

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18275 of Potomac Avenue LLC, pursuant to 11 DCMR §§ 3104.1 and 3103.2 for variances from the use provisions of § 350.1 to allow a coffee shop on the first floor and a pet supply store on the second floor of an existing two-story building in the R-5-B District at premises 1200 Potomac Avenue, S.E. (Square 1021, Lot 34).

HEARING DATES: November 15, 2011, December 20, 2011, February 14, 2012,
March 20, 2012

DECISION DATE: March 20, 2012

DECISION AND ORDER

On July 29, 2011, Potomac Avenue, LLC, (“Applicant”) filed an application with the Board of Zoning Adjustment (“Board”) requesting special exception relief under § 2003.1 to allow a coffee shop on the first floor of an existing two-story building, and a use variance for a pet supply store on the second floor of the building. The Board determined that a use variance was required for both uses¹, and ultimately voted to grant the use variance for a coffee shop on the first floor and to deny the use variance for a pet supply store on the second floor. A full discussion of the facts and law supporting these conclusions are found below.

PRELIMINARY MATTERS

Authorization

The Applicant in this case is 1200 Potomac Avenue LLC. Mr. Bruce Bates, a principal in the firm, authorized John Acker, the project architect, as its authorized agent. (Exhibit 7.)

The Application

The application was filed by Mr. Acker on July 29, 2011 seeking two types of relief: a special exception under § 2003.1 to change an existing nonconforming use as a deli to a nonconforming use as a coffee shop on the first floor of the existing building; and a use variance from § 350.1 to permit a new retail pet supply store on the second floor of the existing building. (Exhibit 1.)

¹ The caption was changed to reflect the relief that is required.

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Referral by the Zoning Administrator

The application was referred to the Board by the Zoning Administrator (“ZA”) of the District Department of Consumer and Regulatory Affairs. (Exhibit 6.) The relief initially sought was consistent with the relief recommended by the ZA.

Notice of Public Hearing

Notice

Pursuant to 11 DCMR § 3113.13, notice of the hearing was sent by the Office of Zoning to the Applicant, all owners of property within 200 feet of the subject site, Advisory Neighborhood Commission (“ANC”) 6B, and the District of Columbia Office of Planning (“OP”).

Posting

The Applicant posted placards at the property regarding the application and public hearing in accordance with 11 DCMR §§ 3113.14 through 3113.20. The Applicant also submitted an affidavit to this effect in accordance with 11 DCMR §§ 3113.19 and 3113.20. (Exhibit 24.)

ANC 6B

The subject site is located within the jurisdiction of ANC 6B, which is automatically a party to this application. In this case, the ANC filed two reports. In a report submitted November 9, 2011, ANC 6B indicated that at a regularly scheduled monthly meeting with a quorum present, it voted to oppose the application. (Exhibit 27.) The report indicated that the Applicant had not provided any evidence or justification for the relief requested. However, in a second report dated December 19, 2011, the ANC indicated that, at a regularly scheduled monthly meeting with a quorum present, the ANC voted to support the application. (Exhibit 28.) The ANC stated further that, after reviewing the Applicant’s documentation, it concluded that the project’s impact on air, light, and privacy would be negligible.

Requests for Party Status

The Board received no requests for party status.

Persons in Opposition

No persons appeared at the hearing to testify in opposition to the application. However, the Board received a letter in opposition from the adjacent property owner at 1208 Potomac Avenue, S.E., Valerie E. Robinson. (Exhibit 23.) Ms. Robinson objected to having any commercial use next door to her home in a residential neighborhood.

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Persons in Support

No persons appeared at the hearing to testify in support of the application. Nor were any letters received from persons in support of the application.

Government Reports

OP Report

OP reviewed the application and prepared a report recommending support in part, and denial in part. (Exhibit 26.) Regarding the request for a special exception under § 2003.1 to allow a coffee shop on the first floor, OP asserted that § 2003.1 was inapplicable, and that a use variance was required instead. However, OP opined that the use variance test could be met for the coffee shop. Regarding the request for a use variance to allow a pet supply store on the second floor, OP opined that the use variance test had not been met. OP's representative, Steve Mordfin, also testified to this effect at the public hearing.

District of Columbia Department of Transportation ("DDOT")

DDOT submitted a report stating that it had no objection to either the requested special exception or the requested variance. (Exhibit 25.)

FINDINGS OF FACT

The Property

1. The property is located at 1200 Potomac Avenue, S.E., in Square 1021, Lot 34, in the R-5-B zone district, and the Capitol Hill Historic District.
2. It is an unusually shaped corner lot with no alley access.
3. The lot is improved with a two-story building that was constructed in 1900, prior to the adoption of the current version of the Zoning Regulations in 1958, as a mixed-use building with a commercial space on the first floor and a residential apartment on the second floor.

The Surrounding Area

4. The character of the surrounding neighborhood is residential.
5. There are row dwellings, detached dwellings, and semi-detached dwellings adjacent to the property.
6. Across Potomac Avenue is a small public park.
7. Across K Street are three- and five-story public housing apartment buildings.

