

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19262 of Dr. Barry Fisher, pursuant to 11 DCMR § 3103.2¹, for a variance from the use requirements under § 501.1, to allow a massage establishment² in the DC/SP-1 District at premises 1800 R Street, N.W., Unit #C-6 (Square 134, Lot 161).

HEARING DATE: May 24, 2016
DECISION DATE: May 24, 2016

DECISION AND ORDER

Pursuant to a Zoning Administrator memorandum dated February 17, 2016 (Exhibit 7), this application was submitted on March 11, 2016 by Dr. Barry Fisher (“Applicant”). The application requested variance relief to allow the use of Unit # C-6, 1800 R Street, N.W. in the DC/SP-1 District as a massage establishment. Following a public hearing, the Board voted 5-0-0 to approve the application with conditions.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated March 28, 2016, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation (“DDOT”), and Advisory Neighborhood Commission (“ANC”) 2B, the ANC within which the subject property is located. Pursuant to 11 DCMR § 3113.13, OZ mailed letters providing notice of the hearing to the Applicant, ANC 2B, and all owners of property within 200 feet of the subject property. Notice was also published in the *D.C. Register* on April 8, 2016 (63 DCR 5209). A hearing was scheduled for May 24, 2016.

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on the date this Application was decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text (“the 2016 Regulations”). The repeal of the 1958 Regulations has no effect on the validity of the Board’s decision or the validity of this order.

² The description of the proposed use was changed from “yoga studio” to “massage establishment”, based on the Applicant’s testimony and the Office of the Attorney General’s recommendation. The caption has been amended accordingly.

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Party Status. Pursuant to 11 DCMR § 3199.1(b), the Applicant and ANC 2B were automatically parties. The Board received a party status request in opposition from the 1800 R Condominium Unit Owners Association (“1800 R”) that was dated May 10, 2016. At the public hearing on May 24, 2016, the Board granted the request. The representatives for 1800 R testified that the condominium bylaws allow for “professional offices within the definition of SP-1 zoning regulations” on the first floor of the building, therefore the proposed massage establishment would go beyond the scope of what the bylaws permit. (Hearing Transcript, p. 151.) The Party in Opposition also raised concerns regarding the possibility of increased vehicular traffic and foot traffic based on the proposed use. The Party in Opposition also argued that the proposed use would “adversely affect the image of the professional units located on the first floor.” (Exhibit 29.)

Applicant’s Case. The Applicant provided evidence and testimony from John Aquino, who represented the Applicant, Dr. Barry Fisher. Dr. Fisher is the owner of the subject property. The Applicant provided testimony regarding the unique condition of the unit, the financial hardship encountered in attempting to sell or lease the unit, and how the proposed operation of the establishment will not have a negative impact on surrounding neighbors.

Persons in Support. Letters in support of the application were submitted to the record from a resident of 1800 R Street Condominiums (Exhibit 23) and from the Applicant’s would-be purchaser’s prior landlord together with copies of several online reviews of other businesses located at other sites. (Exhibit 26.)

OP Report. In a report dated May 17, 2016, the Office of Planning (“OP”) recommended approval of the use variance relief requested. The report addressed the three-part use variance test and concluded that the application satisfied the requirements. (Exhibit 31.)

DDOT Report. The Department of Transportation submitted a report dated May 10, 2016, stating that the proposed project would have no adverse impacts on the travel conditions of the District’s transportation network. DDOT expressed no objection to the approval of the requested variance. (Exhibit 28.)

ANC Report. The subject property is in the jurisdiction of ANC 2B. ANC 2B did not submit a report or participate in the hearing.

FINDINGS OF FACT

The Subject Property

1. The property that is the subject of this application is a condominium unit that is owned by the Applicant and is at premises 1800 R Street, N.W., #C-6 (Square 134, Lot 161). The property is one of nine commercial units within the ground floor of the 1800 R Street Condominium building. Other than the nine commercial units, the rest of the building is residential.

