conditions in the neighborhood."); *cf. Gilmartin*, 579 A.2d at 1166, 1168 (rejecting a challenge to the BZA's order on the issue of uniqueness because "it seems unlikely that many properties would be affected in this particular way, so that these particular types of variances would be required for a large number of properties[.]"). He asserts that the applicant provided no evidence other than its agent's uncorroborated testimony that the property, with its "deteriorated condition," was in any worse condition than any other neighborhood property of its (100-year-old) vintage.[1]

Petitioner's argument gives short shrift to our case law establishing that the requisite unique effect (or close-to-unique effect, *see Gilmartin*, 579 A.2d at 1166, 1168) can "arise[] from a confluence of factors" affecting a single property. *Id.* at 1168. In this case, the BZA heard evidence of such a confluence of factors: that the end-unit property not only was in deteriorated condition but also had "a number

[1] We note that applicant's principal, Mohammed Pishvaeian, did present photographs of the property to corroborate his testimony about "the deterioration in the walls, in the ceilings and the joists and the rain that . . . was coming through the property."

of unnecessary interior walls" (which Mr. Pishvaeian testified were putting undue pressure on the building joists and the end unit wall) and an "unconventional layout," as well as associated increased renovation costs, because of its past use as an 11-room boarding house.[2] That the "unnecessary interior walls," which the applicant had removed, no longer existed at the time of the BZA hearing did not preclude the BZA from taking them into account because the costs incurred to remove them were a factor in whether it was financially practical for the property to be marketed as a less-than-four-unit building.

Turning to the second prong of the three-part test, petitioner argues that the BZA accepted the applicant's claim of financial hardship without "independent evidence . . . other than the applicant's own testimony" about the estimated cost to renovate the property based on the applicant's similar project on Thirteenth St., N.W., and without giving appropriate weight to the evidence that a large part of the cost burden was the high purchase price of the property, a factor "determined solely by the applicant."[3] We note first that, because this is an area-variance rather

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[2] Applicant argued that the property showed the "extended levels of deferred maintenance and extensive wear and tear that is incurred by that type of [rooming house] use[.]"

Notably, in 2010, the Board approved petitioner's application for an area variance to convert a twelve-unit rooming house in the same R-4 District one block from applicant's property into a three-unit apartment house with a new third story addition. In that case, petitioner argued and the Board agreed that the configuration of the rooming house and the expense of renovation created a uniqueness, an extraordinary or exceptional condition, and a practical difficulty that entitled him to variance relief.

[3] Petitioner argues that the BZA improperly dismissed the opponents' "self-created hardship" argument. However, as the BZA noted, this court has repeatedly held that "self-created hardship is not a factor to be considered in an application for an area variance, . . . as that factor applies only to a use variance." *Ass'n for Pres. of 1700 Block of N St., etc. v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978); *see also Gilmartin*, 579 A.2d at 1171 ("[P]rior knowledge or self-imposition of the difficulty d[oes] not bar granting an area variance.").

than a use-variance case, the applicant was not required to show that it would suffer hardship if not permitted to convert the property as proposed; "[i]t is well-established in our case law that the higher 'undue hardship' standard applies to requests for use variances while the lower 'practical difficulty' standard applies to area variances." *Fleischman*, 27 A.3d at 562 n.15 (internal quotation marks omitted). Second, we have held that the unrebutted testimony of a single witness who testified on the basis of information and belief can supply substantial evidence to support a BZA ruling. *See Woodley Park Cmty. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628, 640-41 (D.C. 1985); *see also Citizens' Coal. Against Proposed Brookings Office Bldg. v. District of Columbia Zoning Comm'n*, 516 A.2d 506, 509-10 (D.C. 1986) ("As long as there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, the finding withstands substantial evidence review.").