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Use of the Property

8. A certificate of occupancy (“C of O”) for the building shows that the first floor was used at one point as a “grocery store”. However, the date on the C of O is illegible. (Exhibit 10.)
9. The existing two-story building was abandoned at least eight years ago and is currently vacant. (Hearing Transcript of December 20, 2011, (“Tr.”), p. 70.)

The Project

10. The Applicant proposes to renovate the existing vacant building and locate a coffee shop on the first floor of the building and a pet supply store on the second floor of the building.

The Zoning Relief

11. Regarding the first floor coffee shop, the Applicant initially requested a special exception under § 2003.1 of the Zoning Regulations which, under certain circumstances, allows a change from one non-conforming use to another non-conforming use.
12. Regarding the second floor pet supply store use, the Applicant requested a variance from the use provisions of § 350.1 of the Zoning Regulations.
13. During the public hearing on December 20, 2011, the Board found pursuant to 11 DCMR § 2005.1 that the discontinuance of the previous non-conforming grocery store described in Finding of Fact No. 9 established *prima facie* evidence that there was no intention to resume the active operation of the use. Therefore, pursuant to that provision “any subsequent use shall conform to the regulations of the district in which the use is located.” The Applicant presented no evidence to rebut this presumption.
14. As there was no existing non-conforming use at the property, § 2003.1 (which allows a switching of existing non-conforming uses) was inapplicable. *See, Application No. 17100-A, Jesus is the Way Church, Order on Reconsideration.* (Board granted special exception relief under § 2003.1 where there was evidence of continuous non-conforming retail uses).
15. Since special exception relief was unavailable for the coffee shop on the first floor, the Board determined that use variances were required for both the first floor coffee shop and the second floor pet supply store.

The First Floor Coffee Shop

The Exceptional Condition

16. The first floor of the building was originally designed as commercial space. (Exhibit 26, OP Report, p. 2, Tr., p. 70.)

17. The entrance to this space faces the corner where 12th Street, K Street, and Potomac Avenue intersect, and the activity associated with an intersection.
18. The first floor is improved with two sets of show windows, one facing 12th Street and the other facing Potomac Avenue. The show windows are at ground level and do not afford any privacy to the occupants of the first floor. Show windows, in general, are designed to encourage pedestrians to look in, and are not conducive to residential use.

Undue Hardship

19. The lack of privacy from the show windows and the exposure of the first floor entrance at the intersection make the first floor space undesirable for residential use.
20. It is not feasible to use the first floor for residential use without eliminating the windows and building entrance and completely renovating the first floor of the building.

Impact of the Coffee Shop Use

21. Commercial use will not adversely impact the privacy of neighboring property owners. The first floor space is designed with its entrance away from the adjacent residential properties, shifting any activity associated with the proposed coffee shop towards the corner.
22. The property is now an eyesore. The coffee shop use will be an improvement to the existing abandoned building.

The Second Floor Pet Supply Store

Lack of Exceptional Condition

23. The second floor was originally designed for residential use.
24. The entrance to the second floor is near the adjacent residential row houses which face the street. It is separate from the first floor entrance and provides direct access to the second floor space.
25. The windows in the second floor space are one flight up and would provide an element of privacy to the occupants on that floor.
26. The Applicant asserted that a mixed use project is not feasible because: (a) the second floor space is too small for the coffee shop owner to live in (Tr., p. 65); and (b) most suitable residential tenants would not enjoy the smell and activity of the coffee shop below and would make complaints. (Tr., p. 62.) However, the Applicant did not provide any statements or testimony from realtors to establish these claims.

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27. At the conclusion of the December 20, 2012 hearing, the Board decided that it lacked evidence regarding any exceptional condition at the second floor which would cause an undue hardship in using the second floor residentially.
28. The Board stated that documentation was required to assess the use variance request for the second floor pet supply store. The Board directed the Applicant to provide evidence showing the difficulty in establishing a residential use on the second floor. The Board explained to the Applicant that he could submit statements or testimony from a realtor regarding the difficulty obtaining residential tenants, and/or financial information showing that residential use on the second floor was not financially feasible and would result in undue hardship to the Applicant. (Tr., p. 75 – 76.)
29. The Board continued the hearing to February 14, 2012 to allow the Applicant time to gather and/or prepare this documentation.
30. Shortly before the February 14, 2012 adjourned date, the Applicant submitted a letter to the Board requesting more time to prepare its case for the second floor use variance. (Exhibit 32.)
31. On February 14, 2012, the Board continued the case again, this time until March 20, 2012.
32. On March 20, 2012, the Applicant appeared but he did not proffer the additional documentation that had been requested by the Board. Nor did the Applicant present any evidence showing that the pet supply store would not adversely impact neighboring property owners.
33. Instead, the Applicant testified that the unusual trapezoidal shape of the building constrained his ability to convert the second floor space to residential use and that “putting [in] a one bedroom [would be] a little tight.” The Applicant also cited the “cost of construction” in converting the second floor to an apartment. (Hearing Transcript of March 20, 2012, p. 177.) However, the Applicant did not submit any evidence establishing what the cost of construction would be.

