

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18673 of Michael and Sarah Henry, pursuant to 11 DCMR § 3103.2, for a use variance from 11 DCMR § 330.5, to allow office, professional services, and/or photographic studio use in a one family row dwelling in the CAP/R-4 District at premises 325 Maryland Ave., N.E. (Square 784, Lot 36).

HEARING DATE: December 18, 2013
DECISION DATE: December 18, 2013

DECISION AND ORDER

This application was submitted on September 26, 2013 by Michael and Sarah Henry (“Applicants”), the owners of a one-family row dwelling in the CAP/R-4 District at 325 Maryland Ave., N.E., the property for which the use variance is sought (“subject property”). The Applicants requested that the Board of Zoning Adjustment (“Board”) grant a use variance to allow the use of the subject property for office, professional services, and/or photographic studio use.

The Board held a public hearing on the application on December 18, 2013. At the close of the hearing, and for the reasons that follow, the Board voted 4-0-1 to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated September 27, 2013, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning, the D.C. Department of Transportation, Advisory Neighborhood Commission (“ANC”) 6C, the ANC in which the subject property is located, the member for Single Member District 6C02, and the Council Member for Ward 6. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing in the *D.C. Register* and on October 7, 2013, mailed such notice to the Applicant, ANC 6C, and all owners of property within 200 feet of the subject property.

Request for Party Status. ANC 6C was automatically a party to this application. The Board granted the party status application of Bill Manville, the owner of an adjacent property, in opposition to the application.

BZA APPLICATION NO. 18673
PAGE NO. 2

Applicants' Case. The Applicants submitted two statements in support of their Application (Exhibits 4 and 33) and presented their case at the hearing. The Applicants indicated that they purchased the subject property in the year 2000 and spent significant sums of money making historically compatible improvements in the house. Their two children are now six and nine and the Applicants have concluded that their growing family needs more outside space. They therefore decided to purchase a new house, but still retain ownership of the subject property to “protect[] their time and financial investment”. (Exhibit 4.) However, the Applicants concluded that they could not afford two properties unless the subject property generated revenue and that rental for residential purposes would not generate the minimum revenue stream needed. The Applicants identified the least intensive non-residential uses that could provide the needed revenue and asked the Board to approve those uses.

Government Reports. The Office of Planning (“OP”) filed a report with the Board on December 3, 2013 (Exhibit 33) recommending denial of the variance because the Applicants had not established an exceptional condition nor proved any relationship between the purported exceptional conditions and an undue hardship. OP further concluded that the Applicant's proposal contravened the District's zone plan and creating a detriment to the public good.

The Architect of the Capitol submitted a report dated November 23, 2013. The report stated that the Architect of the Capitol found that the requested variance “would not be consistent with the intent of the CAP/R-4 District (Overlay) and would adversely affect the health, safety, and general welfare of the U.S. Capitol Precinct” and “is not consistent with the general provisions of the R-4 residential district and as such would not be consistent with the goals and mandates of the United States Congress as stated in [11 DCMR § 1200.1] to protect the public interest and retain the character of the overlay district.” (Exhibit 35.)

ANC Report. ANC 6C filed a report dated November 18, 2013, recommending denial of the variance because it did not see evidence of the financial hardship that would support a use variance. (Exhibit 28.)

FINDINGS OF FACT

1. The subject property is located at address 325 Maryland Avenue, N.E., Square 784, Lot 36 and is located in the CAP/R-4 Zone District.
2. The subject property is rectangular in shape, has no significant grade changes, and is improved with a two-story row dwelling constructed in 1880 and was last renovated in 2000.
3. The Applicants propose to lease the row dwelling for office, professional services, and/or photographic studio use.
4. The proposed uses are not permitted in R-4 Districts, necessitating the use variance requested. (See, 11 DCMR § 350.4.)

BZA APPLICATION NO. 18673

PAGE NO. 3

5. The subject property is located approximately mid-block in a row of several similarly sized and shaped lots.
6. The adjacent properties are improved with two- and three-story row dwellings similar in size to the subject property. Several nearby homes are used for commercial purposes including two directly across the street.
7. The original building permit for the subject property, issued in 1880, prior to the adoption of the Zoning Act in 1920, authorized construction of a blacksmith shop. However, the present dwelling contains no characteristic of a blacksmith shop, but is in all respects a one-family dwelling.
8. When the Applicants purchased the property in 2000, it was used as a flat, which is a matter-of-right use in the CAP/R-4 Zone.
9. The Applicants renovated the property and, since 2000, they have used it as a one-family dwelling, also a matter-of-right use in the CAP/R-4 Zone.
10. In total, the Applicants expended approximately \$500,000 to accomplish the renovations, which were undertaken in a manner that was sensitive to the historic character of the neighborhood.
11. The Applicants have two young children and desire to purchase a home in the District with more outside space.
12. The Applicants wish to retain ownership of the subject property thereby “protecting their time and financial investment”. (Exhibit 4.)
13. However, the Applicant’s concluded that they did “not have the financial wherewithal to afford two properties without one generating revenue.” (Hearing Transcript (“Tr.”), December 18, 2013, p. 40.)
14. After consulting two of the largest rental realty firms in Capitol Hill, the Applicants concluded that the residential rental of their home would not generate sufficient revenue to allow them to both purchase a new home and retain ownership of the subject property, but that non-residential rental would. The Board accepts this conclusion.
15. The Applicants acknowledge that they can continue to live in their present house or sell it.
16. The R-4 District is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two or more families. (11 DCMR § 330.1.) The primary purpose of the R-4 District is the stabilization of remaining one-family dwellings. (11 DCMR § 330.2.)

