

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19119 of Warder LLC, pursuant to 11 DCMR § 3103.2, for variances from the lot area requirements under § 401.3¹, the court requirements under § 406, and the addition to a nonconforming structure requirements under § 2001.3; and pursuant to 11 DCMR § 3104.1 for special exception relief under § 336 to allow the Applicant to convert an existing pre-1958 residential building to an apartment house containing three residential units in the R-4 District at premises 549 Park Road, N.W. (Square 3037, Lot 48).

HEARING DATES: December 1 and December 22, 2015

DECISION DATE: December 22, 2015

DECISION AND ORDER

On August 19, 2014, Warder LLC (the "Applicant"), the owner of 549 Park Road (Lot 48 in Square 3037) (the "Property"), filed a self-certified application with the Board of Zoning Adjustment (the "Board") for the above-captioned zoning relief. The Board held public hearings on the application on December 1 and December 22, 2015. Following its December 22nd hearing, the Board voted to approve the application.

PRELIMINARY MATTERS

Self-Certification. The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2. (Exhibit 11.)

Notice of Application and Notice of Hearing. By memoranda dated August 31, 2015, the Office of Zoning provided 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 in which the subject property is located; and Single Member District/ANC 1A09. Pursuant to 11 DCMR § 3113.13, on September 9, 2015, the Office of Zoning

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final paragraph and the final all-capitalized paragraphs, are to provisions that were in effect on the date this Application was decided by the Board of Zoning Adjustment ("the 1958 Regulations"), but which were repealed as of September 6, 2016 and replaced by new text. Also, all zone districts described in this order were renamed as of that date. The repeal and replacement of the 1958 Regulations and the renaming of the zone districts has no effect on the validity of the Board's decision or the validity of this order.

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mailed letters providing notice of the hearing to the Applicant, ANC 1A, and the owners of all property within 200 feet of the subject property. Notice was published in the *District of Columbia Register* on September 11, 2015 (62 DCR 12402).

Advisory Neighborhood Report. ANC 1A, which is an automatic party to this case, filed a report, dated December 1, 2015, stating that at a properly noticed meeting on November 12, 2015, with a quorum present, a motion to support the application failed by a vote of 2-5-1 and no motion was made to oppose the application. (Exhibit 35.) Although the report contains a narrative expressing issues and concerns, there is no indication that the ANC voted in support of those positions.

Office of Planning Report. OP submitted a report dated November 24, 2015. (Exhibit 28.) In its report, OP recommended denial of the lot area relief, concluding that the Applicant has not demonstrated any circumstance that would result in a practical difficulty. OP found no merit in the Applicant's contention that a practical difficulty arises from the lot's unusual angled lot line – i.e., if the angled lot line were perpendicular to Park Road, N.W., the lot would meet the minimum 2,700 square feet of lot area for three units as required by § 401.3. OP concluded that neither the pre-existing condition of the lot nor the regulations prevent the addition of a third unit. Rather, OP stated that it was the lot's size that did not meet the land minimum area as prescribed by the zoning regulations.

Nor did OP find that the relatively *de minimis* amount of relief needed – nine square feet, or three square feet per unit – a basis for granting the relief. OP noted that prior to the adoption of Zoning Commission Case No. 14-11, this degree of deviation could have been granted by the Zoning Administrator. However, the Zoning Commission amended that general waiver provision to expressly preclude the Zoning Administrator from granting this deviation from this particular land area requirement. As to harm to the public good, OP found that granting the requested variance would not have that effect. OP concluded that the immediately adjoining house to the east, 547 Park Road, N.W., would continue to be separated from the proposed addition by its existing side yard and that the light available to the immediate house to the west, 551 Park Road, N.W., would likely be impacted only during the morning hours. In addition, the public good was furthered by the rehabilitation of vacant structures and the expansion of the housing supply. Finally, OP concluded that granting the land area variance would substantially harm the zone plan because of the absence of any exceptional circumstance.

As to the court relief, the Office of Planning considered the existing nonconforming side yard to be an exceptional circumstance and concluded that providing a fully compliant court would be a practical difficulty given the increased cost involved in demolishing significant portions of the existing structure. OP also concluded that no detriment to the public good would result because the property's existing side yard would not be altered for most of its length and the neighbor to the east would still have its light, air, and privacy protected by its existing side yard. Further, though nonconforming, the court would provide adequate light and air. Also, the addition would not include additional windows. With respect to the special exception, OP concluded that the

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Applicant met all of the applicable requirements of § 336, except for the minimum lot area requirement of § 336.5, which is the subject of the variances to which it objects.