2. The building sits upon a square-shaped lot that has vehicular access via porte cochere off of R Street and vehicular access off of 18th Street. An alley serves the building along the west side as well.
3. The building is in the Dupont Circle Overlay and the Dupont Circle Historic District.
4. The building is in the DC/SP-1 District. The Special Purpose Districts act as a buffer between commercial and residential zones and contain a mix of row homes, apartments, offices and institutions of medium (SP-1) and medium high levels (SP-2). (11 DCMR § 500.3 & 500.4.) The Dupont Circle Overlay zone provides protection of the scale, uses, height, and character of the area. (11 DCMR § 1501.4), but does not govern what uses may or may not be established.
5. The neighborhood surrounding the building is predominately developed with a mix of institutional, multifamily, professional offices, etc., of both medium and high levels of density and height. Dupont Circle is located three blocks to the south.
6. Abutting the building is a four-to-five story row house to the east; a 10-story multi-family building to the south; four-story row homes to the west; and institutional uses across R Street to the north.
7. The unit that is the subject property of this application is located on the ground floor of the building.
8. The unit, with only 365 square feet, is exceptionally small and has no windows. The entrance to the unit is external and separate from the entrance to the residential part of the building. The unit has two bathrooms and a waiting room.
9. The unit, along with the eight other commercial units in the building, was constructed in the early 1960's, and is exceptionally small, as compared to typical office spaces or ground-floor retail spaces. It is highly unlikely that the configuration of multiple small, commercial units on the ground-floor of a residential building would be built today, as larger spaces would likely be constructed for primarily retail or for residential leasing, office, or amenity space. (Exhibit 31.)
10. The unit was previously used as a psychiatry clinic, but has remained vacant for two years as the Applicant has made attempts to sell or lease the space.
11. The Applicant has been unsuccessful in selling or leasing the unit and has been informed by potential buyers or tenants that the unit's small size and lack of windows are undesirable features for their matter of right uses.
12. The inability to find a buyer or tenant has caused the Applicant to incur monthly expenditures with no off-setting income. Absent the granting of variance relief, the Applicant is likely to continue to incur these monthly costs for the foreseeable future, which amounts to an undue financial hardship.

13. The Applicant has paid over \$975 per month from September 2014 to March 2015, totaling \$6,825, in attempts to find a buyer for the property. The staging fees have contributed to his financial hardship.

The Proposed Use

14. The Applicant seeks a use variance to permit the unit to be used by a massage establishment. A use variance is required because a massage establishment is not among the SP-1 matter of right uses listed in § 501.1 or among the special exception uses identified in Chapter 5.
15. The proposed use will be subject to the following restrictions, which have been adopted as conditions of the Order. The restrictions were developed by the Board, in collaboration with the Applicant and the Party in Opposition during the public hearing, in order to address the legally relevant concerns raised by the Party in Opposition:
- a. The hours of operation shall be similar to those of the professional offices in the building.
 - b. The Applicant shall display the professional licenses of all practitioners.
 - c. Massage services shall be available by appointment only.
 - d. No appointments shall be scheduled for more than one customer at a time.
 - e. Customers shall be prohibited from parking in the 1800 R Street Condominium parking lot.
16. In addition, the Applicant testified that customers will enter and exit from the existing separate external building entrance.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property . . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of the Zoning Regulations would "result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property" D.C. Official Code § 6-641.07(g)(3) (2012 Repl.), 11 DCMR § 3103.2.

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, and may arise due to a "confluence of factors." *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).

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. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The Applicant in this case requests a use variance from § 501.1 of the Zoning Regulations, to allow a massage establishment in the DC/SP-1 District. Therefore, the Applicant must demonstrate an exceptional situation or condition of the property and that such exceptional condition results in an “undue hardship” to the Applicant. Lastly, the Applicant must demonstrate that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The purpose of the variance procedure is to “prevent usable land from remaining idle.” *Palmer v. Dist. of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The use variance inquiry focuses on whether “the property can be put into any conforming use with a fair and reasonable return to the owner.” *Id.* at 542. The court has also recognized in a use variance application that approval is justified when the relief requested is minor relative to the nature of the surrounding community. *The Oakland Condominium v. Dist. of Columbia Bd. of Zoning*, 22 A.3d 748, 750 (D.C. 2011).

Based on the above findings of fact, the Board finds that the Applicant has satisfied the burden of proof and that the application should be granted.

Exceptional Condition

The Board concludes that the subject property is affected by a “confluence of factors” that create an exceptional situation or condition.

At 365 square feet, the unit is exceptionally small compared to typical office spaces or ground-floor retail spaces. As OP notes in its report recommending approval of the application, it is highly unlikely that the configuration of multiple small, commercial units on the ground-floor of a residential building would be built today, as larger spaces would likely be constructed for primarily retail or for residential leasing, office or amenity space. Other factors that create a unique situation for this unit include a lack of windows and its configuration with two bathrooms and a waiting room. In addition, the Board finds that the fact that the property remains vacant, despite attempts by the owner to sell or lease the property over the course of two years, contribute to the property’s uniqueness.

Undue Hardship

The Board concludes that the unit cannot be put to any conforming use with a fair and reasonable return to the owner and therefore the strict application of the Zoning Regulations would result in undue hardship to the Applicant as the owner of the unit. Uses permitted as a matter of right include art gallery; child/elderly development center; or adult day treatment facility; community center building; private school, including kindergarten, elementary, secondary, trade, or any other school; public school; religious reading room; and ticket office. (11 DCMR § 501.1.) General office use is also “permitted in an SP District as a replacement for office use for international organization, non-profit organization, labor union, architect, dentist, doctor, engineer, lawyer, or

similar professional person existing and approved by the Board of Zoning Adjustment or the Zoning Commission or authorized by a validly issued certificate of occupancy prior to January 29, 1999.” (11 DCMR § 501.3.)

