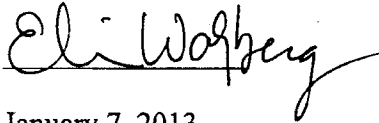


Board of Zoning Adjustment

**Cover Letter accompanying the Findings of Facts and Conclusions of Law
submitted re: Application No. 18448 of 3579 Warder Street LLC.**

Please accept the attached Draft Order as my opposition to the variance relief requested by 3579 Warder Street LLC. In this document, I refer to exhibits as they were numbered and referenced in the opposition brief that I submitted, and which was accepted as part of the record, at the BZA hearing on November 27, 2012.

Submitted by Elias Wolfberg



January 7, 2013.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18448

EXHIBIT NO. 40

Board of Zoning Adjustment
District of Columbia
CASE NO.18448
EXHIBIT NO.40

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 18448 of 3579 Warder Street LLC, pursuant to 11 DCMR §3103.2, for a variance from the lot requirement and nonconformity issues under §401.3 and §2001.3, to add an additional floor to a row-house and convert a rooming house into a four-unit house in the R-4 District at premises 1221 Otis Place NW (Square 2829, Lot 0057).¹

HEARING DATE: November 27, 2012
DECISION DATE: January 15, 2013

DECISION AND ORDER

This self-certified application was submitted July 25, 2012 by 3579 Warder Street LLC, the owner of the property at issue. The application was filed pursuant to 11 DCMR §3103.2 for an area variance for the minimum lot area requirement under §401.3 to allow a conversion of a eleven-room rooming house into a four-unit apartment house in the R-4 District at premises 1221 Otis Place NW (Square 2829, Lot 0057) ("the Property"). At the hearing held before the board of Zoning Adjustment, the Applicant was permitted to amend his area variance to include §2001.3, due to the nonconformity of the structure and Applicant's request to build a third story to the premises.

The Board of Zoning Adjustment ("BZA" or the "Board") held a hearing on the application on November 27, 2012 and deliberated on the application January 15, 2013, at which time the Board voted to reject the application. A full explanation of the factual and legal basis for the Board's decision follows.

PRELIMINARY MATTERS

Notice of Application and Notice of Public Hearing. The Office of Zoning sent notice of the application to the Office of Planning ("OP"); the District Department of Transportation; the Councilmember for Ward 1, Advisory Neighborhood Commission ("ANC") 1A, the ANC for the area within which the subject property is located, and the single-member district ANC 1A07.

A public hearing was scheduled for November 27, 2012. Pursuant to 11 DCMR §3113.13, the Office of Zoning mailed notice of the hearing to the Applicant, the owners of the property within 200 feet of the subject property, and ANC 1A. Notice was published in the *D.C. Register* on September 21, 2012 (DCR Vol. 59-No. 38).

Requests for Party Status. In addition to the Applicant and ANC 1A, Elias Wolfberg of 3601 13th St N.W., Washington, D.C., was granted party status in this proceeding. No other parties were involved.

Applicant's Case. The applicant provided testimony and evidence from Mohammed Pishvaeian, owner of 3579 Warder Street LLC, and James Killelte, architect of the project.

¹ Applicant was granted permission to amend the variance application and request a variance from §2001.3 due to the nonconformity of the structure.

Government Reports. By their supplemental report dated January 7, 2013, the OP did not recommend approval of the variance relief requested. The OP's opposition to the variance relief was additionally conveyed in its November 20, 2012, report and through oral testimony at the public hearing on November 27, 2012.

ANC Report. On November 14, 2012, ANC 1A, with a quorum present, heard testimony by the Applicant about his original submission and voted 6-1-1 to support the area variance request pursuant to §401.3. The ANC was not presented with the issue, and thus did not decide on the merits whether to support the Applicant's request for relief from §2001.3. The Applicant told the ANC, in error, that it could by right construct a third floor. (See the transcript of the hearing on Application No. 18448 before the BZA on November 27, 2012 (*hereinafter* "Transcript") p. 93-95). This assertion was factually incorrect and therefore the ANC was never given the opportunity to vote on the merit of constructing a new third floor.

Persons in Opposition. The Board heard testimony from Elias Wolfberg and Richard Klugman, both adjacent neighbors, in opposition to the application. Additionally, the Board accepted into the record petitions from more than 50 neighbors who oppose the Applicant's proposal. (Exhibit 7).