DDOT Report. DDOT filed a report, dated November 24, 2015, stating that notwithstanding the fact that the additional unit may lead to a minor increase in vehicular, transit, pedestrian, and bicycle traffic and has the potential to generate a minor impact to on-street parking conditions in the area, DDOT concluded that the project would have no adverse impact on the travel conditions of the District's transportation network and that the potential impact on parking would be insignificant. DDOT therefore indicated that it has no objection to the approval of the requested variances and special exception. (Exhibit 29.)

Requests for Party Status. There were no requests for Party Status.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The Property is located at 549 Park Road, N.W. (Square 3037, Lot 48) in the northwest quadrant of Washington D.C.
2. The Property is located within the R-4 Zone, within a block of higher density zones.
3. The Property contains approximately 2,691 square feet of lot area and is improved with a long vacant semi-detached two-story residential structure.
4. The side yard has a maximum width of seven feet, six inches where a minimum of eight feet is required, 11 DCMR §§ 405.2 and 405.9, rendering it nonconforming.

The Proposed Conversion

5. The Applicant proposes to convert and renovate the existing vacant and dilapidated building on the Property into a three-story three-unit condominium apartment house.
6. After the renovation, the cellar and 1st floor will each have a one-bedroom condominium unit and the 2nd and 3rd floors will have a single three-bedroom condominium unit.
7. The building, as converted, will have a new rear addition and a third floor addition.
8. The rear addition will extend entirely into the area of the adjacent side yard turning the remaining portion of the side yard into an open court.
9. The building's existing height is 21 feet, nine inches. With the addition, its height will increase to 34 feet, three inches.

Zoning Relief Requested

Variances

10. Variances are required from the minimum lot area requirements of § 401.3, the minimum court depth requirement of § 406.1, and from the prohibition of § 2001.3(b)(2) against an addition to a nonconforming structure creating a new nonconformity.
11. The conversion of a residential structure existing prior to May 7, 1958 is permitted in the R-4 District as a special exception under § 336.1, subject to several conditions. One such condition is that there be a minimum of 900 square feet of lot area per unit. (11 DCMR § 336.5.) This condition reflects the minimum lot area requirement for such conversions as stated in § 401.3. The Property has 2,691 square feet of lot area, which is nine feet short of the requirement (less than a .34% shortfall).
12. Pursuant to § 406.1, the proposed open court must have a minimum width of four inches for each foot of building height. Since the addition will have a height slightly in excess of 34 feet, a minimum court width of 11 feet is required. Instead, the open court at its narrowest will have a width of one foot, 11 inches.
13. As noted, the existing structure is nonconforming as a result of its substandard side yard. The rear addition will eliminate the rearmost portion of the side yard, thereby creating a substandard court and violating the prohibition of § 2001.3(b)(2) against an addition to a nonconforming structure creating a new nonconformity.

Exceptional Circumstance

14. Although the property's western lot line runs perpendicular to Park Row, its eastern side lot line is significantly angled such that the lot's width is reduced from approximately 29 feet at the front lot line to 19 feet at the rear lot line.
15. The Property is one of only two lots in the entire square with an angled lot line and the only lot in which the angled lot line results in a narrowing of lot width.
16. The Property's only side yard abuts the angled lot line, such that it is similarly angular. The side yard is extremely narrow, with a width that narrows to as little as one foot, 11 inches.

Practical Difficulty

17. Had the angled lot line been perpendicular to Park Road, the Property's lot area would have been sufficient lot to meet the minimum requirement. Instead, the angled lot line resulted in a lot area of 2,691 square feet, nine feet short of the 2,700 square feet required.

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18. Creating a compliant court would require the wasteful and costly demolition of the portions of the existing structure that abut the eastern lot line.

The Zone Plan and the Public Good

19. The existing long vacant and dilapidated structure will be renovated into modern and marketable units that once again will be used for residential purposes.
20. The third floor addition will be set back six feet from the front façade.
21. The front porch will be retained and a tree will be planted.
22. The court's length encompasses most of the area of the prior side yard and therefore the maximum seven foot, six inch width will be maintained.
23. The neighbor to the east, 547 Park Road, N.W., will continue to be separated from the Property by its existing side yard.
24. The light available to the immediate house to the west, 551 Park Road, N.W., would likely be impacted only during the morning hours.
25. As found by DDOT, the addition of a third unit will result in only minor impacts on parking and traffic in the area.

