District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

BZA 16573

Garland Pinkston, Jr.
Clerk of the Court

Telephone: 879-2700
Area Code 202

No.: 00-AA-1162, Lothrop House Unit Owners Assoc., Inc. v. BZA

District of Columbia Office of Zoning
Madeline H. Robinson, Director
One Judiciary Square
414 - 4th Street, N.W.
Suite 210
Washington, D.C. 20001

00 SEP 29 P4:25

Dear Sir/Madam:

Pursuant to the rules of this Court I am transmitting, herewith, a copy of the petition for review filed on 7th day of Sept, 2000 in the above-entitled case.

Yours very truly,

Garland Pinkston, Jr.
Clerk

By: Petra Brady
Deputy Clerk

cc: Charles L. Reischel, Esq.

#83

Board of Zoning Adjustment
District of Columbia
CASE NO.16573
EXHIBIT NO.83

DISTRICT OF COLUMBIA COURT OF APPEALS
PETITION FOR REVIEW



APPEAL NO. 00AA1162

Lothrop House Unit Owners Association, Inc. and Elaine K. Morris,

PETITIONER,

v.

District of Columbia Board of Zoning Adjustment,

RESPONDENT

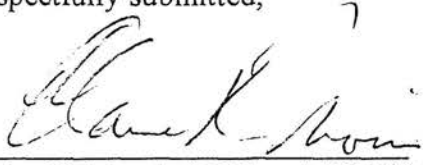
Lothrop House Unit Owners Association, Inc. and Elaine K. Morris hereby appeal to the District of Columbia Court of Appeals from the decision and order of the District of Columbia Board of Zoning Adjustment entered on the 31st day of August, 2000 in case no. 16573.

By this order, the Board approved an application for variances in depth of rear yard, in percentage of lot occupancy and in density (FAR) for applicant Martin E. Hardy to construct a two-family flat with garage in place of two existing garages in a R-5-B district. Petitioners were parties to the case below.

The Board's factual findings and legal conclusions were not supported by substantial evidence in the record and the Board failed to make findings on all contested issues. The conclusions and decision of the Board do not follow rationally from its findings of fact. The Board's decision was plainly erroneous, inconsistent with the District of Columbia zoning regulations and prior cases decided by this court. The

findings and conclusions of the Board are arbitrary, capricious and otherwise not in accordance with law.

Respectfully submitted,



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Attorney for Petitioners

September 7, 2000

Other parties:

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

Application No. 16573 of Martin E. Hardy, pursuant to 11 DCMR § 3103.2, for variances from Subsection 402.4, maximum floor area ratio requirements for a structure; Subsection 403.2, percentage of lot occupancy; Subsection 404.1, minimum depth of rear yard; and Subsection 406.1, minimum width and area of a closed court, for the construction of a two-family flat in an R-5-B District at premises 1821 and 1823 Florida Avenue, N.W., Square 2556, Lot 28 (formerly Lots 808 and 812).

HEARING DATE: June 20, 2000

DECISION DATE: July 5, 2000

DECISION AND ORDER

PRELIMINARY MATTERS:

Applicant. The applicant in this case is Martin E. Hardy, the owner of the property that is the subject of the application. Mr. Hardy was represented at the hearing on this matter by Gladys Hicks, a zoning consultant.

Application. Mr. Hardy filed an application pursuant to 11 DCMR § 3103.2 with the Board of Zoning Adjustment on February 15, 2000, for variances from Subsection 402.4 of the Zoning Regulations, maximum floor area ratio; Subsection 403.2, percentage of lot occupancy; Subsection 404.1, minimum depth of rear yard; Subsection 405.9, minimum depth of side yard; and Subsection 2003.1, changing nonconforming uses within a structure, to permit the construction of a two-family flat in an R-5-B District at premises 1821 and 1823 Florida Avenue, N.W., Square 2556, Lot 28 (formerly Lots 808 and 812). At the hearing, Mr. Hardy presented townhouse plans and alternative townhouse plans, hereinafter referred to as the "alternative project."

The zoning relief requested in the application was initially self-certified pursuant to 11 DCMR § 3113.2. A subsequent memorandum from the Zoning Administrator dated March 16, 2000, confirmed the necessity of variances from Subsections 402.4, 403.2, and 404.1; added Subsection 406.1, relating to the minimum width and area of a closed court; and deleted Subsections 405.9 and 2003.1. The application was noticed and heard in accordance with the Zoning Administrator's memorandum.