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The subject property is located at 1221 Otis Place N.W., and sits upon Lot 2829 in Square 0057. The Property is located on the north side of Otis Place, between 11th Street and 13th Street.
2. Lot 2829 is approximately 18 feet wide and 100 feet long. It is bounded on the South by Otis Place, on the west by an alleyway/private easement, on the north by a public alley and by row-houses to the west. (Exhibit 2).
3. The Property is rectangular in shape and contains approximately 1,800 square feet. The Property is improved with a two-story row dwelling with one below-ground level.
4. The Property was built in 1909.
5. The Property is one of seven attached, contiguous two-story row-houses that have nearly identical facades that sit on the north side of Otis Place between 13th Street and 11th Street N.W. (Exhibits 3, 4).
6. The Property is located within the R-4 Zone District.
7. The R-4 District is designed to include those areas now developed primarily with row dwellings but where a number of those dwellings have already been converted to dwellings with two or more families. (11 DCMR § 330.1). The "primary purpose [of R-4] shall be the

stabilization of remaining one-family dwellings.” (11 DCMR § 330.2) The R-4 District is zoned *not to be* an apartment house district. (11 DCMR § 330.3).

8. To ensure the residential quality of the housing stock the R-4 District is controlled by a minimum lot area per family requirement, which is 900 square feet. (11 DCMR § 401.11).
9. Prior to the Applicant’s purchase of the Property in July, 2012, the Property had a Certificate of Occupancy which enabled it to be run as a rooming house. That Certificate of Occupancy did not transfer to the Applicant when he acquired the Property in July, 2012. (Applicant’s Exhibit C).
10. The Applicant is proposing to construct an additional floor onto the Property and create a multi-unit condominium complex that will be inconsistent with the intent of the R-4 District.
11. The Applicant cannot as a matter of right construct a new third floor onto the existing two-story improvement. Because the existing improvement occupies 68 percent of the lot, the Property is considered non-conforming, pursuant to §2001.3, and the Applicant would need a variance. (Exhibits 1, 2).

The Applicant’s Project

12. The Applicant proposes to construct an additional floor on top of the roof of the existing improvement.
13. The Applicant also proposes to convert the building into a four-unit apartment house with a two-bedroom condominium on each floor.
14. The improvement as it currently exists is one of seven contiguous two-story row-houses that are all the same height and which are located on Otis Place between 11th and 13th Streets. (Exhibit 5).
15. The Applicant’s proposes to add an additional floor to the current improvement thus breaking up cohesive frontages of the existing seven lots. (Exhibit 5).
16. More than 50 neighbors who live within two blocks of the Property signed a petition opposing the construction of an additional floor on top of the existing improvement and opposing a four-unit condominium project. (Exhibit 7).
17. The Office of Planning in its supplemental Memorandum of January 7, 2013 opposes the granting of variances under §§ 401.3 and 2001.3 of the Zoning Regulations, to construct an additional floor and to create four condominium units. The Office of Planning opposed the variance application in its original report issued on November 20, 2012.
18. In testimony before the Board, the Office of Planning noted that the proposed construction of an additional story onto the existing improvement would be awkward and inconsistent with the existing houses that are next to the Property. (Transcript, p. 121).

The Zoning Relief Requested

Variances

19. A conversion to an apartment house in the R-4 District can only occur if it meets the requirements set forth in §330.5(e), §§ 401.3, and 403.2 of the Zoning Regulations.
20. Section 330.5(e) of the Zoning Regulations holds that the conversion of dwelling house that was built before May 12, 1958, as was the Property, and which is in the R-4 District is controlled by §§ 401.3 and 403.2.
21. Section 401.3 requires a minimum land area requirement of 900-square feet for each unit.
22. The existing improvement sits on a lot encompassing 1,800 square feet. The Regulations require that for a three-unit development the lot would have to have 2,700 square feet, and for a four-unit development, the lot would need to have 3,600 square feet.
23. Section 403.2 requires a maximum lot occupancy of the greater of (i) 60% or (ii) the existing lot occupancy as of the date of conversion.
24. The proposed project exceeds the lot occupancy limit because the improvement occupies 68% of the lot, and it is therefore a non-conforming property. (Exhibits 1, 2).
25. Therefore, the Property requires a variance from the requirements of §2001.3.

The Subject Property Does Not Have an Exceptional Condition

26. The Property was built in 1909, the exact same year that each of the houses adjacent and contiguous to it were built.
27. Until July 2012, a single-family had lived in it continuously for 11 years. (Transcript p. 128).
28. Prior to acquisition by the Applicant in July, 2012, the Property had a Certificate of Occupancy designating it as a rooming house, but the Property had not been used as a rooming house for more than a decade.
29. In order for the Property to be operated as a rooming house the Applicant would have had to apply for a new Certificate of Occupancy to run the property as a rooming house – something he has never done. Instead, the Applicant seeks to convert the Property into luxury condominiums. (Transcript p. 133).
30. At the time the Applicant purchased the Property, it was sufficiently structurally sound to pass inspection as recently as 2000. The furnace, plumbing, and electrical systems all were functional. (Exhibit 5).

