

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17874 of Yebeltal Kebede, pursuant to 11 DCMR § 3101.2, for a variance from the use provisions to establish a retail grocery store (basement only)¹ under subsection 330.5, in the R-4 district, at premises 1403 6th Street, N.W. (Square 479, Lot 28).

HEARING DATE: January 27, 2009
DECISION DATE: March 3, 2009

DECISION AND ORDER

This application was submitted on September 2, 2008 by Yebeltal Kebede (“Applicant”), the owner of the property that is the subject of this application (“subject property”). The Applicant applied to the Department of Consumer and Regulatory Affairs (“DCRA”) for a certificate of occupancy to operate a “retail grocery store” at the subject property, which was denied because new grocery stores are not permitted in any residence zone. The applicant did not appeal that decision, but instead filed this application for a use variance to establish a retail grocery store in an R-4 zone district.

The Board held a public hearing on the application on January 27, 2009. At the conclusion of the hearing, the Board kept the record open to receive further information and scheduled a decision for March 3, 2009. On that date, the Board decided to deny the application by a vote of 5-0-0.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated September 4, 2008, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 2C, the ANC within which the subject property is located, the member for Single Member District 2C02, and the Councilmember for Ward 2. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing in the *D.C. Register* and mailed such notice to the Applicant, ANC 2C, and all owners of property within 200 feet of the subject property.

¹As originally advertised, the application requested grocery store use in the basement and first floor, but during the proceedings on the application, the request was changed to encompass only the basement.

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Requests for Party Status. ANC 2C was automatically a party to the application. There were no requests for party status.

Applicant's Case. The Applicant and his attorney discussed his personal situation, the need to re-locate his current grocery business, and how, in their opinion, the application meets the use variance test.

Government Reports. The Office of Planning filed a report with the Board on January 16, 2009 recommending denial of the application. OP opined that the application failed to meet any of the three prongs of the use variance test.

No other government reports were filed.

ANC Report. ANC 2C filed a report with the Board on October 14, 2008 stating that at a properly-noticed, regularly-scheduled meeting with a quorum present, the ANC had voted to support the application. Other than stating that the Applicant spoke in favor of his application at the ANC meeting, the ANC letter did not present any analysis or explanation of why the ANC recommended approval of the application.

Persons in Support or Opposition. The Board received one letter in opposition to the application and eight letters in support, as well as a petition in support with approximately 60 signatures. Four neighbors also testified in support of the application. The single letter in opposition objects to the Applicant's store's sale of alcoholic beverages and states that gang members "frequent the store's present location." Exhibit No. 21. The letters and testimony in support emphasize the convenience of the Applicant's store and how this would be lost if the application were denied, particularly negatively impacting the many seniors in the neighborhood.

FINDINGS OF FACT

The subject property and the background of the application.

1. The subject property is located at address 1403 6th Street, N.W., in an R-4 zone district.
2. The property fronts on 6th Street, N.W., and is located one building from the northeast corner of 6th and O Streets, N.W. A new grocery store is not a permitted use in this R-4 zone (11 DCMR § 330.5); therefore, a use variance is required.
3. On the property is a 2-story plus basement row dwelling with exterior stairs leading down to a front entrance to the basement.
4. There is no alley access to the rear of the property.

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5. Immediately adjacent to the subject property, at the corner of 6th and O Streets, is another building which shares a party wall with the Applicant's dwelling. On the first floor of this attached building is a retail grocery store operated by the Applicant.
6. The address of the attached building containing the Applicant's grocery store is 1401 6th Street, N.W. It is also in the R-4 district.
7. The Applicant does not own the building at 1401 6th Street, but leases the first floor for his grocery establishment.
8. The grocery store was lawfully established prior to the change in zoning. As such it is a nonconforming use pursuant to the definition of that term at 11 DCMR § 199.1.
9. The building containing the grocery store is configured for retail use on the first floor. It has a large, commercial-type window that wraps around the corner.
10. The building containing the grocery store is a larger building than the Applicant's dwelling.
11. The Applicant's lease will end in the spring of 2009 and will not be renewed, therefore, after the lease terminates, his grocery store will no longer be able to operate from the building at 1401 6th Street.
12. The grocery operates from 9:00 a.m. to 10:00 p.m. seven days a week and serves the local neighborhood, many of whose residents are senior citizens on fixed incomes and/or without access to vehicles.
13. The next-closest grocery store is a Giant store approximately two blocks from the subject property.
14. The Applicant proposes to re-locate his grocery store from 1401 6th Street to the subject property (1403) and establish it in his basement, continuing to use the rest of the subject property for residential use.
15. The nonconforming grocery store at 1401 6th Street cannot be re-located, or even extended into other portions of its existing building, without zoning relief. 11 DCMR § 2002.3.

The use variance

No exceptional condition

16. The property is a regularly-shaped rectangle with a length on both sides of 62.25 feet, and a uniform width of 21.75 feet, for a total area of approximately 1,354 square feet.
17. The subject row dwelling is currently being used as a flat. It is owned by the Applicant, who resides there with his family.

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18. A flat is a matter-of-right use in this R-4 zone district.