Notice of Application and Notice of Hearing. By memoranda dated March 29, 2000, the Office of Zoning advised the Office of Planning; Advisory Neighborhood Commission (ANC) 1C, the ANC for the area within which the subject property is located; ANC 2B, the ANC for the

area in proximity to the subject property; ANC Single Member Districts 1C06 and 1C07; and the District Councilmembers for Wards 1 and 2 of the application.

The Board scheduled a public hearing on the application for June 20, 2000. Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed the applicant, the owners of all property within 200 feet of the subject property, and ANCs 1C and 2B a letter dated April 6, 2000, providing notice of hearing. Notice was also published in the *D.C. Register* on May 12, 2000, at 47 DCR 3355. The applicant's affidavit of posting indicates that zoning posters were placed in front of the subject property on May 30, 2000, in plain view of the public.

Requests for Party Status. The following persons in opposition to the application requested party status: (1) Elaine K. Morris, pro se, and as President of the Lothrop House Unit Owners Association, Inc., a condominium association, on behalf of the Association, 1822 Vernon Street, N.W.; and (2) Hanna Association, Inc., owner of an adjacent apartment building at 1818 Vernon Street, N.W. The Board waived the 14-day advance filing requirement of 11 DCMR § 3106.2 to consider the Hanna Association's request, filed six days before the hearing, since the Hanna Association property would be the property most affected by the proposed project. The Board granted Ms. Morris, the Lothrop House Unit Owners Association, and Hanna Association party status. As owners of immediately abutting properties, they would be more significantly impacted by the construction of the proposed townhouse and its effects on light, air, and views than the general public.

Applicant's Case. Ms. Hicks presented the applicant's case. Mr. Hardy testified as to the circumstances that led to his purchasing the property and his plans for building the townhouse. Michael Vallen, architectural designer, presented massing studies, scale models, and sun studies of the proposed townhouse and alternative project and the immediate surroundings. James F. Smith, d/b/a Mr. Permit LLC, land use and zoning consultant, addressed the conditions of the property, applicable zoning provisions, practical difficulties in developing the property, character of the neighborhood, and compatibility of the proposed development with the neighborhood.

Government Reports. There are no government reports in this case.

ANC Report. The ANC 1C report, dated June 13, 2000, indicates that on June 7, 2000, with a quorum present, the ANC voted to support the application, including the development of alternative plans to minimize the rear yard intrusion. The ANC noted that the lot would be virtually unbuildable without zoning relief due to its small size, shallowness of depth, and irregular shape. The ANC stated that zoning relief would further the public good in that it would allow residential use on an eyesore site in the R-5-B District.

Persons in Support of the Application. John Rutkowsky, owner of 17 condominium units and other properties within 200 feet of the subject property, testified in support of the application. In addition, the Board received supporting letters from William J. Trittipoe, David E. Bunch Jr., William J. Carter, Troy M. Teeboom, Linda E. Softli, Vincent Walsh, Jennifer A. Campbell, and George R. Vickers. In sum, these letters describe the existing garages as a long-festering eyesore, a blight and disgrace to a neighborhood trying to rebuild itself, a safety

concern due to the frequent presence of public inebriates, and a haven for rats. They cite Mr. Hardy's proven track record in rebuilding a nearby property at 1812 Florida Avenue, N.W., during 1997–1999. The Board also received a petition in support of the application signed by the owners of 46 adjacent and nearby properties.

Parties and Persons in Opposition to the Application. Ms. Morris, representing herself as a property owner, the Lothrop House Unit Owners Association, and Gertrude Ding, Jochen Heyland, and Jose Quiroga, three Lothrop House unit owners, and Boushra Hanna, representing Hanna Association, testified in opposition to the application. Ms. Morris and Mr. Hanna had each separately offered to buy the subject property from Mr. Hardy. They argued that its continued use for garages was both economically justifiable and the best use of the property. They cited concerns that the proposed development would adversely affect their properties' light, air, and views. Ms. Morris stated that the construction would interfere with the peaceful enjoyment of surrounding properties. She worried that construction debris might fall on vehicles parked in three parking spaces that she owns, located at the rear and side party wall of the proposed townhouse. Both parties asserted that the loss of the garage use would adversely impact their properties.

