

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441-4th Street N.W.
Washington, DC 20001

BZA CASE No. 18991

Appeal of Permit for 1521 Varum Street, NW

PRE-HEARING STATEMENT BY CECILIA WALDECK

This is my supplemental statement supporting the appeal of the zoning permit issued for Varum Lofts, a planned development at 1521 Varum Street N.W. I am a neighbor living at 4517 – 15th Street NW and am active in the local neighborhood association. I and many other neighbors purchased our homes because we wanted to live in a quiet, neighborhood of single-family homes rather than in an apartment district. Varum Lofts is a large new apartment building that simply does not belong at 1521 Varum Street because it destabilizes the surrounding neighborhood of predominantly single-family residences, has not been subjected to the review and scrutiny that most apartment buildings are given by permitting authorities using the R-5 zoning regulations, and will have many negative impacts on nearby neighbors. As described in the following sections, the Zoning Administrator erred in issuing the permit for Varum Lofts and BZA should revoke it.

1. **BZA MUST CONSIDER THE PROVISIONS OF SECTION 101 OF THE ZONING REGULATIONS WHEN EVALUATING THE ZONING ADMINISTRATOR’S DECISION UNDER SECTION 330.5(e)¹ BECAUSE THE SIZE OF VARNUM LOFTS VIOLATED OTHER APPLICABLE ZONING REGULATIONS INCLUDING THE PROHIBITION ON NEW APARTMENT BUILDINGS IN R-4 DISTRICTS AND THE PRIMARY PURPOSE OF THE R-4 ZONING REGULATIONS.²**

By obtaining a building permit for Varum Lofts under section 330.5(e), the developer engaged in regulatory arbitrage and undermined the zoning regulations that protect residents and neighborhood infrastructure from projects that substantially increase population density. Due to its large size, Varum Lofts was unsuitable for the limited regulatory oversight of section 330.5(e) and the project should be located on a lot subject to R-5 regulations. Section 330.5(e) was an old zoning provision permitting the matter-of-right conversion of an existing pre-1958 residence to a multi-unit apartment, subject to few zoning regulations, because the projects were generally small. A drive through the 16th Street Heights neighborhood shows that this long-existing zoning provision was not used to build large apartment buildings with designs dramatically out-of-conformity with the neighboring pre-1958 residences. The

¹ The writer presumes that BZA is reviewing this appeal under the zoning regulations in effect before the recent amendments in June, 2015 which repealed section 330.5(e) and created new regulations for conversions.

² AMM Holdings, Inc. (BZA Appeal No. 18181) (2011) (“... the Zoning Regulations prohibit the construction of a new multiple dwelling in an R-4 Zone ... *“(citing, 11 DCMR§ 330.5c))*; *see, also* 11 DCMR § 330.2 (“... primary purpose shall be the stabilization of remaining one-family dwellings”).

Zoning Administrator erred in permitting Varnum Lofts because it is a large project that involves the construction of a new seven-unit apartment building, comprised of two bedroom units with dens, outdoor decks and many large windows facing nearby row homes.

a) **THE DEMOLITION PLANS SHOW THAT VARNUM LOFTS WILL BE A NEW APARTMENT BUILDING AND ITS CONSTRUCTION IS PROHIBITED UNDER THE GENERAL ZONING PROVISIONS FOR R-4 DISTRICTS.**

The distinction between “a conversion of the usage of an existing residence” under past section 330.5(e) and “new construction” is not clear in the zoning regulations. However, this apparent regulatory gap (*i.e.*, lack of a definition in the zoning code) should not mean that there is no reasonable difference between a conversion and new construction. Section 330.5(e) was part of a zoning regulation that described “uses” permitted “as a matter of right” in R-4 Districts. Meriam-Webster’s Dictionary³ includes in its definition of conversion: “something converted from one use to another.” This definition suggests that “something” existing prior to the conversion in usage remains after the conversion.

