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Subject: BZA Case #18448
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Please see attached Findings of Fact and Conclusions of Law for the Applicant.

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BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18448
EXHIBIT NO. 38

BEFORE THE DISTRICT OF COLOMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF
3579 WARDER STREET, LLC

BZA APPLICATION NO. 18448
HEARING DATE: NOVEMBER 27, 2012
ANC 1A

FINDINGS OF FACT & CONCLUSIONS OF LAW

Application No. 18448 of 3579 Warder Street, LLC, pursuant to 11 DCMR §3103.2 for a variance from the lot area requirement under §401.3, and, if deemed necessary, the lot occupancy requirement under §403.2 and nonconforming structure requirements under §2001.3, to permit conversion of an 11-bedroom rooming house to a four-unit apartment building in the R-4 District at premises 1221 Otis Place, NW (Square 2829, Lot 57).[1]

FINDINGS OF FACT

The Property and the Surrounding Neighborhood

1. The Property, also known as Lot 57 in Square 2829, contains approximately 1,800 square feet of land area.
2. Square 2829 is bounded by 13th Street NW on the west, Spring Road NW on the north, 11th Street NW on the east and Otis place NW on the south. The site currently has a Certificate of Occupancy for an 11-bedroom rooming house.
3. The Property is located in a large R-4 District that is nestled between a C-2-A District along 14th Street NW to the west, a C-3-A District along Georgia Avenue NW to the east, and a C-2-A District along 11th Street NW to the south.
4. Across Otis Place to the south are two-and-half story and three-story detached, semi-detached and row dwellings. East along Otis Place are two-and-one-half story row dwellings. West across 13th Street is a two-story detached dwelling and a series of three-and-one-half story row dwellings. Within a mile walk is the DC USA Shopping Center.

[1] In an abundance of caution, the Applicant amended the Application at the November 27, 2012 hearing to include the area variance relief under §403 and §2001. As stated in this submission, upon further review the Applicant does not believe relief from §403 and §2001 is required because the Applicant meets the lot occupancy requirement.

The Applicant's Project

5. The Applicant proposes to convert a two-story plus cellar, 11-bedroom rooming house to a three-story plus cellar, four-unit apartment building.
6. The existing building is an end-unit structure that abuts a string of rowhouses along Otis Place to the east of the Property. The existing lot occupancy is 66%.[2]
7. The western property line abuts the rear yards of five rowhouses with frontage along 13th Street NW. The rear yards of the 13th Street rowhouses are separated by a 3.8 foot wide footpath or easement that abuts the western property line of the Property.
8. The proposed structure will include 4 residential units, one on each story and one in the cellar. Each unit will have 2 bedrooms and 1½ bathrooms. The proposed lot occupancy is 64.75%.
9. The structure will have a height of approximately 39 feet. The proposed project is within the matter of right for height and story limit.
10. The Property will include 2 parking spaces.
11. In response to recommendations by the ANC and community members, the Applicant will be including a mansard roof and the third floor will be constructed with brick rather than siding.

The Zoning Relief

12. Lot Area
    a. Under §401.3, the conversion of a building or structure to an apartment house in the R-4 district is a permitted use, but requires a minimum of 900 square feet of lot area per apartment unit.
    b. The proposed structure, with four units, is required to have a lot area of 3600 square feet.
13. Lot Occupancy
    a. Existing lot occupancy is 66%.
    b. Proposed lot occupancy is 64.75%. Lot occupancy is decreasing due to a decrease in the depth of the rear deck as well as a decrease in the width of the rear deck due to a new spiral staircase.
    c. The proposed project is a conversion of a rooming house to an apartment house in an R-4 District.
    d. Under §403.2, the maximum percentage of lot occupancy for the conversion of a building to an apartment house in an R-4 District is the "Greater of 60% or the lot occupancy as of the date of conversion."

