

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18687 of William L. Ricks, as amended, pursuant to 11 DCMR § 3103.2, for variances from the lot area requirements under § 401.3 and from the open court requirements under § 406.1 to allow a three-unit apartment house in the R-4 District at premises 3007 11th Street, N.W. (Square 2851, Lot 99).¹

HEARING DATES: January 7, 2014, May 6, 2014, and June 24, 2014
DECISION DATE: June 24, 2014

DECISION AND ORDER

This self-certified application was submitted on October 18, 2013 by William L. Ricks (the “Applicant”), the owner of the property that is the subject of the application. The application requests variance relief from the lot area requirements under § 401.3 and from the open court requirements under § 406.1 to approve the prior unlawful conversion of a one-family row dwelling into a three-unit apartment house in the R-4 District at premises 3007 11th Street, N.W. (Square 2851, Lot 99) (the “Subject Property”). Following three public hearings, the Board voted to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated October 22, 2013, the Office of Zoning provided notice of the application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 1; Advisory Neighborhood Commission (“ANC”) 1A, the ANC in which the subject property is located; and Single Member District/ANC 1A11. Pursuant to § 3113.13, the Office of Zoning mailed letters on October 28, 2013 providing notice of the hearing to the Applicant, ANC 1A, and the owners of all property within 200 feet of the subject property. Notice of hearing was published in the *D.C. Register* on November 1, 2013 at 60 DCR 15221.

Party Status. The Applicant and ANC 1A were automatically parties to this proceeding.

¹ The application originally requested variance relief from the rear yard requirements of § 404.1, but was subsequently amended to eliminate this request. As OP noted in its report, the Applicant proposes no changes to the structure and the building maintains its original 1908 footprint, therefore rear yard relief is unnecessary.

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Applicant's Case. The Applicant submitted evidence and gave testimony describing his proposed use of the property as a three-unit apartment building. The Applicant argued that variance relief would not have a detrimental impact, as he had already completed the conversion and had used the structure as a three-unit apartment house without a negative impact on neighboring properties. Additionally, the Applicant indicated that he had detrimentally relied on his acceptance into the District of Columbia Housing Authority ("DCHA") Rent Voucher Program. The Applicant testified that he interpreted DCHA's issuance of vouchers for two rental units as a grant of permission to use the dwelling as a three-unit apartment house, despite his failure to obtain a building permit or Certificate of Occupancy from the Department of Consumer and Regulatory Affairs ("DCRA"). After the initial hearing, the Applicant submitted DCHA application forms, contracts, and inspection forms to support his argument of detrimental reliance. (Exhibit 29A-B.)

OP Report. By memorandum dated December 31, 2013, the Office of Planning ("OP") recommended denying the application. OP contended that the Applicant failed to show any exceptional conditions on the Subject Property. OP also noted that the increase in density would not be consistent with the one-and-two-family dwellings permitted in the R-4 District. (Exhibit 27.) In response to the Applicant's supplemental filings, OP provided a report reiterating its recommendation to deny variance relief. (Exhibit 30.)

DDOT Report. By memorandum dated December 17, 2013, the District Department of Transportation ("DDOT") indicated that it had no objection to the relief requested. (Exhibit 26.)

ANC Report. By letter dated November 14, 2013, ANC 1A indicated that it discussed the application at its properly noticed meeting on November 13, 2013. With a quorum present, the ANC voted 11-0-0 to support the application. The ANC based its support on the desire for more density in the neighborhood and on the fact that the conversion would not require changing the footprint or height of the structure. (Exhibit 24.)

Persons in support. A petition in support signed by 68 neighbors of the Applicant was filed to the record. (Exhibit 29A).

FINDINGS OF FACT

1. The property is a rectangular lot located on the east side of 11th Street, N.W. between Irving Street, N.W. and Columbia Road, N.W. at 3007 11th Street, N.W. (Square 2851, Lot 99) (the "Subject Property").
2. Prior to the event described in this Order, the Subject Property was improved with a two-and-a-half-story one-family row dwelling constructed in 1908. As will be explained, the structure was unlawfully converted into a three-unit apartment house.
3. The lot has rear access to a 10-foot wide public alley.