The demolition plans for Varnum Lofts show that the “something” in this matter, the existing residence and garage, will be taken down and permanently removed (apparently without a raze permit) and will no longer exist after the demolition. Specifically, the plans show that the following structures on the current property will be removed:⁴

- Garage near the service alley;
- Foundation slab of the residence;
- Steel column supporting the residence;
- Stairs and interior floors of the residence;
- All windows and doors in the residence;
- Front porch and back deck;
- North exterior wall and large portions of the west and south exterior walls; and
- All electrical and plumbing infra-structure.

After the removal of these structures, the plans call for excavating 52% of the lot in preparation for the construction of the Varnum Lofts. The footprint of the existing structures (less than 25% of the lot) is substantially smaller than the size of this excavation. Prior to construction, a large excavated hole in the ground will replace the existing structures on the lot.

The firewall from the existing building will remain intact but its removal will cause structural damage to the neighboring residence at 1519 Varnum Street. Although some portions of the exterior walls on the west and south sides of the building will be retained, they are subject to substantial re-

³ <http://www.merriam-webster.com/dictionary/conversion>

⁴ Exhibit 43A (Demolition Plan).

construction from the installation of a new foundation slab and new windows and doors that substantially differ in design from those in the existing building.

Apparently, the developer's position is that the retention of these partial walls and the firewall qualifies the project for regulation under section 330.5(e) and exempts it from the R-5 zoning regulations, which are designed for regulating apartment projects of this size. The Zoning Administrator erred when he accepted this position. Regulation of this project under section 330.5(e) and the R-4 zoning regulations will put the nearby neighbors and future residents of Varnum Lofts at risk because these regulations are simply inadequate for regulating such a large project.

b) THE DESIGN AND SIZE OF VARNUM LOFTS (i.e., SEVEN TWO-BEDROOM APARTMENTS) CONFLICT WITH THE PURPOSE OF THE R-4 ZONING REGULATIONS WHICH IS TO STABILIZE THE REMAINING ONE-FAMILY DWELLINGS IN THE DISTRICT (11 DCMR § 330.2).

The Zoning Regulations for the R-4 district were mapped for the primary purpose of stabilizing the remaining one-family dwellings, and the R-4 district is not intended to become an apartment house district. As described previously, new apartment buildings are not permitted as a matter-of-right. Both past and recent regulations relating to the usage conversion of pre-1958 residences are intended to limit the size of converted apartment buildings and prevent the R-4 district from becoming an apartment house district, as contemplated in the R-5 zoning regulations.⁵

The existing residence at 1521 Varnum Street is a single-family residence with a footprint of 1,163.4 square feet on a lot, which is 6,277.5 square feet in size. It is attached to 1519 Varnum Street and adjacent to another pair of row homes.⁶ The lot is three lots away from the corner at 16th Street N.W. and has a large back yard that abuts neighboring back yards, which contain trees and plants. Abutting the service alley, behind 1521 Varnum Street, are a series of attached garages for the nearby homes.

Varnum Lofts will dramatically transform the current quiet rows of single-family homes on Varnum and Webster Streets into an apartment neighborhood, with substantial negative impacts on neighbors, as described many years ago by the Supreme Court in The Village of Euclid et. al. v. Amber Realty, 272 U.S. 365 (1926).⁷ What was true in 1926 is true today! The recently amended R-4

⁵ 3545 – 13th Street LLC (BZA Appeal No. 18560) (2013) at 6. *See, also*, 11 DCMR § 330.2 (Very little vacant land shall be included within the R-4 District, since its primary purpose shall be the stabilization of remaining one-family dwellings.).

⁶ Exhibit 43A (architectural plans submitted by WestEnd LLC).

⁷ “. . . the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in

regulations will not adequately protect further apartment development on the block after construction of Varnum Lofts because they allow new additions that are similar in size with those of adjacent homes.⁸ The lot at 1521 is the deepest lot on the block and will have the largest addition possible, extending to within 20 feet of the back service alley. Adjacent residences may be permitted to construct other large additions on their lots that extend to within 20 feet of the service alley. Over time, the entire block may redevelop into apartment buildings, which conflicts with the primary purpose of the R-4 regulations. The Zoning Administrator erred when issuing the permit because his review was myopic and he did not carefully consider the important, underlying purpose of the R-4 zoning regulations.