CONCLUSIONS OF LAW

The threshold question for the Board in this case was the type of relief required to establish a coffee shop use on the first floor. For the reasons stated in Finding of Fact Nos. 9 and 13 through 15, the Board concludes that a use variance is required, and not a special exception.

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.07(g)(3)(2001), to grant variances from the strict application of any Zoning Regulation. In order to grant the use variance relief needed to establish the coffee shop and pet store uses, the Applicant must satisfy the three-prong test set out in the Zoning Act

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and re-stated at 11 DCMR § 3103.2, that (1) its property has an exceptional size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulties or undue hardship 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.

Here, the Applicant must meet the stricter “undue hardship” test for a use variance for the coffee shop use on the first floor, as well as for the pet supply store on the second floor. *See, Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972) (“A use variance cannot be granted unless a situation arises where reasonable return cannot be made of the property in a manner consistent with the Zoning Regulations.”); *Bernstein v. D.C. Bd. of Zoning Adjustment*, 376 A.2d 816 (D.C. 1977). (“[I]t must be shown that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may reasonably be used.”)

The First Floor Use Variance for a Coffee Shop

Turning to the first prong of the variance test, the Board finds that the first floor of the property presents an exceptional condition. Although the property is now residentially zoned, the first floor was designed for commercial use and has been lawfully used in the past for commercial purposes. In fact, there is no evidence that the first floor was ever used residentially. In addition, the show windows at ground level and the entrance facing an intersection constitute exceptional conditions.

As to the second prong, the Applicant has established that strict application of the Zoning Regulations in this case will result in undue hardship. As explained, neither the ground level show windows nor first floor entrance are conducive to residential use. Therefore, the entire first floor would have to be demolished to convert the floor to residential use. (Findings of Fact 19 & 20.)

Turning to the third prong of the variance test, the Board concludes that the conversion to a coffee shop use on the first floor will not be a detriment to the public good or to the zone plan. The first floor space is designed with its entrance away from the adjacent residential uses. Therefore any activity associated with the coffee shop will be shifted away from the nearby residential properties.

The Second Floor Use Variance for a Pet Supply Store

The Board finds that the Applicant never established any exceptional condition relating to the second floor of the property; and, therefore, did not satisfy the test for a use variance on the second floor. It is undisputed that the second floor was designed for residential use. Therefore, it was incumbent upon the Applicant to show why the second floor could not be used residentially. *Bernstein, id.* The Applicant suggested that it would be difficult finding a suitable tenant, that the residential construction would be a challenge due to the building’s shape, and that

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the costs of conversion to residential use would be steep. But the Applicant never established any of these facts with any probative evidence.

The Applicant had opportunities to present such evidence on three separate dates: December 20, 2011, February 14, 2012, and March 20, 2012. The Board postponed this case on December 20, and again on February 14, at the Applicant's request, so that the Applicant could compile documentation to bolster his case. Yet the Applicant failed to produce any additional documentation on February 14 or the final March 20 date. The Board was not persuaded by the Applicant's conclusory statements and explained that the Applicant needed to prove that he could not rent the second floor residentially, or that the costs would be financially burdensome to establish residential use. The Board even suggested that the Applicant obtain the statement or testimony from a realtor, who might assist in this regard. But the Applicant failed to provide any documentation substantiating any exceptional condition or undue hardship that would result from using the second floor residentially. Nor did he present any evidence that a pet supply store would not result in adverse impacts upon neighboring property owners. The burden of proof rested with the Applicant. (11 DCMR § 3119.2.) Since the Applicant failed to meet his burden of proof, the Board had no choice but to deny the request for relief.

ANC

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)(3)(B)) requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. Specifically:

The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

As noted, the ANC supported the application, stating that the "project's impact on air, light and privacy will be negligible." This conclusion relates to the third prong of the variance test and would normally buttress an Applicant's claim that the project will not result in substantial detriment to the public good. The Board agrees with the ANC as to the coffee shop use, but did not reach the issue as to the pet shop use because the Applicant failed to prove that the second floor of the property was either an exceptional condition or that the strict application of the Zoning Regulations would result in undue hardship. Since the Board did not go on to discuss the third prong with respect to the pet store use, it is not necessary to respond to the ANC's assertions that relate to that element.

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The Board is also required under D.C. Official Code § 6-623.04(2001) to give “great weight” to OP recommendations. For the reasons stated in this Decision and Order, the Board finds OP’s advice to be persuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application is hereby **GRANTED** to allow a use variance for a coffee shop on the first floor of the premises, and **ORDERED** that the application is hereby **DENIED** for a use variance for a pet supply store on the second floor of the premises, **SUBJECT** to the approved plans as shown on Exhibit 30, **AS RELATED TO THE APPROVAL OF THE FIRST FLOOR USE ONLY**.

VOTE: 5-0-0 (Lloyd J. Jordan, Nicole C. Sorg, Rashida Y.V. MacMurray, Jeffery L. Hinkle, and Anthony J. Hood, all voting to APPROVE the first floor use variance, and DENY the second floor use variance.)

Vote taken on March 20, 2012

ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

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

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: January 17, 2013

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.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

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PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.