GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 16573 of Martin Hardy

PROPOSED DECISION AND ORDER

DISTRICT OF COLUMBIA
OFFICE OF ZONING
00 JUN 27 P 4:02

Elaine Morris
Lothrop House Unit Owners Association, Inc.
Hanna Associates, Inc
June 27, 2000

BZA
Case No. 16573
Exhibit No. 74

Board of Zoning Adjustment
District of Columbia
CASE NO.16573
EXHIBIT NO.74

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 16573 of Martin Hardy, pursuant to 11 DCMR 3103.2 for variances for the construction of two new flats with one-car garage (town house with garage plus first-floor apartment), from Sections 402.4, 403.2, 404.1 and 406.1 of the Zoning Regulations relating to maximum floor area ratio, percentage of lot occupancy, minimum depth of rear yard and minimum width and area of closed court requirements to replace two existing garages in a R-5-B District at premises 1821 and 1823 Florida Avenue, N.W. (Square 2556, lots 808 and 812).

Hearing Data: June 20, 2000

Decision Date: July 5, 2000

DISTRICT OF COLUMBIA
OFFICE OF ZONING
'00 JUN 27 P4:43

PROPOSED DECISION AND ORDER

PRELIMINARY MATTERS

The applicant, Martin E. Hardy, filed an application pursuant to 11 DCMR 3107.2 with the Board of Zoning Adjustment (Board) on 2/15/00 for a variance from 402.4, 403.2, 404.1 and 406.1 of the Zoning Regulations relating to maximum floor area ratio, percentage of lot occupancy, minimum depth of rear yard and minimum width and area of a closed court requirements.

The zoning administrator by memo calculated the extent of the variances sought as 97.8% of lot occupancy, a 62.47 % variance above the 60% lot occupancy allowed; 2.93 FAR, which is 62.99% above the 1.8 FAR allowed; zero rear yard setback, or 100% above the 15 foot minimum required, and closed court variance of 79.33% above the required 15' width and 90.60% above the 350 sq.ft. required area. The zoning administrator did not calculate extent of variances with respect to an "alternate" plan.

The ANC 1-C met on June 7, 2000 and although supporting development in general, recommended that the plans be modified in a variety of suggested ways to provide rear yard setbacks and/or lower height. The ANC, as its memo shows, was not presented with any alternate plan(s) at the time of the meeting. Additionally, there was no notice to the adjoining property owners, the Lothrop House Condominium ("Lothrop") located at 1822 Vernon Street, N.W. and Hanna Association, Inc, ("Hanna") owner of 1818 Vernon Street, N.W. to inform them that this application would be discussed at the June ANC meeting; accordingly the input of the application's opponents was not considered by the ANC.

At the Board's June 20, 2000 public hearing on Mr. Hardy's application, the Board heard testimony from Mr. Hardy, Michael Vallen, his architect, Gladys Hicks, a zoning consultant, James Smith, a permit handler and John Rutkowsky, a developer who owns property in the area.

In opposition the board heard from the abutting property owners, including Elaine Morris, who testified on behalf of herself individually, the association of unit owners of the condominium, Lothrop House Unit Owners Association, Inc., Gertrude Ding, Jochen Heyland, and Jose Quiroga, individual unit owners in the Lothrop House. Mr. Boushra Hanna testified on behalf of Hanna.

The Board delayed decision until July 5, 2000 for an amended plat combining lots 808 and 812, a second opinion from a government agency of the shadow studies submitted by the applicant, a construction management plan, and responses thereto from the opponents of the application.

FINDINGS OF FACT:

The premises that are the subject of this application, 1821 and 1823 Florida Avenue, NW improved by a 1-story garage at each address, were originally part of properties at 1818 Vernon Street, NW and 1822 Vernon Street, NW respectively, and were accessory garages integral to those lots, which fronted on Vernon Street and backed on Florida Avenue. (the rear yards of both 1818 Vernon and 1822 Vernon still extend to Florida Avenue and surround the subject lots on every side except the south side, which is directly on Florida Avenue). Most of the rear yards of the Vernon Street properties are on the same grade with the roofs of the subject garages. The subject property is surrounded by multi-family buildings on large lots, in addition to those at 1818 and 1822 Vernon Street.

At some time in the past, predecessors in title of the owners of the two aforementioned Vernon Street properties subdivided and conveyed the garages to a purchaser. The current owner of 1818 Vernon Street, N.W. is Hanna Association, Inc. whose president is Boushra Hanna. 1822 Vernon Street, N.W. is now the Lothrop House Condominium, and the association of Unit Owners is the Lothrop House Unit Owners, Inc, whose president is Elaine Morris.