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[2] The Application is self-certified and the Applicant worked with the Applicant's architect following the November 27, 2012 hearing to confirm the lot occupancy calculation.

e. If the Board grants approval to convert the building to an apartment building, the lot occupancy as of the date of conversion will be the existing lot occupancy, 66%. Thus the maximum matter of right lot occupancy is 66%, as of the date of conversion.
f. The proposed lot occupancy is at 64.75% which is under the permitted 66% lot occupancy permitted pursuant to §403.2, no variance relief is required from §403.2.
g. In an abundance of caution, the Applicant amended the application during the hearing to include variance relief to §403.2, if deemed necessary by the Board.

14. Non-conforming Structure Requirements
    a. Variance relief is required under §2001.3 for an enlargement or addition to a structure that does not conform to percentage of lot occupancy requirements.
    b. While the Applicant believes the proposed project conforms to lot occupancy and the nonconforming structure requirements, in the event variance relief is required from §403.2, it will also be required from §2001.3.

Request for Party Status. In addition to the Applicant, ANC 1A is automatically a party in this proceeding. The Board granted a request for party status in opposition to the application from Elias Wolfberg, resident of 3601 13th Street, which abuts the subject property.

Party in Opposition. The Party in Opposition asserted that the property was not unique because it is structurally sound, had been used as a single family home after being used as rooming house, and is similar to other properties in Columbia Heights. The Opposition also asserts that economic infeasibility is not grounds for finding practical difficulties and that any hardship is a result of the Applicant's actions. As stated below, economic infeasibility is, and has routinely been, considered in variance applications and the self-created hardship doctrine does not apply in the context of an area variance application. As to detriment to the public good and zone plan, the Opposition argues that the project is inconsistent with the R-4 District and that the variance relief requested would set a precedent for variance approval in the neighborhood. Conversion to apartment buildings is contemplated by the zoning regulations in an R-4 District. The decision of the Board is limited to the unique circumstances of this case.

Persons in Support or Opposition. At the hearing, the Board heard testimony from Richard Klugman in opposition to the Application. Mr. Klugman resides at 3603 13th Street. Mr. Klugman made assertions regarding the lot occupancy measurement. While the plans remain unchanged, the Applicant has resolved the lot occupancy matter. Mr Klugman also obtained prior BZA approval, BZA Case No. 18115, from lot occupancy, court, nonconforming structure, and off-street parking requirements to allow conversion of a twelve-unit rooming house to a three-unit apartment house with a new third story addition. Mr. Klugman attempts to distinguish his application based on the number of units, the amount of time the property remained on the market, and the relevance of a 13th Street address. Such distinctions are inconsequential when evaluating the three prongs of the variance test. The Board's approval of Mr. Klugman's variance is not at issue in this application.

ANC Report. ANC 1A submitted a report to the Board dated November 27, 2012, recommending approval of the application.

CONCLUSIONS OF LAW

Exceptional and Extraordinary Conditions

The existing structure, in a deteriorated condition due to the prior owners' failure to maintain the premises, requires significant investment to bring this structure up to code and to construct marketable units. The existing structure's prior use as an 11-bedroom rooming house leaves the existing structure with a number of unnecessary walls and an unconventional layout. The space in the structure is inefficient if used as anything other than a rooming house, a use which is presently obsolete. The structure must be renovated and reconfigured at great expense to the Applicant.

