GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

Application No. 16706, Massoud Heidary, pursuant to 3103.2 for a use variance from 11 DCMR § 330.5 to allow office space and a convenience store in an existing apartment building in the R-4 District at 1708 Newton Street, N.W. (Square 2613, Lot 94).[1]

HEARING DATE: May 29, 2001
DECISION DATE: May 29, 2001

DECISION AND ORDER

The applicant in this case is Massoud Heidary, the owner of the property that is the subject of the application. The application was filed with the Board of Zoning Adjustment on February 14, 2001, pursuant to 11 DCMR § 3103.2, for variance relief from 11 DCMR § 330.5, which prescribes the matter of right uses in a R-4 District, to allow office use at 1707 Newton Street, N.W. (Square 2613, Lot 94). At the close of the hearing, the Board voted 5 to 0 to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. The Office of Zoning mailed the Councilmember for Ward 1, the Office of Planning, ANC 1E, and the Applicant, letters dated February 23, 2000, providing notice of the application.

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, ANC 1E, and the Office of Planning, letters dated March 22, and March 30, 2001, providing notice of hearing.

The Applicant submitted an affidavit of posting dated May 29, 2001 (the date of the hearing). At the hearing, the Applicant claimed to have submitted an earlier affidavit of posting that had apparently been lost. After hearing testimony from a neighbor, Lucy Joseph Palanqua, that the property was properly posted at least 15 days prior to the hearing (as required by 11 DCMR § 3113.14), the Board waived its rule, 11 DCMR § 3113.17, requiring the affidavit of posting to be submitted to the Board at least five days before the hearing.

Requests for Party Status. On May 14, 2001, the Board received a request for party status from residents of Mount Pleasant North. At the hearing, it was determined that the members of Mount Pleasant North who live within a block or two of the subject property are more affected by the

[1] The Applicant initially sought to construct office space and a convenience store in the basement of the subject property. At a public hearing, the Applicant withdrew the request to construct the convenience store.

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request for party status. Motion made by Susan Morgan Hinton and seconded by Anne M. Renshaw.

Applicant's Case. The Applicant presented his case. The Applicant argued that he could better manage the subject property by having his office on site, as well as increase his financial return on the subject property because he would not have to rent office space elsewhere to run his real estate management company.

Government Reports. The Office of Planning ("OP") report, dated May 29, 2001, opposes the application, on the grounds that the Applicant has failed to meet his burden of proof and that the grant of the variance would substantially impair the intent purpose and integrity of the zone plan. At the hearing, OP added that it did not object to using a small space in the building for the purposes of maintaining the building itself.

The Zoning Administrator, by memorandum dated December 21, 2000, informed the Applicant that his application for a building permit was disapproved and that he needed a variance from 11 DCMR § 330.5, which prohibits office use in an R-4 District, for the proposed use.

ANC Report. On May 21, 2001, the Board received a report from ANC 1E, dated May 14, 2001, opposing the application. The ANC indicated that it based its decision on the inappropriateness of the proposed use within a primarily residential area; the fact that the neighborhood is already more than adequately served by retail and office space; its concern that the addition of retail and/or retail office space would create additional traffic and strain limited parking resources; and the fact that the conversion of the building would eliminate scarce affordable housing units in Mt. Pleasant. The Commission cited traffic, parking and historic preservation concerns. The ANC's decision to oppose the variance was unanimous.

Parties and Persons in Opposition to the Application. A group called Residents of Mount Pleasant North opposed the application by letter, received by the Board on May 14, 2001, as well as by testimony at the hearing.

On May 7, 2001, the Board received a letter from Gerald A. Fitzgerald and Julianne Byrne opposing the application.

Persons in Support of the Application. Alex Haderas testified in support of the application.

Hearing. A hearing on the application was held on May 29, 2001. Board members present at the hearing included: Sheila Cross Reid, Anne M. Renshaw, Susan Morgan Hinton, Geoffrey Griffis, and John G. Parsons. Testimony was received from the Applicant. Testimony in opposition to the application was received from Stephen Mabley and Kerri Culhane, representing Residents of Mount Pleasant North, Dominick (remainder of name not stated in record), and Lucy Joseph Palanqua. Testimony was also received from John Moore, a development review specialist from the Office of Planning, who stated that the property was not unique, such that the variance could be granted, and that the property was originally constructed for residential use. Katherine Sucher, representing ANC 1-E, testified in opposition to the application insofar as it

requests office use beyond that which is necessary for the maintenance and care of the subject property. Alex Haderas testified in support of the application.

Decision. At the close of the May 29, 2001, hearing on this application, the Board, by a vote of 5 to 0, denied the application.

FINDINGS OF FACT

1. The applicant proposes to construct 2,600 square feet of office space in the basement of the subject property.

2. The subject property is an apartment complex, owned and managed by the Applicant.

3. The subject property is in a R-4 District.

4. Use of the subject property for office space requires a variance from 11 DCMR § 330.5, which does not allow office use in an R-4 District.

5. The Applicant's proposed office would be used in connection with the subject property and other properties managed by the Applicant.

6. The Applicant states that his property is unique in that it looks like it could be for either office use or residential use and that other nearby properties include office use. The Board, however, concurs with OP that the property was probably originally constructed for residential use.

7. The neighborhood immediately surrounding the subject property can be characterized as almost entirely residential.

8. The Applicant testified that he wishes to locate an office at the subject property in order to avoid having to rent office space elsewhere and to increase the profitability of the building itself.

CONCLUSIONS OF LAW

The Applicant seeks a variance from 11 DCMR § 330.5, which does not include office use within the matter of right uses permitted in a R-4 District, in order to construct office space for use in connection with his management of the subject property as well as other properties owned and/or managed by the Applicant.

The Board is authorized to grant variances where "by reason of exceptional narrowness, shallowness, or shape of a specific property. . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or conditions" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property. . ." D.C. Code § 5-424(g)(3), 11 DCMR § 3103.2. Where an applicant seeks use variance, as here, the above standard of "undue hardship" applies, with the "practical difficulties" standard applying only to area variances. Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 542 (D.C. App. 1972).

Because "an area variance. . . does not alter the character of the zoned District, whereas a use variance seeks a use that is ordinarily prohibited. . . a more stringent showing is warranted with respect to the more drastic relief inherent in a use variance". Id. at 541. In addition, variance relief can be granted only "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". Id at 541.

The Applicant has not met its burden with respect to the first part of the test for a variance: unique physical aspect or other extraordinary or exceptional situation or condition of a specific property. The applicant for a variance must show "that the difficulties or hardships [are] due to unique circumstances peculiar to the applicant's [lot] and not to the general conditions in the neighborhood.". Barbour v. District of Columbia Bd. of Zoning Adjustment, 358 A.2d 326, 327 (D.C. 1976) (quoting Palmer v. District of Columbia Bd. of Zoning Adjustment, 287 A.2d 535, 539 (D.C. 1972). While the building may be historic, as alleged by the Applicant, there are many other historic buildings in the neighborhood, which itself is located in the Mount Pleasant historic district. See Capital Hill Restoration Society Inc., 534 A.2d 939, 942 (D.C. 1987) (location in historic district does not make property unique for purposes of granting variance). Also, the inability to use a building in this residential area for office use is not unique to the Applicant. Lastly, while the Applicant's property appears to be larger than most in the area, this does not offer support for the Applicant's request where the size of the building does not give rise to the Applicant's purported hardship.

The Applicant has also failed to meet the burden of proof with respect to undue hardship. The Applicant seeks to operate his property management company out of the office, offering as a reason for requesting relief that he wishes to avoid paying rent on an office space elsewhere and that he seeks a more profitable use for the historic property. Nowhere in the record has the Applicant argued that he is unable to use this property profitably for residential or other purposes permitted under the zoning regulations. The mere inability to use a property in a manner the owner considers to be less costly does not constitute undue hardship. Cf. Myrick v. District of Columbia Board of Zoning Adjustment, 577 A.2d 757, 762 (D.C. 1990).

Because the Applicant does not meet the first two parts of the test for a use variance, the Board need not reach the issue of whether the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.

The Board takes note of the ANC's resolution opposing the application. The ANC's comments concerned the issue of the project's detriment to the public good. Because the Board did not reach this issue, as discussed above, the ANC's concerns were not addressed in this order.

The Board takes note of OP's recommendation opposing the application and agrees with OP's assertion that the applicant failed to meet its burden of proof. Because the Board addresses the applicant's failure to meet its burden of proof in this order, OP has been given the "great weight" consideration to which it is entitled.

Pursuant to 11 DCMR § 3126.11, an applicant "whose application has been denied shall not institute a new appeal or application on the same facts within one (1) year from the date of the order upon the previous appeal or application".

Based on the above, the Board concludes that the Applicant has not met the burden of proof. It is hereby **ORDERED** that the application be **DENIED.**

VOTE: 4–0-1 (John Parsons, Sheila Cross Reid, Anne M. Renshaw, and Geoffrey Griffis to deny; Susan Morgan Hinton not voting).

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

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

FINAL DATE OF ORDER: September 26. 2001

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

BZA APPLICATION NO. 16706

As Director of the Office of Zoning, I hereby certify and attest that on SEP 26 2001, a copy of the foregoing Decision and Order in BZA Application No. 16706 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing and who are listed below:

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