Applicant purchased the garages from an estate from which he had earlier purchased 1812 Florida Avenue, NW a three-unit residential building across the street from the subject property. He renovated that property, sold it to the current owner, Jennifer Campbell, and then turned his attention to the two garages across the street. He decided "Florida Avenue needs something different, something that faces onto Florida Avenue".

Applicant is not a developer, but more of a "hobbyist", and plans to develop the subject property for resale, not as a personal residence.

Applicant testified that when he discovered that there would be opposition from the adjoining property owners to his plan to convert the garages into a taller residential building, he attempted to cancel the contract, but the sellers refused. Applicant closed the sale in September, 1999, paying $38,500 for the two garages combined.

In spite of his desire to be let out of the contract, applicant testified that the only reason Hanna, Elaine Morris and Lothrop are opposing his plans is because they want to purchase the garage lots themselves. Accordingly, applicant recognizes that there are alternates to his development of the property into a residential building.

There is no certificate of occupancy for the garages, but applicant continues to illegally rent parking spaces to waiters from the nearby Hilton Hotel. Applicant has not applied for a certificate of occupancy, nor has he cleaned up the debris on the roof or otherwise made minimal cosmetic repairs, apparently to support his claim that the buildings are derelict.

Section 3108 of the zoning regulations allows applicant to apply for a special exception for a parking garage in an R-5 district per section 355 of the zoning regulations. The Board is authorized to grant those special exceptions which will be in harmony with the general purpose and intent of the Zoning Regulations and which do not tend to affect adversely the use of neighborhood property. In this case, such use would not affect neighborhood property (it has

been used illegally for years for that purpose apparently without complaint), and a renovated parking garage would enhance the goals of the Zoning Regulations per 11 DCMR, Chapter 21. The adjoining property owners would support a special exception for a parking garage.

Alternatively, Hanna has offered and is still willing to purchase the garage(s) at a profit to the applicant, to be renovated and returned to accessory parking use. Elaine Morris and Lothrop are also willing to purchase the garage(s), renovate and return them to accessory parking use. The offer made at the public hearing would give the applicant a 30% profit in less than one year, or appraisal(s) could determined the fair market value of the garages.

Sections 350.4(a), 331.1(b), Chapter 23 and section 2500.1 of the zoning regulations provide that private garages are a permitted accessory use and accessory building in the R-5-B district as a matter of right when incidental to the primary residential use. Applicant does not have a right to accessory garage use as he has no principal use to support an accessory building. Only the adjacent properties can annex the lots and use these garages as accessory buildings.[1]

Gertrude Ding owns Unit 201 (lot 2018) in the Lothrop. Her only bedroom windows look out into the courtyard and over the garage roofs. She would lose her light, air and views.

Jose Quiroga Owns Unit 306 (lot 2025) in the Lothrop and objects to the noise and dust from construction at such close quarters, crowding from the proposed building and noise and lack of privacy from the roof top deck under his windows.

Jochen Heyland owns Unit 102 (lot 2013) in the Lothrop. His windows are on the first and second floor, entirely within the courtyard. He would lose light and air, and his only view is over the garages (see plat and plans of condominium subdivision for Lothrop)

Elaine Morris owns Units 101, 103, 301, 401 and LL1 and parking units P1, P2 and P3 in the Lothrop. (respectively lots 2012, 2014, 2020, 2026, 2027, 2028, 2029 and 2030). Units 101 and 301 have their only bedroom windows looking out over the garages owned by applicant and would have light and air blocked by the proposed building. Unit LL1 has a skylight in the courtyard at first floor level, plus a glass door and windows above grade at the rear of Lothrop which would have light & air blocked by the proposed building. Unit 103 has its windows looking directly at the rear northwest corner of applicant's proposed building, losing its southern exposure, light, air and view.

The parking spaces owned by Elaine Morris would be directly in the path of falling bricks, mortar and other debris during construction, as would the common property of the Lothrop. The corner of the proposed building's brick wall would be as close as 1 foot from the Lothrop building structure.