The Board also received letters in opposition from Gertrude Ding and Jose Quiroga. Mr. Quiroga expressed concerns that the proposed three-story structure, with a roof deck and roof-top structures, would block his light and air, interfere with his privacy, and result in increased noise and loss of parking, all of which he asserted would affect the resale value of his unit. He was also concerned that construction in such a small area would take longer than projected and that he would be adversely affected by construction noise and dust.

Closing of the Record. At the conclusion of the hearing, the Board left the record open to receive certain materials from the applicant, including plans for the alternative project, the shadow study presented at the hearing and information related to solar angles, the new surveyor's plat showing the combination of the two subject lots into one record lot, a construction management plan, and the floor plan of the Lothrop House condominium building. The parties in opposition were given until June 23, 2000, to respond; and the applicant was given until June 27 to reply to any submissions. Both the applicant and the parties in opposition submitted proposed findings of fact and conclusions of law on June 27.

Decision Meeting. At its decision meeting on July 5, 2000, the Board, voting 5 to 0, granted the requested variances for the alternative project.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. This application involves a lot with two contiguous garages/storage buildings, Lot 28, in Square 2556, formerly Lots 808 and 812, with a street address of 1821-1823 Florida Avenue, N.W. Lots 808 and 812 were originally split off from the properties at 1818 and 1822 Vernon

Street (now the Hanna Association and Lothrop House properties, respectively), and have been separate for some 60 to 80 years. Mr. Hardy purchased the lots on September 9, 1999, from the Bernard and Miriam Maizel estate. He combined them by subdivision as Lot 28, Square 2556, recorded on June 7, 2000.

2. The property is an irregularly shaped double trapezoid with an area of 1,054.32 square feet. The existing buildings are nonconforming structures that occupy more than 75 percent of the total area of the property. There are no rear or side yards.

3. The brick walls on the west, north, and east sides are mostly built on the property line. There is a ten foot section behind the west garage that is seven and one-half inches behind the property line. A section of some 14 feet of the rear of the west garage is a party wall shared with the 1822 Vernon Street property. The walls on the west and north sides serve as retaining walls as well as building walls, with the grade of the adjacent lots at the rear of the property more than ten feet above the Florida Avenue street level. The rear walls are fifteen feet, ten inches, from the 1822 Vernon Street building and ten feet, seven inches, from the 1818 Vernon Street building; although at the nearest point, where the structures are built on the lot line, there is a separation of only one foot, three inches, between the east garage and a one-story brick storage building on the southeast corner of the 1822 Vernon Street property. The Lothrop House Unit Owners Association has built a seven-foot chain link fence immediately abutting the subject property on the west and north sides.

4. The property is in an R-5-B District. It is bounded on three sides to the west, north, and east by multi-unit condominium and apartment buildings more than 50 feet in height above Florida Avenue. To the south, across Florida Avenue, there are two- and three-story single family and multi-unit residences.

5. The existing brick garages provide three parking spaces that are currently used for commercial parking, including rental to employees of the nearby Hilton Hotel. They are a nonconforming use, having never received special exception approval, and lack a certificate of occupancy.

6. The garages are in an advanced state of decay and disrepair, the last remaining vestige of urban blight on the 1800 block of Florida Avenue, N.W. The doors are hanging off, and the roof is covered with junk and leaking. The garages are covered with graffiti, and there are complaints of public urination. Public inebriates frequent the site. There is evidence of rodent infestation behind the garages. Water runoff from the parking area at the 1822 Vernon Street is damaging the brick structures on the subject property.

7. At the hearing, the opponents offered to purchase the subject property from Mr. Hardy for $10,000 above his $38,500 purchase price. They would maintain the existing garage use. The opponents, however, had not taken into account the necessity of special exception approval for commercial garage use in the R-5-B District, a certificate of occupancy, nor the substantial repairs required to shore up the retaining/building walls and correct structural damage to the garages.

toward the front of the townhouse. All water discharge will be to the front of the townhouse and drain into the sanitary sewer. Trash receptacles will be located in the garage.

20. Impact on Parking. Under the applicant's proposal, up to two new spaces will become available to the general public as a result of the closure of one of the two curb cuts on Florida Avenue that currently provide access to the existing garages.