2. ON BALANCE, THE EVIDENCE RELATING TO SECTION 101 FACTORS WEIGHS IN FAVOR OF REVOKING THE ISSUED PERMIT.

When issuing a permit, the Zoning Administrator must consider whether his decision “shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to:

- (a) Provide adequate light and air;
- (b) Prevent undue concentration of population and the overcrowding of land; and
- (c) Provide distribution of population, business and industry, and use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and cultural opportunities; and that will tend to further economy and efficiency in the supply of public services.”⁹

The Zoning Administrator failed to take these factors into consideration when issuing the permit for Varnum Lofts.

Varnum Lofts will be 3,131 square feet in size and substantially larger than the current residence (1,163 square feet) and the size of other nearby residences. It will cover 50% of the lot, in contrast to the current residence, which covers 19% of the lot.¹⁰ Varnum Lofts will tower over nearby residences with a penthouse structure that is 47 feet – 11 inches high. The height of the current residence is 29 feet and 4 inches,¹¹ a height consistent with that of the other nearby residences. Varnum Lofts will have an additional story as compared to the current residence and other nearby residences.

more favored localities, -- until finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. **272 U.S. 365, 394.**

⁸ 11 DCMR § 330.7(d) (2015) (“An addition shall not extend further than ten feet (10 ft.) past the furthest rear wall of any principal residential building or structure on an adjacent property”).

⁹ 11 DCMR § 101.1.

¹⁰ Exhibit 43A (General Notes – Code Analysis).

¹¹ Exhibit 43A (Zoning Code Analysis).

Additionally, Varnum Lofts will extend far beyond the footprint of the neighboring residences into the back yard to within 20 feet of the back service alley. The 20 feet of open space between the building and the service alley will be an open parking lot for four cars. In contrast, the current residence has a rear yard that is 109 feet and 5 inches long which contains trees, grass and plants and an enclosed garage next to the service alley.¹² Similarly, the adjacent properties have large grass-covered yards and enclosed garages next to the back service alley.

The bulk and height of Varnum Lofts will negatively impact the air and sunlight currently enjoyed by neighboring properties. The building's substantially greater height will cast shadows on neighboring properties during the day and limit the feasibility of installing a solar panel on the rooftops. Breezes through the back yards will be impeded by the bulk of the large building.

Varnum Lofts will create an undue high density of residents and an overcrowding of land that is uncommon in the R-4 district and immediate neighborhood. The closest apartment building to Varnum Lofts is located several blocks away at Arkansas and 14th Street NW. The residences on the blocks immediately adjacent to Varnum Lofts are single-family residences inhabited by 1-2 families.¹³ The substantially high population density at Varnum Lofts will dramatically transform the currently, quiet neighborhood with the following negative impacts:

- More congested on-street parking in a neighborhood that does not have parking accessible on nearby 16th Street N.W. on most days, and must support on-street parking for many nearby churches, which do not have sufficient parking infrastructure.
- More congested traffic on Varnum and nearby streets, as well as the narrow service alley. Such congestion can increase car accidents and property damage from vehicles.
- A substantial increase in noise from Varnum Lofts due to its large number of residents and the many open decks and windows designed for the apartment units. Each unit has two bedrooms and one den and, except for a basement unit, each has an outdoor balcony. Several balconies are located on the rooftop. Currently, there are no roof decks on residences in the nearby neighborhood.
- An increase in light pollution from the lights planned for the roof decks, walkways, and apartment unit windows. This light pollution can interfere with neighbors' enjoyment of their properties and impact their sleeping patterns and habits.

¹² Exhibit 43A (General Notes – Code Analysis).

¹³ Some residences rent out the basement as a separate unit.

- The loss of privacy in the neighboring back yards and homes. The large decks and many windows designed for Varnum Lofts will allow residents and their visitors to engage in voyeurism or otherwise spy on the activities and movements of nearby neighbors. The roof decks may facilitate a tragic shooting of people walking in the nearby streets and alleys.
- The apartment building may attract more burglaries and armed robberies due to the concentration of residents in an enclosed building. These crimes have recently plagued the neighborhood and the design of Varnum Lofts will likely increase these incidents because it creates an open side-yard at 1521 Varnum Street that can facilitate a quick walk from Varnum Street to Webster Street through the back service alley. Currently, gates, garages, and homes impede cutting through Varnum Street lots to the back service alley and Webster Street.