Practical Difficulties

1. Fair and Reasonable Return

In the context of an area variance, practical difficulties can be demonstrated by showing that without a variance the property will not generate a fair and reasonable return. Under *Palmer v. Bd. of Zoning Adjustment for the District of Columbia*, 287 A.2d 535 (D.C. 1972), the variance procedure has a number of purposes, one of which is "prevent[ing] usable land from remaining idle." The Court in *Palmer* goes on to say that to demonstrate hardship based on economic infeasibility, an applicant must prove that the property cannot be "put to any conforming use with a **fair and reasonable return** arising out of the ownership thereof." *Id* at 541-42 (emphasis added). In *Russell v. District of Columbia Bd. of Zoning Adjustment*, 402 A.2d 1231 (D.C. 1979), the court distinguished an applicant seeking a fair and reasonable return from an "applicant merely seeking the most profitable use for his land." *Id* at1236. It is for the Board to decide, on a case-by-case basis, on which side of this line an application falls. *Tyler v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362 (D.C. 1992). In *Downtown Cluster of Congregations v. District of Columbia Bd. of Zoning Adjustment*, 675 A.2d 484 (D.C. 1996), the Court quoted *Palmer* and found that if no tenant could be located that offered a "reasonable rate of return to the owner" such would qualify as unnecessarily burdensome. While *Downtown Cluster* case was evaluated on a use variance standard, the applicant testified about specific returns for which the Board and Court of Appeals gave great weight. The applicant presented evidence that a matter-of-right use would lead to an average return of 7.4% which would not be a reasonable expected return based on its investment. Furthermore, in finding a practical difficulty, the Board stated that "the projection of any reasonable rate of return is speculative at best" due to multiple unknown factors. *Id* at 492. In sum, an applicant does not need to show that without a variance the Property will generate no return, as Office of Planning may suggest; rather, an applicant must show only that without a variance the property will not generate a return that is fair and reasonable.

The Board has found compliance with the zoning code to be economically burdensome in a number of cases when investment in a matter-of-right development would result in a small profit but not a fair and reasonable profit. In BZA Case No. 17989, the Board approved a variance to convert an existing non-residential structure on an alley lot to a one-family dwelling. The Board found that "[n]o permitted use would provide the Applicant with a fair and reasonable return on his investment." BZA Order No. 17989, p6. The applicant in this case posited that at minimum an annual return of 6% would be fair and reasonable. In that case, Chairman Marc Loud recommended approval based on his determination that no "other use (without granting a variance) is going to provide a reasonable return on the applicant's investment." The Board has also granted variances based on economic feasibility in instances when a reasonable rate of return was found to be far higher than the return showed by the Applicant's proposed project. In BZA Case No. 18163, the Board approved a variance to rehabilitate a vacant flat into a five unit apartment house. The Board approved case 18163 to allow a projected $2.3 million in sales on a $2 million investment (a 15% return) when practical difficulty was found based on the economic infeasibility.

In this instance, the Applicant has demonstrated that without a variance the Property will not generate a fair and reasonable return on investment. The Applicant testified at the hearing that without a variance, a project would not be viable. Evidence to support the Application includes a detailed Construction Budget and Profit and Loss Analysis. Rather than using MRIS data, the Applicant confirmed during testimony that the figures were based on recent sale prices from equivalent units developed by the Applicant at a nearby project located at 3609 13th Street, NW.

The record includes the Applicant's Profit and Loss Analysis, which demonstrates that a four-unit condominium with an additional floor will generate a reasonable return while various alternatives (a flat or 3 unit) will not. As a two-unit condominium without an additional floor, the project would be compliant as to lot area but would result in a significant loss. As a three-unit condominium with an additional floor, the project will result in a $114,380 loss. Thus, limiting the Applicant to either of these alternatives would not be economically feasible.

The three-unit condominium with no addition is projected to result in an insignificant profit of $64,590. Based on an investment of $1,410,410 this alternative, would result in a return of 2.28% per year, far less than the 7.4% and 6% deemed a reasonable return in *Downtown* Cluster and BZA Case No. 17989. Thus, while the return generated is positive rather than negative, the return for a three-unit condominium with no addition is by no means fair and reasonable. Additionally, the projected returns are speculative at best due to numerous unknown construction and market conditions. The Applicant testified to the challenges of selling the cellar/basement unit at a nearby project on 13th Street and the negative financial effect that could have on projected returns.

The four-unit condominium with an additional floor proposed by the Applicant will generate a profit of $183,120 over two years on a total investment of $1,766,880. With an annual return of 5.18%, the return on the project proposed by the Applicant remains modest. Thus, the grounds for demonstrating practical difficulty go far beyond the Applicant merely seeking the most profitable use for his land. The record demonstrates that the Property cannot be put to any conforming use with a fair and reasonable return without the requested relief.