21. Impact on 1818 Vernon Street (Hanna Association Building). None of the 18 units in this building will find their light or air significantly affected. However, the proposed project will completely block the view from a frontal perspective from one window and half of the window above it.

22. At the hearing, Mr. Hanna claimed that the closure of the second curb cut in front of the subject property would impede access to the rear yard of 1818 Vernon Street. The present access involves an illegal maneuver across the curb line in front of the existing garages and then along the sidewalk.

23. Impact on 1822 Vernon Street (Lothrop House). The proposed project would not affect the view of any of the windows at the Lothrop House, nor affect their light or air.

24. Gertrude Ding's unit, unit number 201, is located in front of the building on the second floor and overlooks Vernon Street. Her rear window opens into the space between the Lothrop House and the Hanna Association buildings, and is more than 85 feet from the proposed townhouse. Therefore, her light, air, and views will not be significantly affected by the proposed townhouse.

25. Jose Quiroga's unit, unit number 306, occupies the upper two floors at the southwest corner of Lothrop House. Its nearest window is more than 30 feet distant and 12 feet higher in elevation than the nearest part of the proposed townhouse. His light, air, and views will not be significantly affected by the proposed townhouse.

26. Jochen Heyland owns unit 102 on the first and second floor, a middle unit with windows opening to the space between the Lothrop House and Hanna Association buildings. His light, air, and views will not be significantly affected by the proposed townhouse.

27. Ms. Morris occupies the penthouse suite, unit 401, on the top two floors at the front of Lothrop House facing Vernon Street. At the closest point, her apartment is 73 feet away from and more than 20 feet above the nearest point of the proposed townhouse. Virtually no part of the proposed townhouse can be seen from her unit or from the Lothrop House roof deck. Ms. Morris also owns four other units in Lothrop House. Units 101 and 301 are in front of the building facing Vernon Street and will not be affected by the proposed townhouse. Units 103 and LL1 are located at the rear of Lothrop House. Unit 103 is located on the first and second floor. A one-story, windowless Lothrop House storage building is located at the southeast corner of unit LL1 and unit 103, at the point closest to the proposed townhouse. The storage building also partially serves as the kitchen for unit LL1. Units 103 and LL1 are already affected in terms

The Proposed Structure

8. Mr. Hardy proposes to build a two-family flat on the existing garages facing onto Florida Avenue, incorporating the present structures as the footprint. The building would be 31 feet in height. It would consist of a ground floor one-bedroom apartment with a separate entrance and a two-story house above, with an enclosed garage. It would have a court niche at the rear east side to allow for windows and secondary egress. Otherwise no windows would be constructed on the west, north, and east sides because of the proximity to the property lines. There would be a recessed roof deck in the southwest section of the roof area for the use of the upper dwelling. The architectural design would be in keeping with the character of the neighborhood.

9. The proposed project would have a floor area ratio of 2.93, a 62.99 percent variance from the permitted maximum of 1.8 floor area ratio under 11 DCMR § 402.4. The lot occupancy, at 1,021.70 square feet, represents a 97.8 percent lot occupancy, a 62.47 percent variance from the permitted 60 percent lot occupancy under 11 DCMR § 403.2. There would be no rear yard, a 100 percent variance from the 15-foot minimum required rear yard under 11 DCMR § 404.1. The closed court would have a width of 3.1 feet and an area of 32.86 square feet, a 79.33 percent and 90.60 percent variance, respectively, from the required minimum width of 15 feet and the required minimum area of 350 feet under 11 DCMR § 406.1.

10. To accommodate the concerns voiced by the ANC and the neighbors, the applicant also presented an alternative project. In this proposal, the court niche would be eliminated and the above-grade second and third floors moved forward, away from the Hanna Association and Lothrop House buildings, by three feet. The alternative project would also include bay windows and stoops to be constructed in public space, as well as a roof deck towards the front. It would be 29 feet in height. The floor area would be nearly identical under both proposals.

11. The alternative project would also use the footprint of the existing structure. It would move the northwest corner of the new structure away from the Lothrop House condominium building to a distance of 15 feet at the closest diagonal point. As such, the separation of the proposed alternative project from the rear of either the Lothrop House condominium or Hanna Association buildings would be greater than the distance that currently separates the approximate 60 windows that face each other across the court between those two buildings.