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4. The Subject Property is located within the R-4 Zone District, which permits one-family and two-family dwellings (also known as “flats”), and row dwellings, as a matter of right.² (11 DCMR § 330.5.)
5. The R-4 zone also permits the conversion of a building or other structure existing before May 12, 1958, to an apartment house provided that there is 900 square feet of land area for each unit. (11 DCMR § 330.5 (e).)
6. The other lots on the east side of the 3000 block of 11th Street, N.W. are similar in size to the Subject Property, ranging from approximately 1,200 to 1,461 square feet.
7. The one-family row dwelling on the Subject Property was nonconforming in terms of lot occupancy, rear yard, and open court requirements. The Subject Property has a lot occupancy of 73%, whereas the maximum lot occupancy permitted in the R-4 District for row dwellings is 60%. (11 DCMR § 403.2.³) The rear yard measures 16 feet wide while § 404.1 requires a minimum width of 20 feet. The open court is 5.4 feet wide where a six foot wide court is required for one-family dwellings by § 406.1
8. The Applicant purchased the Subject Property in 1979. In 1999, he began renovations to convert the one-family row dwelling into a three-unit apartment house without a building permit.
9. The Applicant intended to occupy the first floor of the dwelling and rent the basement and second floor units to residential tenants.
10. On September 20, 2007, the Applicant submitted application MS111549 to the DCRA requesting a construction permit to convert the row dwelling into three units. On February 25, 2008, the application was withdrawn and no permit was issued.
11. Without a building permit from DCRA, the Applicant finished the conversion, creating independent units in the basement, first floor, and second floor.
12. In 2009, the Applicant was accepted into the District of Columbia Housing Authority’s Housing Choice Voucher Program. Based on the information provided by the Applicant, DCHA provided rent vouchers for tenants in the basement and second floor units. DCHA did not require the Applicant to provide a Certificate of Occupancy or other documentation from DCRA during the application process.

² A row dwelling in a one-family dwelling with no side yards. (11 DCMR 199.1, definition of “dwelling, row.”)

³ The conversion actually reduced the subject property’s nonconformity with respect to lot area, in that lawful converted apartment houses are permitted a lot occupancy of 60%. *Id.*

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13. The Applicant believed that the issuance of the rent vouchers by DCHA signified that no further steps were necessary for the legal conversion of the Subject Property into a three-unit apartment house.
14. The Applicant estimates that he invested over \$250,000 in the renovation and conversion process since 1999.
15. The Applicant rented out the basement and second floor units to residential tenants from 2009 until 2013 without obtaining a Certificate of Occupancy from DCRA.
16. In 2013, the Applicant became aware of zoning compliance issues. At that time, the Applicant ceased renting the two units and applied for a building permit with DCRA.
17. On March 8, 2013, DCRA issued a building permit for the Applicant to convert the row dwelling into a two-unit flat. The permit required the Applicant to remove the dwelling's third Pepco meter before being issued a Certificate of Occupancy or to seek variance relief to allow a three-unit apartment house.
18. The Applicant proposes to maintain the three converted units, each with a lot area of 452.7 square feet. Because § 401.3 requires a minimum lot area of 900 square feet per unit, variance relief is required.
19. As noted, the building provides a 5.4 foot wide nonconforming open court whereas a six foot wide open court is required for one-family dwelling. However the minimum width for an open court for all other structures in the R-4 District is 10 feet.⁴ Because the Applicant seeks approval for a converted three-unit apartment house, a variance from § 406.1 is needed.
20. The R-4 District is not intended to be an apartment house district, and therefore, conversions are controlled by a minimum lot area per family requirement. (11 DCMR § 330.3.)

CONCLUSIONS OF LAW AND OPINION

The Applicant requests variance relief from the lot area requirements of § 401.3 and from the open court requirements of § 406.1 to allow a converted three-unit apartment house in the R-4 District at premises 3007 11th Street, N.W. (Square 2851, Lot 99). The Board is authorized under § 8 of the Zoning Act of 1938, D.C. Official Code § 6-631.07 (g)(3) (2012 Repl.) to grant variance relief from the strict application of the Zoning Regulations. As noted by the District of Columbia Court of Appeals:

An applicant must show, first, that the property is unique because of some physical aspect or “other extraordinary or exceptional situation or condition”

⁴ It therefore unclear why DCRA issued the building permit for a flat, since § 406.1 also requires at least a 10 foot wide open court for that.

inherent in the property; second, that strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant; and third, that granting the variance will do no harm to the public good or to the zone plan.

Capitol Hill Restoration Society v. District of Columbia Bd. of Zoning Adjustment, 534 A.2d 939, 941 (D.C. 1987).

The “exceptional situation or condition” of a property can arise out of “events extraneous to the land,” including the zoning history of the property. *See De Azcarate v. District of Columbia Bd. of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978). Further, an applicant’s “good faith detrimental reliance on zoning actions” can contribute to the uniqueness of a property. *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097-98 (D.C. 1979).

For the second prong of the variance test, the Court of Appeals has held that the more stringent “undue hardship” standard applies to use variances, while an applicant seeking an area variance must show only “practical difficulties.” *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 540-41 (D.C. 1972). The Court did not explicitly define “practical difficulties,” but notes that an applicant must show that strict compliance with the Zoning Regulations would be “unnecessarily burdensome.” *Id.* at 542.

The Board finds that the Applicant has failed to show an exceptional situation or condition inherent in the Subject Property. The lot size, though small and nonconforming, is similar to other lots in the neighborhood. The lot is rectangular like nearby properties, is similarly developed, and abuts the same public alley. Further, the Board finds that the Applicant has not demonstrated “good faith detrimental reliance on zoning actions” that would constitute a unique zoning history and create an exceptional condition.