BZA APPLICATION NO. 18673
PAGE NO. 4

17. The Capitol Interest Overlay District is established to promote and protect the public health, safety, and general welfare of the U.S. Capitol precinct and the area adjacent to this jurisdiction in a manner consistent with the goals and mandates of the United States Congress in title V of the Legislative Branch Appropriations Act, 1976, (Master Plan for Future Development of the Capitol Grounds and Related Areas), approved July 25, 1975 (Pub. L. No. 94-59, 89 Stat. 288) and in accordance with the master plan promulgated under the Act. (11 DCMR § 1200.1.)

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) (2012 Repl.), 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) (2012 Repl.), 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). The Applicants in this case are requesting a use variance, therefore, they had to demonstrate an exceptional situation or condition of the property and that such exceptional condition results in an “undue hardship” to the Applicants.

The District of Columbia Court of Appeals has interpreted “undue hardship” to mean that a property cannot be put to any use for which it can be reasonably adapted. *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). (“A use variance cannot be granted unless a situation arises where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations.”) *Accord, Bernstein v. D.C. Bd. of Zoning Adjustment*, 376 A.2d 816, 819-820 (D.C. 1977). A zoning variance cannot be granted on the basis of the property owner’s personal circumstances, but must be based on the unique circumstances of the property itself. *Capitol Hill Restoration Society, Inc. v. D.C. Bd. of Zoning Adjustment*, 398 A.2d 13, 15-16 (D.C. 1979). Finally, an “inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship.” *Palmer* 287 A.2d at 542.

Exceptional Condition

The Applicants fail to meet the requisite “exceptional condition” test because neither of the factors cited by the Applicants are exceptional conditions of the property.

BZA APPLICATION NO. 18673
PAGE NO. 5

The mere fact that the original building permit authorized a commercial use is not an exceptional condition of the property. It is not unusual for current residential properties to have started out as commercial uses. The factor is only relevant if the initial construction precludes the establishment of a matter of right use. Clearly that is not the case here. The property functioned successfully as a flat for many years and was successfully renovated to a one-family dwelling.

Nor is Applicant's investment in renovating the property an exceptional condition. The cost of the renovation has not prevented the Applicants from maintaining the residential nature of the building and in fact was expended to retain that characteristic. It is not unusual in this and other/historic District neighborhoods for home purchasers to spend considerable sums to make 19th century dwellings serve 21st century needs.

Undue Hardship

The Applicants also fail to meet the requisite "undue hardship" test because they have not shown that strict application of the Zoning Regulations would preclude the use of the property for *any* purpose for which it may be reasonably adapted. During the hearing, Mr. Henry conceded that there was no impediment to the continued residential use of the building, but that such continued use stymied his family's ability to move to a new home and still retain ownership of the subject property. He testified:

I guess the point I'm trying to make is that we can use it as we have been using it, or we can sell it; there aren't additional uses that are practical or economic that are available to us in the R-4 District. We couldn't keep it and rent it out; we could stay living in it or sell it is really our choices without a variance.

(Tr. at 60.)

As noted, a use variance may only be granted upon a showing "that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may be reasonably adapted." *Bernstein v. D.C. Bd. of Zoning Adjustment*, 376 A.2d 816, 819-820 (D.C. 1977) The fact that the Applicants have the "choices" to use or sell the property for residential purposes precludes their application from being granted. In essence, the Applicants' request stems from an understandable, but personal sentiment; the Applicants spent considerable time and money to successfully renovate this house and wish to be able to continue to protect these investments. Yet, the property is uncontrovertibly suitable for residential use and therefore residential it must remain.

As to the final element of the variance test, the Board concurs with the Office of Planning that granting the variance would result in substantial detriment to the public good, and would substantially impair the intent, purpose, and integrity of the zone plan. Permitting the conversion of this dwelling into a commercial use is directly contrary to the primary purpose of the R-4 Zone, namely "the stabilization of remaining one-family dwellings." (11 DCMR § 330.2.) Applicants' assertion that such commercial uses already exist in nearby homes only demonstrates

BZA APPLICATION NO. 18673
PAGE NO. 6

the need to prevent further erosion to the residential character of the neighborhood, which clearly would result in substantial detriment to the public good.

The Board is also persuaded by the Architect of the Capitol that the requested variance would not be consistent with the intent of the CAP/R-4 District Overlay; would adversely affect the health, safety, and general welfare of the U.S. Capitol Precinct; and is not consistent with the general provisions of the R-4 residential district. As such, granting the variance would not be consistent with the goals and mandates of the United States Congress to protect the public interest and retain the character of the overlay district.

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 (2012 Repl.) Great weight means acknowledgement of the issues and concerns of these two entities and providing a written explanation as to why the Board did or did not find their views persuasive. Both ANC 6C and the Office of Planning recommended denial of the application and the Board agrees.

For all the reasons set forth above, the Board concludes that the Applicants have 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: **4-0-1** (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle, and Peter G. May to Deny; one Board seat vacant).

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

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

ATTESTED BY: _____


SARA A. FARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: August 11, 2014

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.