Special Exception

26. The building on the Property existed prior to May 12, 1958 and with the addition will still be less than 35 feet in height.
27. The building includes an original rooftop architectural element above the second floor windows that will not be altered or removed.
28. The adjacent structures at 441 and 547 Park Road, N.W. do not have chimneys or external vents that would be impacted by the additions nor do the structures have solar energy systems.
29. The Applicant has provided graphical representations and photographs as required by § 336.10 to demonstrate compliance with § 336.9.

CONCLUSIONS OF LAW

Variance 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

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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.) 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. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972). The Applicant in this case is requesting area variances.

The District of Columbia Court of Appeals has held that "an exceptional or extraordinary situation or condition" may encompass the buildings on a property, not merely the land itself." See *Clerics of St. Viator v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990). In *Gilmartin*, the Court of Appeals also indicated that the Board "may consider whether the variance sought is *de minimis* in nature and whether for that reason a correspondingly lesser burden of proof" is required of the Applicant. 579 A.2d at 1171 n.6, citing, *Stewart v. Zoning Hearing Bd. of Radnor Township*, 110 Pa.Cmwlth. 111, 531 A.2d 1180, 1182 (1987) ("infinitesimal deviation [lot a few feet short of one acre] from complete compliance is clearly within the *de minimis* exception for granting dimensional variances.").

The Applicant is seeking variances from the strict application of the Zoning Regulations regarding minimum lot area, minimum court width, and the construction of an addition to a nonconforming structure. As discussed below, the Board concludes that the Applicant has met its burden of proof for these variances.

Exceptional Condition

As to the lot area variance, as noted in the findings of fact, the Property has an exceptionally angled lot line that causes its lot width to narrow substantially from front to rear. As to the court width and nonconforming structure variances, the Board agrees with OP that the nonconforming side yard, which ranges in width between seven feet, six inches and one foot, 11 inches is exceptionally narrow.

Practical Difficulty

As to the lot area variance, if the eastern lot line ran perpendicular to Park Road, such that its 29-foot width would be uniformly maintained, there would have been ample lot area to meet the minimum requirement of 900 square feet for each unit. However, the angled lot line reduces the lot area to approximately 2,691 square feet. It is therefore practically difficult for the Applicant to comply with the minimum lot area requirement.

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Further, although the Board has concluded that the Applicant has fully met its burden, the Board also finds that the relief sought of less than .34% from the 2,700 square feet requirement is *de minimis* and therefore results in a corresponding lower burden of proof for the Applicant, which is easily met here.

As to the variances from the court and nonconforming structure requirements, the extent of the demolition required to create a court with a conforming width of 11 feet would be prohibitive, costly, and wasteful.

No Detriment to the Public Good or Zone Plan

The Board finds that no substantial detriment to the public good and no substantial impairment to the intent, purpose, and integrity of the zone plan will result by its approval of the application.

The requested variances are in furtherance of the public good and zoning regulations. The existing vacant residential structure will be replaced with a three-unit condominium, therefore promoting home ownership in the District. The addition also is compatible with the existing character of the neighborhood. The front porch will be retained and a tree planted. The third floor addition will be set back from the front façade thereby reducing its visibility.

There will be no adverse impact of light, air, or privacy. Only a relatively small portion of the side yard is being eliminated by the rear addition. The Board agrees with OP that the court's width will provide adequate light and air to the adjacent property, which will continue to be separated from the Property by its own side yard. Further no new windows are being added. Although the light available to the property on the west may be impacted during the morning hours, the Board agrees with OP that the impact will not result in a substantial detriment.

Having satisfied the three prongs of the variance test, the Board concludes that the relief sought should be granted.

Special Exception

Special exception relief is required to allow conversion of a residential building existing prior to May 12, 1958 to an apartment house under D.C. Official Code § 6-641.07(g)(2) and 11 DCMR § 3104.1. The Board is authorized to grant a special exception where it finds that the special exception will be (i) in harmony with the general purpose and intent of the Zone Plan and (ii) will not tend to adversely affect the use of neighboring property, subject in each case to the special conditions specified. Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the requested relief are met.

In this case, the Board concludes that the Applicant has satisfied the two general tests stated in § 3104.1 for the same reasons for which the Board concluded that granting variance relief would not impair the intent of the zone plan or cause detriment to the public good.