12. The alternative project would require the same zoning relief as the initial proposal, with the exception of a variance from 11 DCMR § 406.1 for the closed court area requirements, since the alternative does not contain a court.

Practical Difficulties

13. Given the configuration of the lot, its small size, and the absence of rear and side yards, it would be impossible to re-utilize the property in conformance with the Zoning Regulations. Due

to the change in elevation at the west side and rear of the property, a change in the building's configuration or the retaining walls would cause major structural problems for the adjacent lots.

14. The existing garages are in an advanced state of decay and disrepair. The commercial garage use, which would require special exception approval, cannot justify the cost of renovation.

15. Requiring setbacks or applying the existing floor area ratio would result in an uneconomic structure. The applicant's expenses in providing water, sewer, electricity, and other on-site utility service represent a substantial fixed cost for developing the site. In addition, the existing brick retaining walls require extensive remedial work, including structural engineering, that will add substantial costs. The rental apartment and roofdeck will aid in the marketability of the townhouse, which will lack the yard and garden space typical for one-family dwellings in the neighborhood. The Board finds that the proposed project represents the only economically viable use of the property.

The Proposed Project Will Not Result in Substantial Detriment to the Public Good

16. Impact on Light. The applicant's sun studies were carried out with AutoCad 14 and Accurender 3, using real world coordinates and true north. These programs are commercially available and widely used by architects, engineers, and related professionals. The applicant's architect re-ran the program to take account of Daylight Savings Time. He also verified the coordinates used in the studies against a second program, Sundesign, whose numbers were checked to three digits of precision.

17. The sun studies indicate that even at the winter solstice, all windows at the rear of both the 1818 and 1822 Vernon Street properties will receive direct sunlight for at least part of the day. Neither of the applicant's proposals would significantly increase the existing wintertime shadowing. There would be some blocking of light in the middle of the day and afternoon, but the additional shadowing would be negligible compared to the existing shadowing from the 50-foot apartment building at 1825 Florida Avenue. The alternative project would result in slightly less shadowing during the winter. At summer solstice, there is no impact whatsoever from either of the applicant's proposals on any of the windows of the adjacent properties.

18. Impact on Air Circulation. The proposed townhouse does not abut any of the neighboring buildings nor create any area that is completely enclosed. When air is moving, there could be some acceleration in flow due to wind-tunnel effects. There would be no impact when the air is still.

19. Impact from Noise and Utilities. The utilities for the proposed townhouse will vent at the front of the building or on the roof. To prevent noise from affecting the neighbors, there will be no windows, vent fans, air-conditioning, or other noise-causing equipment on the rear and side walls of the proposed townhouse. Air-conditioning compressors will be placed on the roof

of light, air, views, and noise by the storage building and the virtually uninterrupted parking of a large plumber's van and other vehicles at the rear of Lothrop House. The Board finds that the proposed townhouse will not significantly affect Ms. Morris' units.

28. Security Concerns. The applicant's designs take into account security for the proposed project. The opponents were concerned that the design and structure of the proposed townhouse might create hiding places for criminals trying to gain access to their properties. The Board finds that the proposed townhouse would improve security due to the presence of its residents. It would not provide hiding areas any more than the existing garages.

29. Impact from Construction Activities. The applicant submitted a construction management plan, outlining the proposed yearlong work schedule and measures that will be taken to avoid adverse impacts on the neighboring properties. Mr. Hardy will be the general contractor and on-site manager, and available by telephone at all times to address complaints and inquiries. The construction plan indicates that Mr. Hardy will cooperate with the neighbors to mitigate any adverse construction impacts, including noise, theft, rodents, and debris.

30. The Board finds that Mr. Hardy has addressed the opponents' construction concerns that were based on his rehabilitation of the 1812 Florida Avenue property. Mr. Hardy undertook that project while employed full time at the International Monetary Fund in a position that required foreign travel. He has since retired and will be able to devote his full attention to the construction at the subject property. There was only one stop work order on the 1812 Florida Avenue project, due to a subcontractor who failed to obtain a separate permit after the general construction permit had been issued. A small fire that occurred when a halogen lamp was knocked over did not result in any exterior damage.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under Section 8 of the Zoning Act of June 20, 1938 (52 Stat. 799, as amended; D.C. Code § 5-424(g)(3) (1994)), to grant variances from the strict application of the Zoning Regulations. Martin E. Hardy is seeking variances pursuant to 11 DCMR § 3103.2 from the provisions of 11 DCMR §§ 402.4, 403.2, 404.1, and 406.1, relating to the maximum floor area ratio, percentage of lot occupancy, minimum depth of rear yard, and minimum width and area of a closed court requirements for a structure in the R-5-B District, to permit the construction of a two-family flat. The proposed alternative project does not contain a closed court; therefore, a variance from Subsection 406.1 is not required. The notice requirements of 11 DCMR § 3317 for a public hearing on the application have been met.