Applicant took 2-3 years to renovate an existing three-story building at 1812 Florida Avenue, NW, and he failed to replace or even clean debris from the roof of that building, or repair the decaying brick in the rear. His permits restricted his work to "all interior". Considering the much more dangerous, complicated structural work involved in the subject property, applicant's construction management plan which states he will be the general contractor and on-site manager of construction at 1821-1823 Florida Avenue gives little confidence that the project would be

[1] Gladys Hicks testified that there is no accessory garage use as a matter of right, but she was undoubtedly referring to *applicant's* use. The owners of the Vernon Street properties may have accessory garage(s) as a matter of right. Witness testimony cannot change the plain meaning of the cited zoning regulations.

completed in a timely, neat or professional manner. Applicant's lack of experience with the problems inherent in shoring retaining walls, construction of new brick walls or of structural elements to support the size of the project, etc. make the Lothrop and 1818 Vernon Street's position precarious insofar as applicant plans to be the general contractor.

The remaining unit owners in the Lothrop are included in the opposition by virtue of their membership in the Unit Owners Association.[2] Each of the owners would be injured economically, as apartments with light, ventilation and views are more desirable and more valuable than those without those amenities. Even those units whose windows are not directly affected would be economically affected by the lesser value of units in the same building and downgrading of the general amenities - light, air and views.

1818 Vernon Street has numerous windows on the rear and in the courtyard that would be adversely affected with respect to light, air and view and the owner injured economically as a result. The proposed rear wall would be ten feet from 1818 Vernon Street windows.

Lothrop and Hanna have legitimate concerns for the security of their property and residents. The rear windows of both buildings and the Lothrop parking spaces have been open to Florida Avenue for decades, visible to passersby, police and other emergency services, and illuminated at night by street lights. The proposed building would screen the rear of both Vernon Street buildings from Florida Avenue and create an opportunity for criminals to hide, break into windows and accost residents. Mr. James Smith for the applicant stated that windows, if included in the plans for the rear of the proposed building, would be vulnerable to break-ins. Just such a concern threatens the opponents with regard to their own windows and Mr. Smith's testimony makes this evidence undisputed.

Applicant's alternate plan, which the opponents had little opportunity to study and comment upon, barely pays lip service to the concerns of ANC 1C in adding a slight setback at the rear of lot 812 for a row of skylights, which would benefit the proposed building more than it would the abutting properties. (a resident of 1818 Vernon Street, in looking down into its rear yard, is forced to simultaneously look into the ground-level bathroom of the "alternate plan") The concerns of the ANC have not been addressed by the "alternate plan". The Board must address each of the ANC's issues and concerns in its findings, which is the meaning of the "great weight" to be accorded the ANC's view, Wolf v BZA, 397 A.2d 936 (1979).

Applicant objects to the chain-link fence which was erected by Lothrop with a permit and entirely on its own property, as an impediment to persons fleeing a fire and fire control. However, applicant proposes to erect a building with only a one-foot separation between it and the Lothrop, insufficient for anyone to escape through. The fence has a gate which can be opened, the proposed brick wall is permanent.

Applicant, in his application (exhibit No. 1), asserts that development into a 2-family flat is "**the only economically viable alternative**" and in exhibit No. 3, page 2 he further states:
"Without variances, the property would be condemned to remain storage space/garages. As such, it would likely remain an eyesore, spoiling the entire 1800 block of Florida Avenue, **as this use cannot justify the cost of renovation**".

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[2] The owner of Unit 302 in the Lothrop House signed applicant's petition. He, however, has contracted to sell the unit, with settlement scheduled by the end of June, 2000.

However, the applicant failed to offer any evidence regarding the cost of renovation of the garages, or the reasons why only a 2-family flat is economically viable and declined to state the cost of the property itself until he was cross-examined with the correct figure ($38,500). Members of the board were reluctant to hear evidence disputing these written assertions of the applicant, or concerning renovation of the existing garages and thereby legalization of the existing parking use, from the opponents of the petition.

A number of applicant's exhibits are misleading. The photographs of the cardboard models appear to show a shorter building than do the computer generated models, and neither the models nor computer generations show the many interior courtyard windows of 1818 and 1822 Vernon Street or the skylight the first floor rear of 1822 Vernon Street, which will be adversely affected by the proposed building. The calculations used to produce the sun studies were NOT a product of the commercially available Auto-CAD system, but were produced by a program called Accurender, using Auto-Cad merely to draw the results. Accordingly, Mr. Vallen's testimony that the results were reliable because produced by Auto-CAD was also misleading. The program Accurender, has not been verified by a disinterested third-party or even its developer (see e-mails submitted by applicant). Furthermore, there was no expert testimony that the 3 times of day chosen by Mr. Vallen for the studies showed the worst-case scenarios. Even if the software and data were reliable, hourly studies would have been more probative.

Applicant's diagram of the area purporting to show buildings colored in blue supporting his plan indicates that the owner(s) of 1826 Vernon Street are in support. However, there is no letter of support nor a signature on the petition showing support from 1826 Vernon Street, and this exhibit is also misleading.