Varnum Lofts may overburden the public infrastructure in the neighborhood. When infrastructure is overburdened, neighbors suffer electrical outages, sewage backups, more rodents, bad smells from garbage containers, property damage and health risks. The R-4 zoning regulations are not suited for regulating Varnum Lofts and do not require city agencies and DCRA to consider its infrastructure impacts. The public records for Varnum Lofts do not describe plans by utility companies or city agencies (*i.e.*, Pepco, Water Department, Public Works, DDOT) to increase the neighborhood infrastructure to support this new apartment building. Before approving the Zoning Administrator's decision, BZA should require the developer to produce information on the infrastructure needs of Varnum Lofts and any plans for resolving these needs.

Varnum Lofts will create the following serious health and safety risks for nearby neighbors and building residents:

- The planned demolition and excavation may pollute neighboring properties and endanger the health of neighbors because lead paint, asbestos, and other toxic substances in the pre-1958 structures subject to removal can spread throughout the neighborhood. In a nearby demolition of a similar vintage building at 1424 Buchanan St. NW, despite complaint calls from neighbors, DCRA, the city's environmental agency, and OSHA did not enforce laws requiring the safe removal of these toxic substances. As in this matter, DCRA did not require a raze permit because the Zoning Administrator classified the project as a usage conversion under section 330.5(e). There is no evidence that the experience at 1424 Buchanan will not be repeated at 1521 Varnum Street.
- The original architectural plans for Varnum Lofts located the east exterior wall of the third floor very close to a working chimney on the residence at 1519 Varnum Street.

The close proximity of this stick frame wall to the nearby chimney violates the International Fire Codes.

Although the developer has recently submitted a design fix for eliminating the chimney safety problem, BZA should consider this error by DCRA and the Zoning Administrator as more evidence that the review of the Varnum Lofts project was inadequate and the resulting project may endanger the health and safety of future residents and nearby neighbors. BZA should revoke the issued permit because the Zoning Administrator did not consider the factors outlined in section 101.1.

Finally, section 101.2 of the zoning regulations further requires that the Zoning Administrator consider the following factors when issuing a zoning permit:¹⁴

- (a) Character of the respective districts;
- (b) Suitability of each district for the uses permitted in each district under this title; and
- (c) Encouragement of the stability of districts and of land values in those districts.

The Zoning Administrator failed to take the character of the nearby R-4 neighborhood into consideration when issuing the permit for Varnum Lofts. Due to its size and design, the Varnum Lofts is simply not suitable for placement on the lot at 1521 Varnum Street. The project belongs on an R-5 zoned lot on Georgia Avenue or 14th Street NW. As described above, the nearest apartment building is several blocks away on 14th Street NW. The planned building towers over nearby buildings on Varnum Street, Webster Street and 16th Street. Its large addition will dwarf the adjacent residences. With its large windows and outdoor balconies, Varnum Lofts has a post-modern design, not in character with the existing, early 20th century homes in the neighborhood.

Neighbors living near Varnum Lofts may experience lower resale values for their homes assuming that they do not sell their homes to a developer interested in converting the property into an apartment building. The sale of nearby homes for such apartment building conversions conflicts with the goal of encouraging the stability of single-family homes in this R-4 neighborhood. The Zoning Administrator erred in not considering the factors in section 101.2 when issuing the permit, particularly the risk that the project may trigger the conversion of additional nearby adjacent homes into equally large, apartment buildings.

3. THE ZONING ADMINISTRATOR ERRED IN PERMITTING A SEVENTH APARTMENT UNIT, PURSUANT TO SECTION 407.1 BECAUSE ALLOWING THIS VARIANCE TO THE LOT SIZE REQUIREMENTS SIGNIFICANTLY EXACERBATES THE NEGATIVE NEIGHBORHOOD IMPACTS DESCRIBED ABOVE.