Under the three-prong test for a variance set out in Subsection 3103.2, the applicant must demonstrate that (1) the property is unique because of its size, shape, or topography or other extraordinary or exceptional situation or condition connected with the property; (2) the applicant would encounter practical difficulty or undue hardship if the Zoning Regulations were strictly applied; and (3) granting the variance will not result in 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 Maps. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990).

Further, the Board is required under D.C. Code § 1-261(d) (1999) to give "great weight" to the affected ANC's recommendation. The Board must "articulate why the particular ANC itself, given its vantage point, does – or does not – offer persuasive advice under the circumstances." *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (D.C. 1977). The Board has carefully considered the ANC's report and as discussed below finds the ANC's recommendation persuasive.

Based upon the findings of fact and having given great weight to the ANC's recommendation, the Board concludes that proposed alternative project meets the three-prong test for variance relief. Specifically, the Board concludes as follows:

1. Unique, Extraordinary, and Exceptional Conditions of the Property. First, there is no question but that the subject lot presents a unique, extraordinary, and exceptional situation. It is very small, irregular in shape, and shallow in depth, even after the combination of the two original lots, as well as ten feet lower than the ground level of the adjacent properties at the west side and rear. As the ANC found, the property is virtually unbuildable without zoning relief.

2. Practical Difficulties. With respect to the second prong of the variance test, the higher "undue hardship" standard applies to requests for use variances, while the lower "practical difficulty" standard applies to area variances. *Gilmartin,* 579 A.2d at 1170; *Palmer v. District of Columbia Bd. of Zoning Adjustment,* 287 A.2d 535, 540-41 (D.C. 1972). A use variance seeks a use ordinarily prohibited in the particular district, while an area variance relates to restrictions such as floor area ratio, percentage of lot occupancy, rear yard, frontage, setback, or minimum lot requirements and does not alter the character of the zone district. *Palmer*, 579 A.2d at 541; *see Tyler v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362, 1365-66 (D.C. 1992). As Mr. Hardy is seeking area variances, the practical difficulty standard applies.

To show practical difficulty, an applicant must prove that compliance with an area restriction would be unnecessarily burdensome and that the practical difficulty is unique to the particular property. *Gilmartin,* 579 A.2d at 1170. The nature and extent of the burden are determined on a case-by-case basis, and the Board may consider a wide range of factors in determining whether there is an unnecessary burden or practical difficulty. *Id.* at 1170.

The Board may consider the economic hardship in evaluating the applicant's practical difficulties, and find practical difficulty where strict compliance with the Zoning Regulations would result in a substantial increase in the cost of the proposed construction plus a significant limitation in the property's overall utility. *Id.*; *see Tyler*, 606 A.2d at 1366-67. For example, in *Wolf v. District of Columbia Board of Zoning Adjustment*, 397 A.2d 936, 943 (D.C. 1979), the court upheld an area variance to permit the conversion of a row dwelling to a three-unit rental apartment where it would otherwise be economically unfeasible to rent the property and the investment would yield a loss. Similarly, in *Russell v. District of Columbia Board of Zoning Adjustment,* 402 A.2d 1231, 1236 (D.C. 1979), the court held that the Board properly granted an

area variance where the owner could never sell an unimproved lot for a permitted residential use absent a variance.