In this case, although the party-in-opposition testified to the ($16,000) amount he paid to remove the interior walls of his adjacent, 100-year-old row house after he purchased it in October 2010 (i.e. two years prior to the applicant's purchase of the subject property in July 2012), he did not testify about the cost of his "entire renovation project" and, more to the point, did not rebut the aggregate "Renovation Hard Cost Estimate" presented in the applicant's "Profit and Loss Analysis." The BZA was entitled to credit Mr. Pishvaeian's unrebutted testimony about rising construction costs and his testimony that real estate prices had increased 33 percent over prices two or three years earlier.[4]

Petitioner also argues that the BZA had no authority to grant a variance to assure the applicant a profit. However, our case law has "eliminated any doubt that economic use of property may properly be considered as a factor in deciding the question of what constitutes a[] . . . practical difficulty" that can support variance relief in area variance cases. *Tyler v. District of Columbia Bd.* of *Zoning Adjustment*, 606 A.2d 1362, 1367 (D.C. 1992) (internal quotation marks and brackets omitted); *see also id.* at 1366 (rejecting the categorical contention "that the BZA does not have authority to grant variances to make a particular project economically feasible[]"). In *Wolf*, we held that the BZA properly granted an area variance to permit conversion of a property to a three-unit rental apartment building where the marketability of the property would otherwise have been

[4] Mr. Pishvaeian testified that, because of low inventories, properties in the neighborhood "sell within 24 hours from the time they come in the market" and may sell for $100,000 more than they would have two or three years earlier.

unfeasible, causing the applicant's investment to yield a loss rather than a return. *See* 397 A.2d at 943. Further, our case law declaring it "certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income," *Palmer*, 287 A.2d at 542, establishes by implication that a sufficient "practical difficulty" to support an area variance can exist where strict application of the zoning regulations will preclude a reasonable return on an investment in property. Here, the BZA concluded, after examining the applicant's profit and loss analysis, that "a fourth unit [was] required to really make the project one that can really be financially worth going forward," that strict application of the zoning regulations would create a practical difficulty in bringing the property up to code and marking it marketable, and that conversion to four units was "necessary for the viable reuse of the building." We have said that "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" and that it is "the Board's task to decide on which side of the — necessarily imprecise — line . . . the evidence . . . falls." *Tyler*, 606 A.2d at 1368. We discern no reason to second-guess the BZA's line-drawing with respect to whether the applicant in this case faced a "practical difficulty."

Lastly, petitioner advances a number of arguments as to why the BZA lacked substantial evidence to conclude that the requested variances could be granted "without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity" of the zoning regulations. We address these in turn.

Petitioner asserts that the BZA summarily dismissed and thus failed to give "great weight," D.C. Code § 6-623.04 (2012 Repl.), to the Office of Planning ("OP") position that approval of the application would be contrary and detrimental to the intent and integrity of the zoning regulations. Section 6-623.04 required the BZA to specifically acknowledge and address OP's position and to provide a reasonably precise explanation for its disagreement with OP's recommendation. *See Spring Valley-Wesley Heights Citizens Ass'n v. District of Columbia Zoning Comm'n*, 79 A.3d 904, 912 (D.C. 2013). We are satisfied that the BZA did that, in a "discernible manner." *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C. 1990). Although the section of the BZA's order that acknowledges the requirement of § 6-623.04 does not discuss at length OP's "contention that the conversion of the rooming house to a three-unit building was economically feasible," the BZA did, earlier in the order, explain why it disagreed

with that view. The BZA explicitly credited the applicant's testimony and evidence, including the applicant's "financial analysis showing the expected return on the renovation of the building." Thus, the BZA credited Mr. Pishvaeian's testimony that the expected return from three renovated units (an approach that OP opined was one for which the applicant "may be able to make an acceptable case for variance relief") would yield income of less than 1.5% on his investment after two years of work and risk, a return that would be "equivalent to what you would get in your bank account" and, in the BZA's words, would not be "economically feasible under the circumstances."

Further, while the BZA did not discuss at length OP's contention that permitting the applicant to construct a four-unit building "would be contrary and detrimental to the intent and integrity of the Zoning Regulations," it explained earlier in its order its reasoning that the applicant's proposal would "not alter the building's footprint substantially" and its reasoning that approval would make it financially feasible to restore the building to "residential use, at a lower density than its prior 11-room boarding house use"[5] and would allow the building to

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[5] Party-in-opposition Elias Wolfberg testified that "just prior to the applicant purchasing the property[,] there had been a single family living there . . . for ten years." He stated in a written submission that a single family had occupied the property for more than eleven years prior to applicant's purchase of the property. Although the BZA referred to the undisputed testimony that the property had been occupied as a single-family residence (rather than a rooming house) during the most recent ten- (or eleven-) year period as an "alleg[ation]," that undisputed testimony did not preclude the BZA from finding that conversion of the deteriorated building into a four-dwelling-unit property would yield a predictably lower-density use of the property.