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As to the specific conditions of § 336, the requirement of § 336.5 that there be 900 square feet of land area per unit has been rendered moot by the Board's grant of a variance from the minimum lot area requirement of § 401.3. The affordable housing requirement of § 336.3 does not apply because the converted building will have less than four units. Also presently inapplicable is the requirement of § 336.5 that there be an existing residential building at the time a building permit is applied for. That determination will be for the Zoning Administrator to make. The remaining conditions are met. Even with the third floor addition, the building will not exceed a height of 35 feet (§ 336.2), the addition will not block or impede the functioning of a chimney or other external vent on the adjacent properties (§ 336.6), and neither adjacent property includes a solar energy system (§ 336.7). Although there is an existing original rooftop element above the second floor windows, the third floor addition has been set back so as to not require the element to be removed or altered.

As to the requirements of § 336.9, the Board has already explained why the light, air, and privacy of the adjacent properties will not be adversely impacted. Further, the addition will not visually intrude upon the character, scale, and pattern of houses along the subject street because of the setback of the third floor addition from the front façade. Finally, the Applicant has provided graphical representations and photographs as required by § 336.10 to demonstrate compliance with § 336.9.

The Board is required under § 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)) to give "great weight" to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 1A. To satisfy the great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. In this case ANC 1A was unable to arrive at a position, so there is no advice to which great weight must be given.

The Board is also 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 OP's recommendations. Although the Board agrees with OP that the special exception as well as the requests for variances relating to the court and the addition to the nonconforming structure should be granted with respect to the lot area relief sought, the Board disagrees with OP that the Applicant has not demonstrated any circumstance that would result in a practical difficulty. The Applicant has demonstrated that the angled lot line is an exceptional condition and had that lot line run perpendicular to Park Road there would have been ample lot area to meet the 2,700 square feet needed. Thus, contrary to OP's contention, both the pre-existing condition of the lot and the regulations prevent the addition of a third unit because the angled lot line results in there being less land area than the regulations require for a third unit.

The Board is aware that the only reason why the lot area variance is needed is because the Zoning Commission removed the ability of the Zoning Administrator to grant a two percent deviation

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from the lot area requirements applicable to R-4 conversions.² (See 11 DCMR § 407.1 (c).) However, this does not make the extent of the relief sought here any the less *de minimis* or worthy of being granted. Further, the Zoning Commission did not remove the authority of itself or the Board to grant such a *de minimis* deviation from the lot area requirement. Finally, OP claims that the purported absence of an exceptional condition will result in the granted relief impairing the integrity of the zone plan. The Board previously rejected a similarly circular argument in *Application No. 18725 of Rafael Romeu* at 9 (2014), *affirmed, Hill v. District of Columbia Bd. of Zoning Adjustment*, 2016 WL 5404728 (Table) (2016) (Unpublished). The requirement for an exceptional condition and the requirement that the zone plan not be impaired are separate tests, and the failure to satisfy one test, does not disprove the other. However, since all three elements for the lot area variance have been met, the question is academic.

CONCLUSION

Based upon the record before the Board, the Board concludes that the Applicant has met the burden of proof for variance relief pursuant to 11 DCMR § 3103.2 from the zoning regulations regarding lot area (§ 401), courts (§ 406), and an addition to a nonconforming structure (§ 2001), and special exception relief pursuant to 11 DCMR § 3104 and § 336, regarding converting an existing residential building to an apartment house in an R-4 zone.

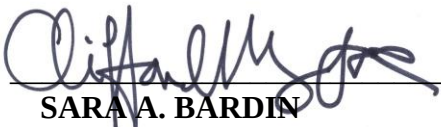
It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 33 – REVISED RENDERINGS.**

VOTE: 3-0-2 (Robert E. Miller, Marnique Y. Heath, and Jeffrey L. Hinkle³ to APPROVE; Frederick L. Hill, not participating; one Board seat vacant.)

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

² The Applicant argued that this created an exceptional circumstance as to it, because the Applicant purchased the property before the regulation was adopted. This argument fails because an exceptional condition cannot be personal as to the owner. Also, there are doubtless many properties with similar minor land area deficiencies; otherwise the Zoning Commission would not have taken the action it did. Therefore, the removal of this flexibility presents no exceptional circumstance whatsoever.

³ Mr. Hinkle read the full record to participate in the decision for this application.

FINAL DATE OF ORDER: January 24, 2017

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, 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 SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, 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.