2. No Self-Created Hardship

The Court of Appeals has repeatedly held that a 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. In *1700 Block of N Street, NW and Vicinity vs. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978) the Court affirmed an order of the BZA granting an area variance despite the Petitioner's argument that whatever hardship faced the Applicant was self-created to the extent of Metro YMCA having full knowledge of all problems with the alleged shape of the land, the type of zoning, and the costs of putting in the parking, prior to the purchase of the Property. The Court refused to consider the argument stating, "the [Applicant's] self-created hardship is not a factor to be considered in an application for an area variance, however, as that factor applies only to a use variance." *Id.* at 678.

In *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164 (D.C. 1990), the Court reaffirmed that self-created hardship is limited to use variances. In *Gilmartin*, the Court states, "this court has held that prior knowledge or constructive knowledge or that the difficulty or hardship is self-imposed is not a bar to an area variance . . ." While the Court in *Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230 (D.C.. 1973) finds that knowledge or self-imposition of the hardship would ordinarily bar a use variance, *Gilmartin* limits *Taylor*, stating, "*Taylor*, however, has been limited to requests for use variance, and has not been applied to applications for area variances."

The Party in Opposition, citing *Carliner v. District of Columbia Bd. of Zoning Adjustment*, 412 A.2d 52 (D.C. 1980), has made the argument that the Applicant ought to be denied the variance requested because the Applicant's practical difficulties are a self-created hardship. In *Carliner*, a property owner was denied a variance because her affirmative action in dividing a single tract into three contiguous lots made the property nonconforming. In light of the considerable precedent against applicability of the self-created hardship discussed above and the unique circumstances in *Carliner* of the need for a variance as a result of subdivision by the Applicant, *Carliner* is distinguishable from the facts at hand. The Applicant has in no way altered the size or dimensions of the lot or otherwise affected whether or not the lot itself is buildable. Again, the Applicant has applied for an area variance rather than a use variance. In light of the Court's holdings regarding the non-applicability of the self-created hardship doctrine to an area variance, the Party in Opposition's argument is not valid in this case.

No Harm to Public Good or Zone Plan

There will be no substantial detriment to the public good and no substantial impairment to the intent, purpose, and integrity of the zone plan by approving the zoning relief. First, by converting this vacant property to a beneficial, residential use, the public will benefit from the improvement over the existing structure's state of disrepair. Second, the lot area requirement of 900 square feet of lot area for every unit is intended to limit density. This project decreases density by converting a boarding house with a Certificate of Occupancy for 11 rooms to a four-unit apartment building. The proposed project adequately balances the Zoning Regulations' goals of protecting existing properties in the neighborhood and modernizing a vacant, underutilized property.

The Applicant conducted extensive outreach and received a number of letters of support from neighboring property owners. The ANC 1A Resolution recommended approval of the variance after an exhaustive discussion and presentation by the Applicant, Party in Opposition and Mr. Klugman. The Board has received the ANC letters of support and shall provide it great weight.

The Office of Planning did not support a four-unit structure but acknowledge that Applicant could make an acceptable case for a three-unit structure. The Office of Planning's primary concern, as stated in its OP report and in testimony at the Hearing, was that the profit-and-loss analysis demonstrated that a three-unit structure result in a profit, and made no distinction between a dollar profit and profit that is fair and reasonable. As demonstrated by case law and prior BZA cases, the Board has supplemented OP's approach and provided greater industry analysis based on information in the record to evaluate a reasonable return and financial difficulty in granting variances.

Therefore, for the reasons stated above, the Applicant requests that the Board of Zoning Adjustment grant the application to allow zoning relief from the requirements under §401.3, and §403.2 and §2001.3 if necessary, to allow conversion of an 11-bedroom rooming house to a four-unit apartment building.

Respectfully submitted,

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