The Applicant testified that, in attempting to sell or lease the property, potential buyers or tenants indicated that the unit’s small size and lack of windows are undesirable features for the matter-of-right uses envisioned. As a result of these impediments, the Applicant has been unsuccessful in his attempts to sell or lease the unit, despite his significant efforts, over the course of two years during which the Applicant has expended over \$6,825 in staging fees. Further, because a change to these circumstances is unlikely, the Applicant will continue to incur such costs for the foreseeable future without any off-setting income. Therefore, denying use variance relief would prevent the Applicant from receiving a fair and reasonable return on the property, and instead would result in a permanent undue economic hardship.

The Public Good and Integrity of the Zone Plan and Regulations

The Board concludes that the requested variance can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. As to the zone plan, the Board finds that the proposed use would be in keeping with the character of the neighborhood and the square. The SP-1 District permits a mix of row homes, apartments, offices and institutions at a medium density. (11 DCMR §§ 500.3 & 500.4.) The DC Overlay was established to protect the low scale, predominately residential character, independent small retail businesses, human scale streetscapes, and historic character of the Dupont Circle neighborhood. (11 DCMR § 1501.1.) Although the proposed use is ordinarily prohibited, its small-scale and location within a larger residential building will prevent any impairment to the zone plan.

Further, the Board finds that the impacts of the proposed use, as described by the Applicant in his testimony and as restricted by the conditions of this Order, would not impair the public good. The Board credits OP’s finding that the proposed use will “activate a vacant, windowless, small commercial space, which is in keeping with the maintenance of the public good in this neighborhood.” (Exhibit 31.)

During the public hearing of April 5, 2016, the Board considered the concerns raised by the Party in Opposition, including: (1) that the use will generate increased foot and vehicular traffic, (2) that the use will negatively affect the image of the other professional units on the first floor, and (3) that the condominium bylaws permit only uses that are allowed as a matter of right in the DC/SP-1 District, therefore, regardless of the granting of a use variance, the bylaws would not allow the proposed use.

In response to the first two concerns raised by the Party in Opposition, the Board developed five conditions, in collaboration with the Applicant and the Party in Opposition, during the public hearing. The conditions aim to mitigate potential impacts of the proposed use and include: (1) a restriction on the hours of operation; (2) a requirement to display the professional licenses of practitioners; (3) a requirement that services be available by appointment only; (4) a requirement

that one customer be seen at a time; and (5) a prohibition on customers parking in the condominium's parking lot. The Applicant agreed to the conditions, and they were adopted by the Board. In limiting the hours of operation and requiring that customers be seen by appointment, one at a time, the Board finds that the use will not generate foot traffic that would impair the public good. In prohibiting customers of the proposed use from using the parking lot at 1800 R Street Condominium, the Board finds that possible vehicular traffic impacts have been mitigated, such that the proposed use will not have a negative impact on the surrounding neighborhood.

As to whether the massage establishment would be allowed under the condominium bylaws, that is a question that concerns the interpretation and enforcement of a private agreement rather than of the Zoning Regulations and is therefore not a basis for the Board to deny use variance relief. *See Spring Valley Wesley Heights Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 644 A.2d 434, 435–36, 438 (D.C. 1994) (Affirming the Board's determination that its jurisdiction may not extend beyond that prescribed in the Zoning Regulations, notwithstanding the existence of a private agreement.)

Great Weight

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 2B. In this case, the ANC did not submit a written report to the record and thus there is nothing to which to give great weight.

The Board is also required to give “great weight” to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2001).) In this case, the Board concurs with OP's recommendation to approve the application, crediting the analysis provided in OP's written report.

It is therefore **ORDERED** that the application is hereby **GRANTED, SUBJECT TO THE FOLLOWING CONDITIONS** governing the massage establishment use:

1. The hours of operation shall be similar to those of the professional offices in the building.
2. The Applicant shall display the professional licenses of all practitioners.
3. Massage services shall be available by appointment only.
4. No appointments shall be scheduled for more than one customer at a time.
5. Customers shall be prohibited from parking in the 1800 R Street Condominium parking lot.

VOTE: 5-0-0 (Anita Butani D'Souza, Anthony J. Hood, Marnique Y. Heath, Fredrick L. Hill, and Jeffrey L. Hinkle to APPROVE).

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: January 9, 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 § 702.2, 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.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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.