31. The Property has already been gutted by the Applicant, who chose to strip it of all of its interior walls, plumbing, insulation, and electrical systems. (Exhibit 5; Transcript, p. 100).
32. The Property today exists as one large room with no interior walls or other infrastructure. (Exhibit 5).
33. Upon acquiring the Property, the Applicant re-pointed the exterior bricks, and put primer on the outside of the Property. (Transcript, p. 99-100).

Practical Difficulties Will Not Occur if the Zoning Regulations Are Strictly Enforced

34. The Property, prior to its recent purchase had been actively and continuously operated in a manner consistent with the R-4 District. It had been a house continuously occupied by tenants and was used and operated in a manner consistent and unremarkable for the Colombia Heights neighborhood.
35. The Property was purchased at a private auction that was open only to professional real estate developers.
36. The Applicant's claim of financial hardship is based upon its data arguing that the high cost of renovating the subject property for anything less than four condominiums is economically unsound.
37. The Applicant is a professional developer in Columbia Heights who speculated that paying \$455,000 for a property, one it knew to be zoned for a maximum of two flats,² would be a highly profitable investment. (Applicant's Exhibit F).
38. The Property can be developed for a modest profit consistent with the R-4 District and without the necessity of any variances. (Applicant's Exhibit F).

Substantial Detriment to the Public Good or Zone Plan

39. The Property has, for more than ten years, been the home of a single family and the creation of condominiums will increase rather than decrease the density of the neighborhood beyond what is contemplated by the R-4 District. (Transcript p. 128).
40. The proposed addition of a story on top of the existing improvement would not provide any additional privacy to any of the existing homes along Otis Place. Instead, it would create a non-conforming frontage that would interrupt the consistent existing frontages of adjacent, contiguous houses. (Exhibits 4; Transcript p. 121).

² Knowledge of §403.2 by the Applicant is more than implied; by the existence of BZA Case No 18421, it is on record that Applicant is aware of, and has obtained an area variance for the very same zoning regulation.

41. The Board accepts the findings made by the Office of Planning in its original November 20, 2012 Memorandum and in its supplemental Memorandum of January 7, 2013, that the Applicant's variance requests would be contrary and detrimental to the intent and integrity of the Zoning Regulations.
42. The Board notes that the Zoning Commission recently amended the R-4 District regulation to clarify and reinforce that this zone district is not intended to be an apartment zone.
43. More than 50 neighbors who live within a two-block radius of the Property signed a petition opposing the construction of an additional floor and the creation of a four-unit condominium building. (Exhibit 7).

CONCLUSIONS OF LAW

Variance Relief

Standard of Review

The Board is authorized under §8 of the Zoning Act of 1938. D.C. Official Code §6-631.07 (g)(3), to grant variance relief where, "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that 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 (*See* 11 DCMR § 3103.2).

Under the three prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate to the Board that the (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the Applicant shall encounter practical difficulties if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan (*see Gilmartin v. District of Columbia Bd. Of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990)).

The proposed conversion of a two-story row house into a three-story, four-unit apartment building would require a land area of 3,600 square feet and a conforming property. However, the Property consists of a lot that is exactly 1,800 square feet, and the improvement on the property occupies 68.5 percent of the lot. (Exhibits 1, 2). Therefore, the Property is non-conforming, and the Applicant needs two variances to allow the construction as requested.

The Applicant is seeking a variance from §§ 401.3 and 2001.3 of the Zoning Regulations. As discussed below, the Board concludes that the Applicant has not met its burden of proof for the requested area variances in this case.

No Exceptional and Extraordinary Conditions

The Board concludes that the Property is not affected by extraordinary or exceptional conditions and therefore there are no cognizable constraints on its development. The Board finds that the Property is a 104-year old building that, until several weeks before its acquisition by the Applicant, had been home to a single family who had resided there for the last eleven years. The Property had functioning electrical, plumbing and heating systems. The Applicant has entirely gutted the Property's interior and no interior walls exist, and the Applicant has made moderate repairs to the improvement's exterior, such as pointing up the bricks and putting primer on the improvement's exterior.

The Board concludes that it is unexceptional for row homes in Columbia Heights built in 1909, like the Property, to require some repair. Moreover, as the Applicant has already gutted the improvement's interior, new electrical, modern plumbing and sister joists will be required for a renovation project. The required upgrades do not brand the property unique, but rather make it consistent with other recently purchased Columbia Heights row houses slated for redevelopment. Therefore, the Board concludes that the Property is not affected by exceptional or extraordinary conditions.