¹⁴ 11 DCMR § 101.2.

The Zoning Administrator erred in permitting a seventh apartment unit, pursuant to section 407.1, which allows a small variance to the minimum lot size requirements of section 401 if “the deviation or deviations shall be deemed by the Zoning Administrator not to impair the purpose of the otherwise applicable regulations.”¹⁵ The lot at 1521 Varnum St. is 6,277.5 square feet and smaller than the 6,300 square feet required to support seven apartment units.¹⁶ Although the difference is small enough to permit a variance by the Zoning Administrator under section 407.1, he erred in his analysis of the impact of an additional unit on the purpose of the R-4 zoning regulations, the compliance of the project with other applicable regulations and the configuration of Varnum Lofts in relation to adjacent lots.¹⁷ His conclusion is not well-founded for the following reasons.

First, in his memorandum describing the basis for his decision,¹⁸ the Zoning Administrator mentions factors unrelated to the zoning regulations or nearby lots which reflect his personal biases in favor of development. These include a preference favoring smaller apartment units over larger units and a preference for sub-dividing lots to promote development. These preferences or factors are not part of the zoning regulations and should not be considerations in the decision to grant a variance to the requirements of section 401.3(c).

Second, the Zoning Administrator assumes that there is relative consistency in character between a six-unit building and a seven-unit building. There are no submitted plans for a six-unit building at 1521 Varnum Street and, consequently, no alternative plan to compare with the submitted plans for a seven-unit building. A six-unit building could be smaller and significantly different from the submitted plans. The Zoning Administrator’s assumption otherwise is speculative and not well-founded.

Third, the Zoning Administrator relies on a past BZA decision, BZA No. 18108, which involved a variance under section 407.1, and he argues that adding another apartment unit at Varnum Lofts has much less impact than the subdivision of a single-family lot to create two single-family residences in an R-1 neighborhood. However, the Zoning Administrator does not provide any retrospective evidence that the decision made in BZA No. 18101 was in fact a good decision, in accordance with the applicable zoning regulation, and did not lead to disruptions in the usage of nearby lots or negative impacts on the neighborhood. Moreover, even if the decision in BZA No. 18101 led to a good outcome, it is very dependent on the specific facts of the project and the local neighborhood. These facts differ substantially from the specific facts of Varnum Lofts and its neighboring residences because the matter did not involve high density housing in an R-4 district. Consequently, the Zoning Administrator’s logic in citing this decision as a precedent is not persuasive.

In his decision to grant a variance, the Zoning Administrator relies on one specific fact related to 1521 Varnum Street, namely the unique, longer shape of the lot relative to the adjacent lots. The lot is

¹⁵ 11 DCMR § 407.1.

¹⁶ Note that 11 DCMR § 401.3 requires a minimum lot area of 900 square feet per apartment unit.

¹⁷ See, Exhibit 24, Memo written to Mr. Sullivan by Mr. LeGrant (Aug. 11, 2014) (granting minor flexibility for a seventh unit under section 407.1).

¹⁸ *Id.*

longer than nearby lots, due to a former owner buying adjacent land from the Church on 16th Street NW. This transaction occurred many years after the neighborhood was developed. The shape of the lot at 1521 Varnum does not detract from or impair its usage, nor the usage of the neighboring lots, as single-family residences. It should not be the sole basis for allowing an additional unit at Varnum Lofts because it is simply not that different in size from the other lots on the block.

Another family residing at Varnum Lofts will exacerbate the negative neighborhood impacts described above including, but not limited to: greater on-street and alley traffic; more on-street parking congestion, more noise, more light pollution, greater demands on sanitation and other infrastructure; and loss of privacy. Eliminating one apartment unit may eliminate an outdoor balcony and some windows.

Finally, the Zoning Administrator's factual finding that "his decision does not allow for any increase in the overall density or bulk of the proposed project"¹⁹ has no basis and is not logical. Adding a seventh unit adds another family unit to the building and will likely increase the population in the building even if the alternative is to build the same size building for only six units. For all the above reasons, BZA should reject the Zoning Administrator's decision to permit a seventh apartment unit at Varnum Lofts.

