

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19185 of Samson Gugsu and Luleadey K. Jembere, pursuant to 11 DCMR § 3103.2¹, for variances from the use requirements under § 200 to permit a flat, and from the requirements under § 2116.4 to allow the location of parking spaces between the front building wall and the front lot line in the R-1-B District at premises 3101 35th Street, N.E. (Square 4325, Lot 15).

HEARING DATE: February 9, 2016

DECISION DATE: February 9, 2016

DECISION AND ORDER

Pursuant to a Zoning Administrator letter dated October 30, 2016 (Exhibit 5), this application was submitted on November 5, 2015 by Luleadey K. Jembere and Samson Gugsu (together, the “Applicant”), the owners of the property that is the subject of the application. The application requested a use variance from 11 DCMR § 200 to allow a flat (i.e. a two family dwelling) and an area variance from 11 DCMR § 2116.4 to allow the location of parking spaces between the front building wall and the front lot line in the R-1-B District at 3101 35th Street, N.E. (Square 4325, Lot 15). Following a public hearing, the Board of Zoning Adjustment (“Board”) voted to grant the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated November 12, 2015, 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 5; Advisory Neighborhood Commission (“ANC”) 5C, the ANC in which the subject property is located; and Single Member District/ANC 5C03. Pursuant to 11 DCMR § 3112.14, on November 17, 2015 the Office of Zoning mailed letters providing notice of the hearing to the Applicant, ANC 5C, and the

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in 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on the date this Application was decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text. The repeal and replacement of the 1958 Regulations has no effect on the validity of the Board’s decision or the validity of this order.

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owners of all property within 200 feet of the subject property. Notice was published in the *District of Columbia Register* on November 20, 2015 (62 DCR 15115).

Party Status. The Applicant and ANC 5C were automatically parties in this proceeding. The Board granted a request for party status in opposition to the application from Jacqueline Jones, who lives in a residence abutting the subject property and was represented by her niece, Cheryl Tracy.

Applicant's Case. The Applicant provided testimony and evidence describing the acquisition of the subject property, and explaining their interest in retaining the use of the property as a flat.

OP Report. By memorandum dated February 2, 2016, the Office of Planning recommended approval of the application subject to a condition requiring the Applicant to limit "off-street parking ... to one off-street parking space and remove all excess paving from the front yard" so as to enhance the residential appearance of the property. (Exhibit 28.)

DDOT. By memorandum dated January 20, 2016, the District Department of Transportation indicated no objection to approval of the application. (Exhibit 26.) At the public hearing, DDOT indicated its agreement with OP's proposed condition, which would limit the off-street parking in the front yard to one parking space, so as to reduce the size of the paved area in favor of landscaping. DDOT encouraged the Applicant to ensure compliance with public space regulations, in part by seeking permits for improvements to the curb cut into the subject property and the treatment of the front yard.

ANC Report. By letter dated December 16, 2015, ANC 5C indicated that, at a properly noticed public meeting with a quorum present, the ANC voted 6-0 in support of the application. (Exhibit 22.)

Party in opposition. The party in opposition objected to the height of the building on the subject property and its use as a flat in an otherwise "residential neighborhood," and complained about the limited availability of parking on the street and that the cul-de-sac did not provide enough room for vehicles, including emergency vehicles, to turn around. (Exhibit 31; Hearing Transcript of February 9, 2016, pp. 76-88.)

Person in support. The Board received a letter in support of the application from the owner of a neighboring property in the 3100 block of 35th Street, N.E., who heard the Applicant's presentation at an ANC meeting and recommended that the Board grant the relief requested. (Exhibit 23.)

FINDINGS OF FACT

The Subject Property

1. The subject property is located on the north side of 35th Street N.E., east of its intersection

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with Bladensburg Road (Square 4325, Lot 15).