No undue hardship

19. There was no evidence that residential use could not continue at the subject property. Therefore, the subject row dwelling can continue to be used as a flat or as a one-family dwelling, both of which are permitted uses in this R-4 zone.

There would be a substantial detriment to the zone plan.

20. The “primary purpose” of R-4 zone districts is “the stabilization of remaining one-family dwellings.” 11 DCMR § 330.2. See also, Zoning Commission Order No. 06-47 (2007), at 2, where this purpose was recently repeated and re-emphasized.

CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property … or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition” of the property, the strict application of the Zoning Regulations would “result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property....” D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. The “exceptional situation or condition” of a property can arise out of the structures existing on the property itself. See, e.g., *Clerics of St. Viator v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 293-294 (D.C. 1974).

Relief can be granted only “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. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. A showing of “practical difficulties” must be made for an area variance, while the more difficult showing of “undue hardship,” must be made for a use variance. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972).

Because the Applicant in this instance “seeks a use ordinarily prohibited in the particular district,” the request is considered one for a use variance. *Id* The Applicant was therefore required to demonstrate an exceptional situation or condition of the property and that such exceptional condition results in an “undue hardship” to him. Lastly, the Applicant had to show that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The District of Columbia Court of Appeals (“DCCA”) has determined that “undue hardship” only exists “where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations.” *Palmer*, 287 A.2d at 542. *Accord.*, *Bernstein v. D.C. Bd. of Zoning*

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Adjustment, 376 A.2d 816, 819-820 (D.C. 1977) (“[I]t must be shown that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may be reasonably adapted.”)

This Applicant did not meet his burden as to any prong of the use variance test.

As to the first prong, neither the property nor the dwelling on the property is beset with any exceptional conditions or unusual circumstances. The property is a regular rectangle with no topographical issues.

Nor will compliance with the use regulations for an R-4 District result in an undue hardship upon the Applicant. The row dwelling is currently used for residential purposes, which can be continued indefinitely. The only “hardship” exhibited by the Applicant is the loss of his lease in the building next door to the property. Although the Board appreciates his plight, personal hardships do not satisfy the use variance test. *See*, 3 Rathkopf, *The Law of Zoning and Planning*, § 58:20 (2006) (“Hardship must relate to some characteristic of the land for which the variance is requested, and must not be solely based on the needs of the owner. ... Personal considerations, therefore, are not sufficient grounds on which to base a variance.”) *Cf. Draude v. D.C. Bd. of Zoning Adjustment*, 527 A.2d 1242, 1255 (D.C. 1987) (In reference to the first prong of the variance test, the court says that the exceptional condition is “not merely ... unusual circumstances personal to the owner and related to the property only in the sense that the owner’s personal situation makes it difficult to develop the land consistently with the zoning regulations.”)

The Applicant also argues that the location of the property in a neighborhood with many senior citizens creates the necessary exceptional condition and that the loss of the grocery store will cause an undue hardship to those citizens. Under the use variance test, however, the undue hardship must be incurred by the owner of the property in question and that property itself – not the surrounding neighborhood – must exhibit the required exceptional condition. Further, the presence of seniors in a neighborhood is not exceptional, and, even if it were, neighborhood demographics could change at any time.

Granting a use variance and allowing the Applicant to establish his grocery store at the subject property would impair the purpose and integrity of the R-4 zone district in which it is located. The primary purpose of the R-4 zone district is the stabilization of remaining one-family dwellings (*See*, Finding of Fact No. 21) and a newly-established commercial use within an otherwise completely residentially-used line of row dwellings would undermine this purpose.

A use variance requires a high threshold of proof because it is a relatively drastic type of relief. Granting a use variance could have serious effects on a neighborhood and the requisite tests must be met. The Applicant’s situation is unfortunate. The Board sympathizes with him, but must operate within the confines of the regulations; and under the facts of this case, the variance test is simply not met.

Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. The Office of Planning recommended denial of the application, finding none of the prongs of the use variance test to be met. The Board agrees with this assessment.

ANC 2C recommended approval of the application, but did not engage in any zoning analysis nor discuss any aspect of the use variance test. The Board recognizes that the corner store is a convenience to the neighborhood, but cannot find that any of the prongs of the use variance test are met. Therefore, it disagrees with the ANC's recommendation.

For all of the reasons set forth above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to an application for a use variance from § 330.5, pursuant to § 3103.2. Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: 5-0-0 (Ruthanne G. Miller, Shane L. Dettman, Marc D. Loud, Mary Oates Walker and Michael G. Turnbull to deny.)

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

A majority of Board members has approved the issuance of this order.

ATTESTED BY:


RICHARD S. NERO, JR.

Acting Director, Office of Zoning

FINAL DATE OF ORDER: MAY 27 2009

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

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As Director of the Office of Zoning, I hereby certify and attest that on MAY 27 2009, 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 who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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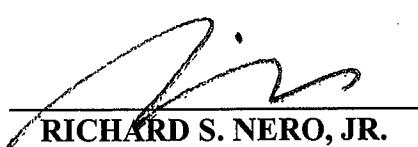
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