4. THE UNIQUE DESIGN OF VARNUM LOFTS DOES NOT CONFORM WITH THE DESIGN OF NEARBY RESIDENCES AND MAY CONSEQUENTLY VIOLATE OTHER APPLICABLE R-4 ZONING REGULATIONS. THE ZONING ADMINISTRATOR ERRED IN NOT CONSIDERING THESE POTENTIAL CONFLICTS.

Unlike all the other residences on Varnum Street, which have a front entrance abutting Varnum Street, Varnum Lofts will have a front entrance in the middle of the side yard facing 1529 Varnum Street. There will be a second entrance in the rear of the building facing the service alley. This design will convert the current side-yard at 1521 Varnum to a front-yard and the current rear-yard to a side yard. This creates ambiguities in the application of section 404.1, which requires a minimum 20-foot rear yard behind residences in the R-4 District. Because Varnum Lofts has no yard between it and 1519 Varnum Street, there may be a violation of section 404.1. Additionally, there may be violations of the zoning regulations related to height limitations as the Zoning Administrator may be measuring the building's height from the grade on Varnum Street rather than from the grade of the current side yard.

Merriam-Webster defines "front" as "the forward part or surface of something: the part of something that is seen first: a place, position, or area that is most forward or is directly ahead." When applying this definition to the plans for Varnum Lofts, the current side yard is best described as the "front" of the building. There will be a sign on that side of the building identifying it as "1521 Lofts."²⁰

¹⁹ *Id.*

²⁰ Exhibit 22 (Architectural Plans) at A204.

Presumably, the Zoning Administrator concluded that the stacked balconies abutting Varnum Street, which have no direct entrance onto Varnum Street, comprise the front of the building. This conclusion is not reasonable given the architectural drawings and the unique design of Varnum Lofts, which makes it inconsistent in design with nearby residences. If BZA does not revoke the permit for Varnum Lofts, it should require the developer to modify the design so that the front entrance to the building abuts Varnum Street, in harmony with all other nearby residences and the back yard requirements of section 404.1.

5. **BZA SHOULD REVOKE THE PERMIT AND END THIS PROCESS OF ALLOWING THE DEVELOPER TO REPEATEDLY MODIFY HIS PLANS TO CONFORM THEM TO THE ZONING CODE. DCRA'S RULES REQUIRE THAT A COMPLETE SET OF DOCUMENTS FOR A BUILDING PERMIT ARE SUBMITTED BEFORE A PERMIT IS ISSUED. BZA'S ACCEPTANCE OF A SUBSTANTIAL NUMBER OF REVISIONS TO THESE DOCUMENTS AFTER AN APPEAL IS FILED CREATES SUBSTANTIAL CONFUSION FOR THE APPELLANTS, THE PUBLIC AND DCRA.**

Since John Stokes filed this appeal, the developer has made multiple changes to his plans to conform them to the zoning codes.²¹ This practice makes it difficult for appellants to prepare their appeal case as the ball continues to move.

Additionally, this very forgiving process by BZA enables DCRA to continue to rush through zoning permit applications and make countless errors. A well-functioning DCRA should be the goal and, if sister agencies such as BZA tolerate DCRA's incompetent, error-prone reviews, this goal will never materialize. Neighbors filing BZA appeals will have to continue to shoulder the burden of zoning code enforcement. Additionally, buildings that violate the zoning codes will continue to proliferate because not all neighbors can afford to file a BZA appeal and hire an architect and attorney to second-guess DCRA's poor permitting decisions.

BZA should be tougher on DCRA and revoke permits like this one for Varnum Lofts that contain multiple zoning code errors. Such permits result from a sloppy permitting process and many undetected problems from the inadequate review can put the public's safety and health at risk.

8/30/2015

DATE

Respectfully,

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²¹ The developer has changed the location of the air-conditioning and heating units on the rooftop, increased the size of the parking lot abutting the service alley, changed the placement of the addition to avoid trespassing on the property at 1519 Varnum and, recently, the developer may be changing the wall on the third floor that abuts the chimney at 1519 Varnum.