While petitioner is correct that the BZA did not specifically address the comment it received that the multiple kitchens and bathrooms in a four-unit building would impose a substantial burden on the public infrastructure (i.e., the "neighborhood's combined sewer system"), we are satisfied that the BZA's conclusion that approval of the application would result in lower density than the property's prior 11-room boarding house use sufficiently responded to that infrastructure concern (since it is hardly self-evident that more facilities, but fewer people using them, would be likely to impose a greater burden on the sewer system).

(continued...)

"remain in residential use in a manner consistent with the relatively lower density residential use of the surrounding neighborhood."

Petitioner is correct that Advisory Neighborhood Commission ("ANC") 1A reported its support for the application before it was amended, during the public hearing, to seek additional variance relief (necessitated on the basis of a more accurate lot-occupancy measurement). To the extent that the BZA's statement that the ANC "did not express any issues or concerns" about the amended application can be read to mean that the ANC formally approved the amendments made during the public hearing, the statement may be misleading. However, nothing in the ANC's report indicated that its support for the application was tied to the particular variance(s) the applicant sought; rather, the ANC stated that it had no concerns with "[c]onversion of an 11-bedroom rooming house to a four-unit apartment," a proposal that did not change." And while the petitioner is also correct that there were no witnesses who testified at the BZA hearing that the project "would not visually intrude upon the character, scale, or pattern of houses in the neighborhood[,]" the BZA apparently was recalling that language as contained in the many signed (form) letters from neighbors that were submitted in support of the application.[6]

(...continued)

[6] As petitioner notes, the BZA Order did not mention the protest letters, signed by over 50 neighbors who opposed the applicant's proposal, that the opponents submitted. However, the protest letters made the same point that petitioner and party-in-opposition Wolfberg made in their testimony and written submission: that the R-4 residential zone was established with the specific intent of preserving the neighborhood for single family dwellings and that approval to convert the property to a four-unit building would encourage similar overdevelopment by other developers. The BZA's order acknowledges these objections, see Order at 2 (noting the objection that "approval of the requested zoning relief would encourage other property owners in the neighborhood to seek approval of additional units in their buildings") and at 4 (recognizing that "[t]he primary purpose of the R-4 zone is the stabilization of remaining one-family dwellings"). This is not a case in which the BZA "ignored [a] body of evidence adduced in opposition to [applicant's] proposal." *Levy*, 570 A.2d at 751.

(continued...)

As to petitioner's argument that the BZA did not adequately consider the detriment to the public good from the possible increased need for on-street parking, the BZA was entitled to rely on the fact that the District of Columbia Department of Transportation found "no adverse impact to the transportation system" from the applicant's proposal and on the undisputed testimony by appellant's architect and the representation by applicant's counsel that the applicant would provide the two parking spaces legally required for four units.[7]

(...continued)

Although the BZA did note, toward the end of its summary of the views of the party-in-opposition, that Mr. Wolfberg "objected that the planned third story at the subject property would compromise his view," Order at 2, this part of the BZA's Order began by accurately summarizing Mr. Wolfberg's objections that related to the three-part test. Thus, we do not agree that the BZA mischaracterized or demeaned the opponents' argument as being based on the project blocking their view.

[7] Petitioner also argues that the BZA was biased in favor of the applicant. As the petitioner cites no basis for this claim other than the Board's ruling, we are not persuaded that the Board acted without the requisite impartiality. *Cf. Bansda v. Wheeler*, 995 A.2d 189, 203 (D.C. 2010) ("'To be disqualifying, the alleged bias and prejudice must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'") (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.").

Wherefore, the BZA Decision and Order is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

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Clerk of the Court

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