The opponents rely upon *Barbour v. District of Columbia Board of Zoning Adjustment,* 358 A.2d 326 (D.C. 1976) (*per curiam*), for the proposition that a substantial increase in the cost of an intended improvement coupled with some loss in the overall utility of the property is not a practical difficulty that merits an area variance. However, as explained in the *Gilmartin* case, the court's subsequent decision in *Association for Preservation of 1700 Block of N Street, N.W., and Vicinity v. District of Columbia Board of Zoning Adjustment,* 384 A.2d 674 (D.C. 1978), indicates that at some point, economic harm, when coupled with a significant limitation on the utility of the structure, becomes sufficient to warrant an area variance. 579 A.2d at1170-71. The case, *Myrick v. District of Columbia Board of Zoning Adjustment,* 577 A.2d 757, 761 (D.C. 1990), cited by the opponents, is inapposite. *Myrick* stands for the proposition that economic hardship alone is not sufficient to establish uniqueness. In the instant case, the physical characteristics of Mr. Hardy's property supply uniqueness.

Without zoning relief, the small, irregular lot is unbuildable. A smaller structure is economically unfeasible due to the substantial costs of shoring up the retaining/building wall and the installation of new utilities. Continuation of the existing commercial garage use would likewise entail zoning relief and substantial repair and reconstruction costs. The Board therefore concludes that compliance with the area restrictions of the Zoning Regulations would be unnecessarily burdensome and that the practical difficulties that Mr. Hardy has encountered in developing the site are unique to the subject property.

The opponents contend that Mr. Hardy has not met the practical difficulty standard since the property could be fixed up and used as a commercial parking garage. This argument is problematic for two reasons. First, the opponents rely upon excerpts from Court of Appeals cases discussing use variances. The *Palmer* case was the first case to distinguish the practical difficulty test from the undue hardship test. In *Palmer*, the court wrote that "it is certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if not put to another use, will yield a greater income." 287 A.2d at 542 (footnote omitted). Subsequent cases, however, have recognized that "Although this statement was within the section of the opinion discussing area variances, it appears that it refers to a particular use of a property and thus *the economic discussion is more appropriately confined to use variances.*" *Gilmartin*, 579 A.2d at 1170 (emphasis added); *see Russell*, 402 A.2d at 1236 n.8 ("In the context of use variances, this court has held 'an inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship.'"). Second, under Section 355 of the Zoning Regulations, a commercial parking garage in an R-5 District requires special exception approval. The existing garages, which lack a certificate of occupancy, would not conform to the regulations without zoning relief. The Board concludes therefore that the opponents' objection to Mr. Hardy's showing of practical difficulty based on the asserted existence of an alternative conforming use lacks merit.

The opponents also offered to purchase the property from Mr. Hardy for $10,000 above Mr. Hardy's purchase price. A reasonable offer to purchase the property is relevant to the

determination of practical difficulty. For example, in *Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405, 408 n.1 (D.C. 1980), the court noted that the Board's findings that the adjoining property owners had offered to purchase a lot that was the subject of a variance application and that the applicant could receive a reasonable return on his investment were relevant to the issue of practical difficulty. *See also Carliner v. District of Columbia Bd. of Zoning Adjustment*, 412 A.2d 52, 54 (D.C. 1980) (*per curiam*) (denial of an area variance upheld where among other reasons, the Board found that the applicant would be able to reasonably dispose of her property to an adjacent property owner). As noted above, the commercial garage use proposed by the opponents would require special exception approval. Accessory garage use pursuant to 11 DCMR § 351 would require the opponents to subdivide the property to include it with their lots. Either use would require a certificate of occupancy and substantial repairs and reconstruction. The opponents had not taken these factors into account in making their offer. Moreover, the opponents' offer would not result in a fair and reasonable return on Mr. Hardy's investment in light of Mr. Hardy's efforts in purchasing and developing the site. In light of these circumstances, the Board concludes the opponents' purchase offers should not be taken into account in assessing Mr. Hardy's practical difficulties.

Finally, a question came up at the hearing whether Mr. Hardy's subdivision of the property would have any bearing on his request for variance relief. The general rule is that zoning relief is not justified where an applicant for an area variance has committed an affirmative act that directly results in the practical difficulties complained of. *See DeAzcarate v. District of Columbia Bd. of Zoning Adjustment,* 388 A.2d 1233, 1239 (D.C. 1978). The case, *A.L.W., Inc. v. District of Columbia Board of Zoning Adjustment,* 338 A.2d 428, 432 (D.C. 1975), cited by the opponents, recognizes that with respect to substandard lots, unless the applicant "is responsible for the irregular shape of the lot, he cannot as a practical matter improve the lot in any way that would enable him to realize income or to sell it to a purchaser for value." The combination of the two lots, approved by the Zoning Administrator, did not cause or add to the unique and exceptional conditions of the property or to Mr. Hardy's practical difficulties. The subdivision of the property therefore does not present any obstacles to the granting of variance relief.