No Practical Difficulties

The Board concludes that the Applicant has not shown that practical difficulties will arise in complying with the zoning regulations.

The Applicant's sole hardship is financial, and unto itself, the Court of Appeals has determined that renovation expenses alone do not present the kind of "exceptional practical difficulties" required to establish hardship or to establish that the property is unique. Myrick v. District of Columbia Bd. of Zoning Adjustment, 577 A.2d 757, 762 (D.C. 1990) (*internal citations omitted*). The Applicant's main financial estimates rest on essentially two significant costs: the purchase price plus the projected construction costs. Here, not only is the claimed hardship financial, but it is self-initiated. The Applicant, a professional developer, purchased a single-family house on a 1,800 square foot lot. In order for him to make a significant profit he has stated that he needs to create four luxury condominium units; he can make a smaller profit by creating fewer units. The Board concludes that the Applicant created an economic situation where the only path to significant profitability rests upon a decision by the Board to grant him two variances. However, the Board concludes that the merits of the financial hardship do not create a cognizable practical difficulty.

The Board recognizes material differences between previous cases in which financial challenges were recognized as cognizable practical difficulty and those claimed by the Applicant. In BZA Cases No. 18055, 18115, 18312 and 17873, the properties remained unused and unsold for years due their deteriorated conditions, complicated zoning status, foreclosure, and un-marketability. In this matter before the Board, the Applicant purchased a functioning, inhabited row house before it reached public sale. The unique financial hardships that were present in the above,

aforementioned cases, are not found in this matter. As noted by the Office of Planning, the Property can be developed in a manner that will generate a modest profit without the construction of an additional floor.

Therefore, the Board finds no cognizable practical difficulty affects this Property.

Harm to Public Good or Zone Plan

The Board concludes that there will be substantial detriment to the public good and substantial impairment to the intent, purpose, and integrity of the zone plan if the zoning relief were to be granted.

The Office of Planning, in its November 20, 2012, report stated its opposition to the zoning relief request, and stated that, "Granting the zoning relief as requested would be contrary and detrimental to the intent and integrity of the Zoning Regulations. The Zoning Commission recently amended the R-4 District regulation to clarify and reinforce that this zone district is not intended to be an apartment zone." In its January 7, 2013 submission, the Office of Planning reiterated its opposition to granting any variance relief.

The Board concludes that the variance relief the Applicant requests would increase the neighborhood density rather than decrease it. The Board concludes that while the Property could be legally operated as a rooming house, it has not been operated in such manner for more than a decade. Instead, a single family lived there until July, 2012, when the Applicant purchased the Property. The requested relief would create four new condominium units in a house that had been used exclusively by a single family. Such relief would be contrary to the intent of the R-4 District, which is zoned to discourage the conversion of single-family homes into the kind of four-unit development the Applicant is seeking to build.

Additionally, the Board concludes that the construction of a new story to the existing non-conforming improvement would increase the residence density of the neighborhood and break up the continuity of the frontages of the existing housing stock. (Exhibit 3). For the past 104-years the Property has been a component of a cluster of exclusively two-story row houses that make up the fabric of the Columbia Heights community. Allowing for the frontage of one of these buildings to be changed would not serve the public good and would harm the zone plan. The Board notes that more than 50 neighbors who live within two blocks of the Property have signed a petition opposing the Applicant's plan to construct an additional floor and to create four-units into the two-story row house.

Great Weight

Section 13(b)(d) of the Advisory Neighborhood Commission Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Code §1-309.10(d)(A)), requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, however, the ANC 1A was presented with only the original variance request, under §401.3, and was not asked to debate whether to support Applicant's amended request for

§2001.3. Furthermore, the Applicant incorrectly told ANC 1A that he had the right to construct a third-floor onto the existing improvement. In fact, because the Property is non-conforming, the Applicant had to apply for a variance to construct the additional floor.

The Board concludes that the ANC 1A was misled by the Applicant with respect to a material fact relevant to the application for a variance from Section 401.3 of the Zoning Regulations. The Applicant incorrectly told the ANC 1A that the erection of a new floor was a *fait accompli*, and therefore the ANC's deliberation on the merits of this variance must be viewed as incomplete. Moreover, the ANC 1A did not vote on, and therefore has never weighed in on the Applicant's variance request with respect to relief from § 2001.3 of the Zoning Regulations. For these reasons, the Board concludes that the ANC 1A's written recommendations will not be afforded great weight consideration.

The Board is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Official Code § 6-623.04) to give great weight to the Office of Planning recommendations. The Board concurs with the Office of Planning's recommendation that zoning relief should not be granted for either variance request.

Accordingly, it is therefore **ORDERED** that the application is hereby **DENIED**.

VOTE:

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

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