The Applicant claims that he detrimentally relied on the actions of the District of Columbia Housing Authority when the agency accepted his application to the Housing Choice Voucher Program and issued rent vouchers for two rental units in 2009. The Applicant claims that, in reliance on this approval, he invested over \$250,000 in converting the property starting in 1999.

Section 10 of the Zoning Act of 1938 makes it illegal to erect, construct, reconstruct, convert or alter any building in the District of Columbia without a building permit. (D.C. Official Code § 6-641.09 (2012 Repl.)) That section also provides that no such permit may issue unless “the plans of and for the proposed erection, construction, reconstruction, conversion, or alteration fully conform to ... the regulations adopted under” the Zoning Act. The record reflects that the Applicant began to convert his row dwelling into a three-unit apartment house in 1999 without a building permit. Although the Applicant applied for a building permit in 2007, the request was later withdrawn. Had the Applicant applied for and not withdrew his request for a building permit, he would have been advised that variance relief was required and would not have expended the sums of money he did. Since it was the Applicant’s unlawful act of undertaking a

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renovation without a building permit which led to the expenditures complained of, the Board can properly deny what amounts to equitable relief based upon the doctrine of “unclean hands.”⁵

Further, the Applicant’s claimed reliance upon the actions of DCHA does not constitute “detrimental reliance on zoning actions.” First, any alleged detriment occurred prior to the DCHA actions and second DCRA and its Zoning Administrator are the only entities authorized to determine whether proposed construction complies with the Zoning Regulations. The Applicant points to no action by DCRA or the Zoning Administrator that caused him to believe he could lawfully convert the building to an apartment house use. Thus, this application is distinguished from cases where an applicant detrimentally relied on assurances from the Office of Zoning or approval from DCRA. *See, Application No. 18570 of 1845 North Capitol Street NE LLC* (2013) (variance from § 401.3 granted after DCRA issued building permit to renovate three-unit apartment house believing it to be a nonconforming use, but later denied certificate of occupancy after concluding that the use had been abandoned).

Since there is no exceptional condition existing on or related to the property, the Board need not analyze how, as a result of any such condition, strict compliance with the Zoning Regulations would result in a practical difficulty.

As to the final prong of the variance test, the Board finds that the conversion would not be a substantial detriment to the public good, but that granting the requested relief would cause substantial harm to the zoning regulations. The Board credits ANC 1A and the letters in support from neighbors, which note that the dwelling has previously operated as a three-unit apartment house without a negative impact on neighboring properties. However, the Board concurs with OP that granting the relief would cause substantial harm to the zone plan. The R-4 District is not intended to be an apartment house district, and to that end, specific regulatory requirements were put in place to prevent conversions of this nature. (11 DCMR § 330.3.) Although there may be factors that counter these considerations, none are presented here. Therefore, permitting such as conversion in this case would cause substantial harm to the zone plan.

The Board is required to give “great weight” to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2012 Repl.)) For the reasons discussed, the Board concurs with OP’s recommendation to deny the relief requested.

The Board is also required to give “great weight” to the issues and concerns raised by the affected ANC in its written report. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2012 Repl.)).) The ANC voted to support the application, based on the desire for more density in the

⁵ Although an administrative tribunal, the Board notes that “courts of equity have traditionally exercised their discretion to deny relief to parties who have acted in bad faith.” *Albergottie v. James*, 470 A.2d 266, 269 (D.C. 1983).

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neighborhood and the fact that the conversion would not require changing the footprint or height of the structure. The ANC's concerns were only relevant to the third prong of the variance test pertaining to the potential harm of granting the relief requested. As discussed, the Board concurred with the ANC in its finding regarding the public good. The ANC did not address the first and second prong of the variance test. The Board found that the Applicant failed the first and second prong of the test, there was no unique or exceptional condition on or related to the property. And, as there was no exceptional condition existing on or related to the property, there could not be a practical difficulty arising from such a condition of the property. Therefore, the Board cannot follow the ANC's recommendation that the application be granted.

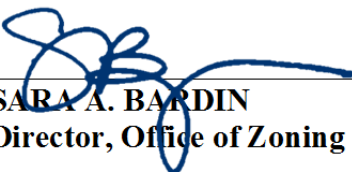
Based on the findings of fact and conclusions of law, the Board finds that the Applicant has not satisfied the burden of proof with regard to the request for variance relief from the lot area requirements under § 401.3 and from the open court requirements under § 406.1 to allow a three-unit apartment house in the R-4 District at premises 3007 11th Street, N.W. (Square 2851, Lot 99). Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: **3-0-2** (Lloyd J. Jordan, Marnique Y. Heath, and Jeffrey L. Hinkle to DENY; S. Kathryn Allen and Robert E. Miller not present, not voting.)

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

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

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: February 11, 2015

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.