Based on the above, the Board concludes that Mr. Hardy would encounter practical difficulties in building on the property if the area requirements of the Zoning Regulations were strictly applied.

3. Impact on the Public Good. The Board concludes, as did the ANC, that granting the variances will not result in substantial detriment to the public good. The existing garages are in an advanced state of disrepair. As the ANC found, they are an eyesore and seriously detract from the neighborhood. The entire block of 1800 Florida Avenue and the Adams-Morgan neighborhood generally will benefit from the upgrading of the dilapidated garages into a two-family townhouse that is in keeping with the aesthetic integrity of the neighborhood. More broadly, the District of Columbia also stands to benefit from the improved utilization of the property, with its corresponding favorable impact on revenues.

As discussed above in Finding of Fact Nos. 16–17 and 21-27, the proposed project will result in a very small increase in shadowing during the wintertime and will block the views from two of the Hanna Association apartment house windows. The proposed project does not otherwise adversely affect the adjacent properties, including their light, air, and views. These impacts do not constitute a "substantial detriment to the public good" that would require denial of the variance. As suggested by the ANC, the Board concludes that the applicant's alternative project should be approved, since the alternative design reduces the light, air, and view impacts on the adjacent properties. Further, the applicant has submitted a construction plan to prevent, mitigate, and control adverse effects from the construction process.

The proposed removal of one of the existing curb cuts on Florida Avenue will result in two additional street parking spaces. Since the existing commercial garage use was never lawfully established pursuant to special exception approval and a certificate of occupancy, the loss of the garage parking spaces is not considered in evaluating the proposed project's impact. *See e.g., Gage v. District of Columbia Bd. of Zoning Adjustment,* 738 A.2d 1219, 1222 (D.C. 1999) (*per curiam*) (only existing legitimate uses are considered in determining whether a proposed use is in harmony with the Zoning Regulations for purposes of special exception approval); *Capitol Hill Restoration Soc'y, Inc. v. District of Columbia Bd. of Zoning Adjustment,* 398 A.2d 13, 15-16 (D.C. 1979) (failure of neighbors to challenge prior illegal use for more than ten years will not support a variance that would make the use legal). Similarly, the loss of the Hanna Association's ability to unlawfully cut across the sidewalk to the back alley is not relevant to the question of detriment to the public good.

Impact on the Zone Plan. The R-5 Districts provide for flexibility of design by permitting in a single district all types of urban residential development, subject to certain area and use restrictions. They are further subdivided to permit varying levels of height and density, with a moderate height and density permitted in an R-5-B District. *See* 11 DCMR §§ 350.1 – 350.2. A commercial parking garage in an R-5-B District requires special exception approval. *Id.* § 355.1. The requested density and area variances are necessary to allow the applicant to change the existing nonconforming commercial garage use, which lacks special exception approval and a certificate of occupancy, to a conforming residential use. No height variance is required. The Board therefore concludes that the variances will not substantially impair the intent, purpose, and integrity of the zone plan.

For the reasons stated above, the Board concludes that the applicant has met his burden of proof. It is hereby **ORDERED** that the application is **GRANTED,** to permit the construction of the applicant's alternative townhouse project.

Vote: 5:0 (Robert N. Sockwell, Anne M. Renshaw, Sheila Cross Reid, John G. Parsons, and Rodney L. Moulden, to approve).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order and authorized the undersigned to execute this Decision and Order on his or her behalf.

ATTESTED BY: Jerrily R. Kress

JERRILY R. KRESS, FAIA
DIRECTOR

FINAL DATE OF ORDER: AUG 31 2000

UNDER 11 DCMR § 3125.9, "NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS (10) AFTER IT BECOMES FINAL PURSUANT TO SUBSECTION 3125.6" OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.

THIS ORDER IS VALID FOR A PERIOD OF TWO YEARS PROVIDED WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

PURSUANT TO D.C. CODE § 1-2531 (1999), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE TITLE 1, CHAPTER 25 (1999), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR REVOCATION OF THIS ORDER.

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