Conclusions of law

The District of Columbia Court of Appeals has held:
"An area variance may be granted ... if all of the following conditions are met:
1) the property suffers from 'exceptional narrowness, shallowness or shape' or from 'exceptional topographic conditions or other extraordinary or exceptional situation or condition'
2) these exceptional circumstances 'result in peculiar and exceptional practical difficulties' to the owner unless he or she can obtain a variance and
3) variance relief will not create 'substantial detriment to the public good' or 'substantially impair the intent, purpose and integrity of the zone plan as embodied in the zoning regulations and map", Draude v. Board of Zoning Adjustment, 527 A.2d 1242, 1254, citing D.C. Code 5-424(g)(3) (1987) [other citations omitted].

"This court has enunciated the ... three-part test, each part of which the applicant for the variance has the burden of satisfying before BZA may grant a variance", Gilmartin v BZA , 579 A.2d 1164 (D.C. App. 1990)

In Draude, supra at 1254 the court cautioned the BZA to "apply vigorously the legal standard for granting variances". In this case, applying the legal standard vigorously, the variances cannot be granted because the application does not satisfy any, let alone all three required conditions as discussed below.

1) Exceptional shape, etc ("uniqueness"):
Applicant created the irregular shape of the property by his act of combining two regularly shaped garages. The application as submitted requested variances for two separate lots which had not been combined, lots 808 and 812. Board member Mr. Sockwell correctly advised the

applicant that he was creating his own non-conformity, which could not support the variances requested. As individual garages the two lots purchased are not unique. By the unilateral act of purchaser, he made the lots odd-shaped and is estopped from benefiting from his self-created hardship. When "the applicant himself is ... responsible for the irregular shape of the property" that is a factor to be considered against the granting of an area variance. See ALW, Inc. v. BZA, 338 A.2d 428 (DC1975). Also, if applicant can convert two one-story garages into a three-story flat, other owners must be allowed to combine other side-by-side garages and convert likewise as a matter of due process.

2) practical difficulties
Applicant's claim of peculiar and exceptional practical difficulties does not satisfy the legal standard.

In Roumel v. BZA, 417 A.2d 405, 407 (D.C. 1980) the Board found that proposed construction of a single-family house on a vacant under-sized lot requiring 'substantial' variances, would adversely affect the neighboring property owners and further that: "the lot is too small to permit any independent use of the site. The Board notes however, that the applicant does have the option of selling the lot to the adjoining property owners who have offered to pay fair market value for the lot to subdivide and include it as part of their present property." (emphasis added).

While the board in Mr. Hardy's case appeared uninterested in testimony from the opponents that they are willing to purchase the property, in Roumel it allowed such testimony into the record and made a corresponding finding. The Court of Appeals held that such a finding "is relevant to the issue of practical difficulty", Id. at 408, n.1. (emphasis added). In this case, the applicant could also use the lot independently with a special exception for parking use (and without a variance), which the above-cited zoning regulations encourage.

Also in Russell v. BZA, 402 A.2d 1231, 1236 (DC 1979), the court held in an application for development of a vacant lot that an area variance could be granted where "the owner would be unable to reasonably dispose of his property for a permitted use or develop the lot himself", "there is no other used to which the lot can be put". In the Russell case, the variance requested was not substantial and accordingly there was no adverse impact to the neighborhood.

In Carliner v. BZA, 412 A.2d 52, 54 (DC 1980) the owner wanted to replace a 'dilapidated" garage with a single family home on an under-sized lot. The Board found she would be able to sell the lot to the adjoining property owner for use as a garage, defeating the claim that it was unusable. The Board also found that the building would adversely affect neighboring property and impair the zone plan. (she had also created the non-conformity). The court affirmed the Board's decision.

There was no justification given by applicant for the substantial variances from FAR and setback requirements requested for his proposed constructing of a three-story 3,000 sq. ft. building, including a rental unit, other than general unsupported assertions that it would be "more marketable". If the Board is to grant the application with no other reason given for the substantial relief from FAR, etc., it must have evidence of the economic necessity. Geoffrey Tyler et.al. v. BZA, 606 A.2d 1362 (1992). It has no such evidence.

Apparently the applicant expects to realize a greater return on his investment if the variances are granted than he would in using or selling them as garages. There is nothing at all wrong with making profits, even big profits. But the grant of variances must follow legal standards and be consistent with prior decisions affirmed by the court. The fact that it would be more costly (or in

this case, provide less of a windfall profit) to conform with zoning regulations "does not present the kind of 'exceptional practical difficulties' necessary to establish that the property is unique ... economic hardship does not constitute uniqueness necessary to justify issuance of a variance", Richard Myrick v. BZA, 577 A.2d 757 (1990) [citations omitted].

