GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16838 of Goal LLC, pursuant to 11 DCMR § 3103.2 for a variance from the maximum lot area ratio requirements of subsection 401.3, and variance from the maximum lot occupancy requirements of subsection 403.2, for an addition to and conversion of a flat (two unit dwelling) in an R-4 district at premises 1717 and 1719 5th Street, N.W. (Square 508 N, Lots 801 and 808).

HEARING DATE: March 12, 2002
DECISION DATE: April 2, 2002

DECISION AND ORDER

Goal LLC, filed an application with the Board of Zoning Adjustment on January 3, 2002, for a variance from the maximum lot area ratio requirements and the maximum lot occupancy requirements of §§ 401.3 and 403.2, for an addition to, and conversion of, a flat (two unit dwelling). The property is in an R-4 District. The application was accompanied by a memorandum from the Zoning Administrator certifying the required zoning relief. After a public hearing, the Board denied the variance from § 401.3 and granted the variance from § 403.2.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated January 9, 2002, the Office of Zoning advised the D.C. Office of Planning; the Department of Public Works; Advisory Neighborhood Commission (ANC) 2C, the ANC for the area within which the property that is the subject of the application is located; the ANC commissioners for the single-member districts affected by the application; and the Ward 2 councilmember of the application.

The Board scheduled a public hearing for March 12, 2002. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on January 18, 2002, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 2C notice of the hearing. Notice of hearing was also published in the *D.C. Register* on January 25, 2002, at 49 DCR 745. The applicant submitted an affidavit of posting indicating that 1 zoning poster was placed on the subject property.

Request for Party Status. The Board received no requests for party status.

Applicant's Case. The applicant was represented by George Nwanze and Audrey Nwanze, owners of Goal LLC. The applicant presented oral testimony and a written brief.

D.C. Office of Planning (OP) Report. In its report dated March 5, 2002, the Office of Planning recommended that the variance under § 401.3 be denied and the variance under 403.2 be granted.

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OP cited as a reason to deny the variance from § 401.3 the fact that the relief cannot be granted without impairing the intent, purpose and integrity of the zone plan where R-4 favors general residences over apartments. Steven Cochran presented the report at the hearing.

Department of Consumer and Regulatory Affairs (DCRA). The Acting Zoning Administrator, Toye Bello, submitted a memorandum stating that the applicant needed a variance from §§ 401.3 and 403.2.

ANC Report. In its report dated March 14, 2002, the ANC 2C indicated that at a regularly scheduled meeting, with a quorum present, the ANC voted two to one in favor of the variances.

Persons in Support of the Application. Alex M. Padro, Single Member District Commissioner for ANC 2C-01, submitted a letter, dated March 11, 2002, and testimony in support of the application. Mr. Padro asserted that the variances were necessary in order to bring more affordable housing to the area.

Mr. Allen W. Caster submitted a letter on March 7, 2002, in support of the applicant's project.

Mr. Noel B. Lewis submitted a letter on March 7, 2002, in support of the applicant's proposal to construct three units on the site.

Persons in Opposition to the Application. There were no persons in opposition to the application.

Decision. Following the public hearing, the Board voted 5 to 0 to approve the application, in part, and to deny the application, in part.

FINDINGS OF FACT

1. The subject property is on lots 801 and 808, in the center and east side of the 1700 block of 5th Street, N.W.

2. Lot 808 comprises 869 square feet and is 17 feet wide and 50.58 feet deep.

3. Lot 801 is an irregular lot, 17 feet wide, 74.08 feet deep on its northern side and 83.64 feet deep on its southern side.

4. The applicant applied for consolidation of the two lots. Combined, the lots comprise 2192.49 square feet.

5. The zoning relief applied for and considered by this Board is premised on the two lots being combined.

6. The applicant received a building permit to construct a two-story addition to a vacant row house on existing lot 801 that has a certificate of occupancy for a 2-unit flat. The permit was premised on the two lots being combined.