2. The subject property is trapezoidal, narrower along its street frontage (35.33 feet) than along the rear property line (77.5 feet). Its side lot lines are 133.41 feet long on the west and 139.92 feet long on the east, providing a lot area of 7,526 square feet.
3. The subject property is improved with a two-story building configured as a two-family dwelling. The Zoning Regulations provide that a two-family dwelling is a “flat.” See 11 DCMR § 199.1, definition of “two-family dwelling”. The building was built in 2004 and has been used and configured as a flat continuously. The building has separate gas and electric meters, kitchens, furnaces, air conditioners, duct work, and hot water heaters for each unit. One unit is located on the first floor and in the basement, while the second unit occupies the second floor of the building. Each unit contains approximately 1,248 square feet and contains at least five bedrooms.
4. The Applicant purchased the property in June 2015 from Fannie Mae as a foreclosure property. The property had been listed as a two-family residence, was treated for tax purposes as a two-unit building, and was rented to tenants at the time of the Applicant’s purchase.
5. The Applicant decided to rent both units through a housing choice voucher program. After finding tenants, the Applicant pursued approval of a landlord-tenant agreement with the D.C. Housing Authority and had the property inspected successfully. After applying for a business license from the Department of Consumer and Regulatory Affairs, the Applicant first learned that the use of the subject property did not comply with zoning requirements and therefore was ineligible for a certificate of occupancy.
6. Other properties along the same segment of 35th Street, including the abutting lot to the west of the subject property, are improved with one-family detached dwellings. The neighboring houses are smaller buildings on smaller lots (generally 3,000 to 3,500 square feet) than the Applicant’s building and lot.
7. Areas to the east and south are located within the Fort Lincoln New Town development, which is zoned R-5-D and contains both row dwellings and vacant land. A large parcel northeast of the subject property is zoned R-5-A and is currently undeveloped, although a townhouse development has been planned for the parcel.
8. The Applicant’s building is set back from the front property line, and much of the front yard is paved for use as parking for four or five vehicles. The paved area is accessible via a curb cut situated near the western lot line of the subject property, while the largest area of paving is located on the eastern portion of the front yard. The subject property has no alley access.

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9. 35th Street does not extend to the east beyond the subject property into the Fort Lincoln New Town development. Vehicular access from 35th Street to nearby private roadways within the Fort Lincoln New Town is blocked by a fence and concrete barriers.
10. The subject property is located in the R-1-B District, which is designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be developed for those purposes. (11 DCMR § 200.1.)
11. A flat is not among that matter of right uses permitted in R-1 zones, see 11 DCMR § 201.1, but is first permitted in the less restrictive R-4 zone pursuant to § 330.5 (f).
12. The Zoning Regulations applicable in the R-1 District are contained in Chapter 2 of Title 11 and are intended “to stabilize the residential areas and to promote a suitable environment for family life. For that reason, only a few additional and compatible uses” are permitted in areas zoned R-1. (11 DCMR § 200.2.) Examples of such uses include public schools, public libraries, and places of worship.
13. The building at the subject property satisfies the minimum area requirements of the R-1-B zone, with the exception of minimum lot width (a minimum of 50 feet is required). The building has two stories, where three are permitted. The lot area exceeds the minimum requirement of 5,000 square feet. Existing lot occupancy is 17.2%, where a maximum of 40% is permitted. The rear yard is 44 feet deep, where a minimum of 25 feet is required, and the side yards are at least 10 feet wide, where the minimum requirement is eight feet. (See 11 DCMR §§ 400-405.)

CONCLUSIONS OF LAW AND OPINION

The Applicant seeks a use variance from § 200 of Title 11 DCMR to allow a flat, which is not among the matter of right uses permitted in an R-1 zone by § 201 and an area variance from § 2116.4 to allow the location of parking spaces between the front building wall and the front lot line in the R-1-B District at 3101 35th Street, N.E. (Square 4325, Lot 15). The Board is authorized under § 8 of the Zoning Act to grant variance relief where, “by reason of exceptional narrowness, shallowness, or shape of a 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.)

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The District of Columbia Court of Appeals has held that the uniqueness test follows from its rationale: to support a variance, difficulties or hardship must be due to unique circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood. There is no requirement that the uniqueness inheres in the land at issue, and the uniqueness may arise from a confluence of factors, so long as the extraordinary or exceptional condition affects only a single property.

The higher "undue hardship" standard applies to requests for use variances while the lower "practical difficulty" standard applies to area variances. The District of Columbia Court of Appeals has interpreted "undue hardship" to mean that a property cannot be put to any zoning-compliant use for which it can be reasonably adapted. *See, Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). Determinations of whether practical difficulties exist must be made on a case-by-case basis, where an applicant can demonstrate that compliance with an area restriction would be unnecessarily burdensome. *Fleischman v. District of Columbia Bd. of Zoning Adjustment*, 27 A.3d 554 at 560-161 (D.C. 2011) (citations omitted).

Based on the findings of fact, the Board concludes that the application satisfies the requirements for variance relief in accordance with § 3103.2. The subject property exhibits an exceptional condition in that the Applicant's lot is approximately twice as large as any other property on its street, and was already improved with a building devoted to use as a two-family flat when the property was acquired by the Applicant. The building had been constructed more than 10 years earlier, and had been used and offered for sale as a two-family dwelling.

The Board concludes that the strict application of the use permissions of Zoning Regulations would create an undue hardship to the Applicant as the owner of the property. The existing building has always been configured as a two-family dwelling, with separate ductwork, kitchens, and other features necessary for a flat but not for a one-family dwelling. Use of the existing building as a one-family dwelling would require the Applicant to bear the expense of its conversion, and would result in a very large house – possibly one with 10 or 11 bedrooms. The Applicant demonstrated that a one-family dwelling of that size and at that location would not be readily marketable.

The rule against self-created hardship bars variance relief where the affirmative act of an applicant, or its predecessor in title, is the sole cause of the hardship complained of. *See De Azcarate v. District of Columbia Bd. of Zoning Adjustment*, 388 A.2d 1233 (D.C. 1978) (Court declined to apply the self-created hardship rule in part because "the hardship at issue ... cannot be accurately described as the direct consequence of the [property owner's] sole and affirmative acts....") In this proceeding, the Board finds no self-created hardship by the Applicant, who purchased the property long after its construction and use as a flat, and who relied on the presence of tenants, real estate listings, and tax classifications that depicted the property as a two-family dwelling. The Applicant's immediate predecessor in title acquired the property in foreclosure. Nothing in the record suggests that either the Applicant or its predecessor in title were in any way involved in the construction or initial use of the building as a two-family dwelling.

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The Board does not find that approval of the requested use variance relief would cause substantial detriment to the public good or would substantially impair the intent, purpose, and integrity of the zone plan. The building complies with area requirements of the R-1-B zone in terms of height, lot occupancy, and yard setbacks, and does not adversely affect neighboring properties with respect to light, air, or privacy. Approval of the requested use variance would allow a flat in a location where that use would not otherwise be permitted; however, the Board notes that the R-1-B zone does not impose use restrictions that would result in the limited sort of “residential neighborhood” described by the party in opposition. Rather, the R-1-B zone also allows certain other uses compatible with its one-family residential emphasis, whether as a matter of right or by special exception approval including such institutional uses such as schools, libraries, and places of worship. To suggest that a flat may never be permitted when exceptional circumstances and undue hardship are shown is contrary to both the letter and spirit of the Zoning Act. *See e.g. Wolf v. District of Columbia Bd. of Zoning Adjustment*, 397 A.2d 936 (D.C. 1979) (Variance relief was appropriate to allow a flat in an area characterized by one-family dwellings in light of factors including the exceptional size and unique layout of the structure, which was “already an anomaly in its neighborhood larger than any of the houses within 200 feet,” and the infeasible marketability of the large property as a single dwelling.)

With respect to the area variance relief requested by the Applicant to allow the location of a parking area between the building and the front lot line, the Board finds an exceptional condition arising from the siting of the existing building on the property, which hinders the use of the side yards as a location for a driveway to the rear of the property. The widths of the existing side yards exceed the minimum requirement by two feet, but air-conditioning equipment has been installed on one side and vehicular access to the other side would require a substantial addition to the amount of paving on the property, due to the location of the existing curb cut.

The Board is required to give “great weight” to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2001).) In this case, OP recommended approval of the application subject to a condition restricting the extent of the paving, to an area suitable for parking one vehicle, in order to improve the residential appearance of the property. DDOT also recommended adoption of that condition, so as to minimize the extent of paving, rather than landscaping, in the front yard of the residence. The Board is sympathetic to those concerns, but declines to include the restriction as a condition of its approval because use of the subject property as a flat might generate a demand for parking greater than one space. The Board credits the testimony of the party in opposition about the limited availability of on-street parking and the difficulties faced by motorists in navigating the cul-de-sac, which is relatively narrow and lacks access to nearby private roads. The Board also notes DDOT’s testimony about public space issues possibly affecting the front yard of the building and the location of the curb cut. The Board encourages the Applicant to work with DDOT on a suitable parking arrangement that could enhance maneuverability without reliance on unduly extensive paving in the front yard of the dwelling.

The Board is also required to give “great weight” to the issues and concerns raised by the affected ANC. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March

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26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2012 Repl.)). In this case ANC 5C did not express any issues or concerns but voted unanimously in support of the application. For the reasons discussed above, the Board concurs with the ANC's recommendation that the requested zoning relief should be granted.

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for a use variance from § 200 to allow a flat when that use is not permitted in an R-1 zone by § 201 and an area variance from § 2116.4 to allow the location of parking spaces between the front building wall and the front lot line in the R-1-B District at 3101 35th Street, N.E. (Square 4325, Lot 15). Accordingly, it is **ORDERED** that the application is **GRANTED**.

VOTE: **3-0-2** (Frederick L. Hill, Jeffrey L. Hinkle, and Robert E. Miller to APPROVE; Marnique Y. Heath 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

FINAL DATE OF ORDER: October 31, 2016

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 § 702.2, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

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

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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.