Thus where the requested variance is substantial as it is in this case, it can only be granted if otherwise the property would be unmarketable and unusable for any purpose[3]. The board must consider the evidence before it that the applicant has the option of selling to a purchaser for value for any use allowable under existing zoning regulations or using it himself consistent with zoning regulations. In this case, the cited regulations regarding accessory private garages (as well as those for special exception for parking garages), demonstrate that use can be made of the property consistent with the regulations. The applicant declined to consider those options although he wanted to get out of the contract. Since applicant conceded on the record that the opponents are willing to purchase the property, and the opponents testified to that as well, the board must credit that undisputed evidence.

Accordingly, as a matter of law, the variance cannot be granted because the application does not satisfy the legal test for exceptional practical difficulties.

3) public good and adverse impact on zone plan

The substantial nature of the variances adversely affects neighboring property owners and impair the intent and purpose of the zoning plan.

When a variance requested is 'substantial', it "reinforces the conclusion of detriment to the public good and impact on the zoning plan", See Roumel, supra at 409. In the Roumel case, the variances that the Board termed "substantial" were less than in this case, only 24.68% below minimum lot area and 68% below minimum rear yard requirements. Furthermore, "It is well established that a variance may not be granted, even to alleviate a bona fide serious hardship to the owner, if the granting thereof would adversely affect the surrounding neighborhood", Id. [citation omitted]

11 DCMR 101.1 states the purpose of the zoning regulations:
"In their interpretation and application the provisions of this title shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals, convenience, order, property and general welfare for the following purposes:
(a) to provide light and air
(b) To prevent undue concentration of population and the overcrowding of land ...(emphasis added)

This application cannot be granted without adversely affecting the public good or the zone plan, as the buildings on Vernon Street would be severely adversely affected as to light and ventilation as well as safety. "Adverse effect on light and air to neighboring property can constitute a reason for denying a variance under the zoning regulations", Draude, supra at 1252 (citing Roumel). Applicants "shadow studies" could not be independently verified as Board member Mr. Sockwell surmised, and must be dismissed as scientifically unreliable. Furthermore, it is clear that reflected light would be greatly reduced to the rear of the Vernon Street properties, which the "sun studies", even if reliable, did not address. The effect a proposed building has on reflected

[3] When the applicant is seeking to enlarge an existing personal residence the test is somewhat different, in that the lot is already usable - the applicant is living there.

light is just as valid as its adverse effect on direct sunlight. See Draude v. BZA, 582 A.2d 949 (1990). An examination of the photographs submitted by the opponents, the distances shown in the building plats, and the massing studies in the record demonstrates the adverse effects on light.

Furthermore, the proposed building would be sandwiched in among multi-family buildings, with no open space of its own resulting in overcrowding of the land. Thus it is out of character in the neighborhood. The two families would have virtually no off-street space to store their trash receptacles between pickups.

Applicant testified that street views would be attractive to a purchaser of his proposed building. Just so are the street views attractive to tenants in the rear units of 1818 Vernon Street and purchasers/tenants of the condominiums at 1822 Vernon Street. (None of the properties on Vernon Street to the east of 1818 have buildings behind them on Florida Avenue, since the block narrows to a point at 18th and Florida. The east half of square 2556 is simply too narrow to support back-to-back buildings). If the subject lots were buildable as a matter of right, then the Vernon owners would have to accept the loss of those amenities. However, the proposed structure requires substantial variances; one person should not be allowed to acquire these amenities at the expense of others by obtaining such large variances from allowed FAR and the various setback requirements.

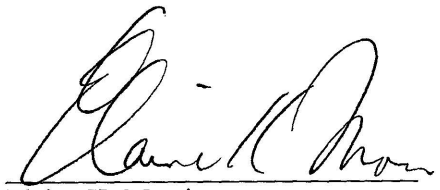
"Power to grant variances should be exercised sparingly as the power to exempt, if used often can easily destroy the zoning scheme", Richard Myrick v. BZA, 577 A.2d 757 (1990)

For the reasons stated above, the Board concludes that the applicant has not met his burden of proof. It is hereby ORDERED that the application be DENIED.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 27th day of June, 2000, I served by first-class mail, postage prepaid, a true copy of the foregoing to:

Martin E. Hardy
871 Dolley Madison Blvd
McLean, VA 22101



Elaine K. Morris