As of the time of the hearing, the applicant had made substantial progress on construction of a two-story addition to the structure on Lot 801, built upon Lot 808.

7. The final structure occupies both lots is 1719.72 square feet, comprising 78.44% lot occupancy.

8. The subject property is zoned R-4.

9. The ANC report stated its approval of the project but offered no specifics as to the reason a third unit was acceptable.

10. The Single Member ANC Commissioner for 2C-01 submitted nothing in the record to indicate that he represented ANC 2C at the hearing or that his letter dated March 11, 2002, was approved or ratified by the ANC.

Variance From § 401.3

11. The applicant requested a variance in order to add a third story unit, to be constructed over the existing flat and on each of the two consolidated lots, and to build an addition on lot 808.

12. Pursuant to § 401.3, one apartment unit may be constructed for each 900 square feet of land area in an R-4 district. The applicant is therefore allowed to construct only two apartment units on the consolidated lot as a matter of right and must obtain a variance to construct the third.

13. The applicant stated that it intended to build a third unit because each unit would then become more affordable to low income buyers.

14. No evidence was presented that a developer of the property would necessarily encounter economic obstacles such that it was necessary to build three units on the consolidated lot.

15. As noted by the Office of Planning, an R-4 district is not intended to be apartment house district, unlike the R-5 district. *See* 11 DCMR § 330.3.

Variance from § 403.2

16. After consolidating lots 801 and 808, a single family dwelling was not economically feasible and only a flat would prove adequate return on the applicant's investment.

17. A flat is permitted a 60% lot occupancy, pursuant to § 403.2. The applicant needs a variance from the lot occupancy requirements of § 403.2 where it already occupies approximately 78% of the consolidated lot.

18. Because of the size of Lot 808, any such flat must exceed the lot occupancy for the consolidated lots in order to be economically feasible.

19. The single member ANC Commissioner for ANC 2C-01 stated that Lot 808 has proved to be one of the most difficult to develop in the entire area due to its configuration and has stood idle for a considerable time.

20. The project is a benefit to the community in that it removes blight from the property, provides new housing, and the construction is of a high quality.

21. The Comprehensive Plan's Generalized Land Use Map shows the area as being suitable for moderate density residential use.

22. The Ward 2 Element of the Comprehensive Plan stresses the provision of additional housing and the need for neighborhood stabilization.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Official Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application of the Zoning Regulations. The applicant is seeking a lot area variance from the provisions of 11 DCMR § 401.3 and a lot occupancy variance from 11 DCMR § 403.2. The notice requirements of 11 DCMR § 3113 for the public hearing on the application have been met.

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 an area variance, as here, the above standard of "practical difficulties" applies, with the "undue hardship" standard applying only to use variances. *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535 (D.C. App. 1972).

Additionally, 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.*

In reviewing a proposed variance, the Board is required under D.C. Code § 5-412.4 to give "great weight" to OP recommendations. The Board is also required under D.C. Code § 1-261(d) (1999) to give "great weight" to the affected ANC's recommendations. Under § 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Official Code § 1-309.10(d)(3)(a) (2001 Ed.)), the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with

respect to each of the ANC's issues and concerns. The Board carefully considered both the OP and ANC reports.

Variance from § 401.3

The Zoning Regulations in 11 DCMR § 401.3 prescribe a lot area of 900 square feet per apartment unit in an R-4 district. The applicant proposes to build three units on a lot area of 2,192.49 square feet, less than the requisite 2,700 square feet.

The Applicant has failed to meet its burden of proof with respect to peculiar or exceptional circumstances or practical difficulties necessitating the construction of a third unit. The Applicant stated at the public hearing that its basis for asserting practical difficulties is that it seeks to make the units affordable. As for any perceived economic burden, that alone does not necessarily constitute sufficient grounds to justify the grant of a variance. *See, e.g., Myrick v. District of Columbia Bd. of Zoning Adjustment*, 577 A.2d 757 (D.C. 1990) (the fact that renovating existing space without obtaining variance would be more costly does not justify grant of variance). The District of Columbia Court of Appeals has held that proof of economic burden may be relevant to the decision of whether to grant an area variance where the applicant is not merely seeking the most profitable use for its land but faces difficulty financing any improvement of the property without the variance. *Tyler v. D.C. Board of Zoning Adjustment*, 606 A.2d 1362 at 1366, 1367 (D.C. 1992). Nowhere in the record is it asserted that three units must be constructed in order to make the project profitable. Instead, the applicant states that it wishes to market the units to lower income buyers. While this goal is laudable, where two units, as discussed below, can be marketed profitably, a variance for a third unit is not warranted.

Moreover, as stated by the Office of Planning, the R-4 district discourages apartment use, unlike the R-5 district. *See* 11 DCMR § 330.3. The means by which such use is controlled is by prescribing a minimum lot area. *See Id.* Therefore, the Board does not grant variances from the minimum lot area requirements lightly, for to do so would be to ignore a zone plan that plainly discourages a proliferation of apartment units in an R-4 district.

Variance from § 403.2

After the consolidation of lots 801 and 808, a residential building that maintained matter of right lot occupancy requirements would not provide sufficient return to make the project marketable. Thus, in contrast to the situation described above with respect to a three-unit building, in order to permit economical development of the consolidated lot, a flat must be allowed on the subject property. Because lot 808 is so small, any such flat must also exceed the lot occupancy requirements. The Board therefore concludes that the applicant would encounter practical difficulties if the Zoning Regulations are strictly applied and a variance from the lot occupancy requirements for the entire combined lot is warranted.

The requested lot occupancy variance will not detrimentally affect the public good or the zone plan where additional housing is provided at a density that generally resembles that in the neighborhood and a formerly dilapidated and vacant property is now returned to quality

residential use. In addition, the development conforms to the comprehensive plan in that it provides needed housing and neighborhood stabilization with a moderate density project.

For the reasons stated above, the Board concludes that the applicant has not met its burden of proof with respect to the variance from the lot area requirements of 401.3. It is hereby **ORDERED** that the application is **DENIED** with respect to the variance from 401.3.

VOTE: 0-5-0 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Anne M. Renshaw, David W. Levy and Anthony J. Hood (by absentee vote), voting against the motion to approve a variance from 401.3).

For the reasons stated above, the Board concludes that the applicant has met its burden of proof with respect to the variance from the lot occupancy requirements of § 403.2. It is hereby **ORDERED** that the application is **APPROVED** with respect to the variance from § 403.2.

VOTE: 5-0-0 (Geoffrey H. Griffis, Anne M. Renshaw, Curtis L. Etherly, Jr., David W. Levy and Anthony J. Hood (by absentee vote), voting to approve the variance from 403.2).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY:
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 17 2002

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME EFFECTIVE 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.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED ADDITION WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C.LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 14 IN TITLE 2 OF THE D.C. CODE. SEE D.C. CODE SECTION 2-1402.67 (2001). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER

BASIS FOR THE REVOCATION OF THIS ORDER. NOTE IN SECTION 2-1401.01 OF THE D.C. HUMAN RIGHTS ACT THAT IT IS THE INTENT OF THE COUNCIL OF THE DISTRICT OF COLUMBIA, IN ENACTING THIS CHAPTER, TO SECURE AN END IN THE DISTRICT OF COLUMBIA TO DISCRIMINATION FOR ANY REASON OTHER THAN THAT OF INDIVIDUAL MERIT, INCLUDING, BUT NOT LIMITED TO, DISCRIMINATION BY REASON OF RACE, COLOR, RELIGION, NATURAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, AND PLACE OF RESIDENCE OR BUSINESS.
CB/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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As Director of the Office of Zoning, I hereby certify and attest that on JUL 17 2002 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning